IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF OF *AMICI CURIAE* OREGON LEGAL ACADEMICS
AND THE OREGON JUSTICE RESOURCE CENTER
IN SUPPORT OF BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the
Circuit Court for Yamhill County
Honorable RONALD W. STONE, Judge

Order of Summary Affirmance Filed: May 6, 2014
Before: Wollheim, P.J. and Haselton, C.J.

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BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON LEGAL ACADEMICS AND OREGON JUSTICE RESOURCE CENTER

PRELIMINARY STATEMENT

Amici curiae, Oregon legal academics and the Oregon Justice Resource Center, submit this brief in support of Petitioner-Appellant Jose Antonio Gonzalez Verduzco to assist the Court by making three points relevant to the questions presented that are not addressed or are not fully addressed in the parties' briefs. The *amici* hope to assist the Court in determining what retroactivity rule should be applied to Mr. Verduzco's claim of ineffective assistance of trial counsel, a claim resting on evidence outside the record available for direct review and therefore properly raised for the first time in post-conviction proceedings.

First, the *amici* demonstrate that applying the anti-redressability rule of *Teague v. Lane*[1] in Mr. Verduzco's case will actually undermine, rather than promote, the policy interests sought to be advanced by the *Teague* rule. The *amici* scrutinize the foundations of the United States Supreme Court's redressability jurisprudence, revealing the policy considerations underlying the rules.[2] The Supreme Court has fashioned a rule of redress for cases on direct review,[3] and an anti-redress rule for cases reviewing a state-court criminal judgment in federal

[1] 489 US 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989).
[2] Section I(A), *infra.*
[3] *Griffith v. Kentucky*, 479 US 314, 107 S Ct 708, 93 L Ed 2d 649 (1987).

habeas corpus proceedings.[4] Because state post-conviction proceedings share attributes of both direct and collateral review, it is necessary to examine the type of claim presented to select the appropriate rule to advance the policy concerns of the redressability regime.[5] Applying the *Teague* rule to Mr. Verduzco's claim is not only inappropriate but unnecessary. Oregon procedural law ensures that claims are properly channeled to the proper forum at the proper time, and ineffective assistance of counsel claims are properly channeled to post-conviction proceedings for initial adjudication.[6] The finality interest with respect to such claims is no greater than the finality interest with respect to claims on direct review[7], and the substantive law governing ineffective assistance of counsel claims is carefully calibrated to serve the state's interest in finality.[8] In the specific circumstances presented by this case, then, Oregon's interest in finality is overcome by its interests in providing an initial forum for constitutional claims, in which Oregon courts can discharge their duty to say what the law is and develop federal constitutional doctrine.[9] This Court should conclude that the redressability rule of

[4] *Teague v. Lane*, 489 US 288 (1989).
[5] Section I(B), *infra.*
[6] Section I(C)(1) and I(C)(2), *infra.*
[7] Section I(D), *infra.*
[8] Section I(E), *infra.*
[9] Section I(F), *infra.*

Griffith v. Kentucky,[10] and not the *Teague* anti-redressability rule, applies to claims like Mr. Verduzco's.

While *amici* urge this Court to refrain from applying *Teague* to claims like Mr. Verduzco's, in the second point raised *amici* alternatively propose the *Teague* framework should at least be modified, to mitigate three of the persistent criticisms of the *Teague* rule. First, *Teague*'s threshhold inquiry—whether a constitutional rule is a "new rule"—is indeterminate and unpredictable, as exemplified by the divergent conclusions of lower courts as to whether *Padilla v. Kentucky*[11] announced a "new rule." This Court can tailor the "new rule" analysis to the lessened finality concerns presented by claims like Mr. Verduzco's.[12] Second, the selection of the end of direct review as the "trigger point" for the shift from a redressability regime to an anti-redressability regime has been criticized as generating unfairness, and this is particularly so when *Teague* is applied to claims like Mr. Verduzco's which are properly brought for the first time in post-conviction proceedings. Adopting the end of post-conviction review as the "trigger point" for claims like Mr. Verduzco's is much more appropriate in light of the interests to be served by the *Teague* rule.[13] Third, *Teague* has been criticized for its overly narrow definition of "watershed" rules which require redress in all

[10] 479 US 314 (1987).
[11] 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010).
[12] Section II(A), *infra.*
[13] Section II(B), *infra.*

instances, and this Court can modify the "watershed" rule definition to account for the lessened finality interests at stake when considering a claim properly first raised in post-conviction proceedings.[14]

Finally, the *Padilla* rule ought to be considered a "watershed" rule even under *Teague*'s restrictive definition. The rule concerns the scope of the constitutional right to counsel, and the Court has always valued this right as a bedrock procedural guarantee.[15]

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[14] Section II(C), *infra.*
[15] Section III, *infra.*

INTEREST OF THE *AMICI CURIAE*

Amici curiae Oregon legal academics are Oregon law faculty who teach, research and write about criminal law, criminal procedure, constitutional law, and immigration law.[16] (*See* below for a complete list of amici). As teachers, practitioners, and scholars, the proposed *amici* have an interest in the proper resolution of the issue addressed by this brief. This is particularly so because the proposed *amici* include clinical faculty who, in addition to lecturing and researching, are also actively engaged in supervising law students in the practice of law in Oregon.

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Amicus curiae Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation to traditionally underserved communities."[18] The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and law students from Lewis & Clark Law School, where OJRC is located. The OJRC's interest in the proper resolution of the issue addressed in this brief stems from its dedication to immigrant rights and to eliminating unfair procedural barriers to the courts.

[18] OJRC Mission Statement, www.ojrc.info/mission-statement.

ISSUE PRESENTED

What rule should Oregon courts apply in post-conviction proceedings to determine whether redress will be available for violations of the constitutional right recognized in *Padilla v. Kentucky,*[19] to be adequately advised by counsel as to the immigration consequences of a criminal conviction?

[19] 559 US 356 (2010).

ARGUMENT

In *Danforth v. Minnesota,*[20] the Supreme Court explained that because the *Teague*[21] anti-redress[22] rule was fashioned to address comity and finality concerns specific to federal habeas review of state-court criminal judgments, *Teague* does not bind state post-conviction courts. This Court must now determine whether, under Oregon law, redress should be available to a litigant who properly raises for the first time in state post-conviction proceedings his claim of constitutionally ineffective assistance of trial counsel. The federal rules are not binding,[23] but the principles underlying them compel an affirmative answer.

Prior to *Danforth*, in *Page v. Palmateer*,[24] this Court had held that Oregon was not "free to determine the degree to which a new rule of federal constitutional law should be applied retroactively" and was bound to follow the

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[20] 552 US 264, 128 S Ct 1029, 169 L Ed 2d 859 (2008).

[21] *Teague v. Lane*, 489 US 288 (1989).

[22] The Court explained that "redressability," rather than "retroactivity," is the appropriate term because the use of "retroactivity" terminology falsely "impl[ies] that the right at issue was not in existence prior to the date the 'new rule' was announced." *Danforth*, 552 US at 271, 271 n 5. The question *Teague* addresses is whether a violation of the new rule prior to its announcement is subject to *redress* in a particular proceeding. *Id.*

[23] *See Danforth*, 552 US 264. Thus, although the United States Supreme Court held in *Chaidez v. United States*, __ US __, 133 S Ct 1103, 185 L Ed 2d 149 (2013), that *Padilla* was a "new rule" that should not be applied retroactively, this Court is not bound by that decision.

[24] 336 Or 379, 84 P 3d 133 (2004).

Teague rule.[25] *Danforth* explicitly repudiated this holding. *See* 552 U.S. at 277 n.14 (citing with approval this Court's earlier decision in *State v. Fair,*[26] and criticizing the Court's retreat from *Fair* in *Page*). This case presents the Court squarely with the opportunity—indeed, the necessity—to revisit *Page* and revise its adherence to *Teague.*

Prior decisions of this Court applied *Teague* to claims that would properly have been the subject of adjudication on direct review.[27] Here, however, Mr. Verduzco's claim of ineffective assistance of counsel relies on facts outside the record and is therefore properly brought for the first time in post-conviction proceedings. While the policy concerns underlying the *Teague* rule are arguably advanced by *Teague*'s application in cases where a claim that ought to have been, or was litigated on direct review,[28] is *relitigated* in post-conviction proceedings, they are undermined by *Teague*'s application to Mr. Verduzco's claim, properly brought for the first time in state post-conviction proceedings.

I. APPLYING THE *TEAGUE* ANTI-REDRESS RULE TO A CLAIM OF TRIAL COUNSEL INEFFECTIVENESS PROPERLY BROUGHT FOR THE FIRST TIME IN STATE POST-CONVICTION PROCEEDINGS RUNS CONTRARY TO THE

[25] *Id.* at 387.

[26] 263 Or 383, 502 P 2d 1150 (1972).

[27] *Page*, 336 Or 379 (addressing claim that jury, rather than sentencing court, was required to determine facts supporting sentence); *Miller v. Lampert*, 340 Or 1, 125 P 3d 1260 (2006) (same).

[28] *See Page*, 336 Or 379; *Miller*, 340 Or 1.

PRINCIPLES UNDERLYING THE FEDERAL REDRESSABILITY REGIME.

A. The federal redressability rules are premised on state courts applying and developing federal constitutional law.

The United States Supreme Court's rules for deciding whether a litigant may obtain redress[29] for the violation of a newly announced constitutional rule stem from two seminal decisions. *Griffith v. Kentucky*[30] established a rule of full redressability in proceedings on direct review, and *Teague v. Lane*[31] established a rule of non-redressability (with two narrow exceptions, for rules placing conduct "beyond the power of the criminal law-making authority to proscribe" and "watershed" rules implicating a trial's fundamental fairness) in federal habeas corpus proceedings to review a state-court criminal conviction.

The roots of the Court's redressability rules lie in the expansion of federal habeas corpus review of state criminal judgments.[32] In two influential

[29] In *Danforth*, the United States Supreme Court explained that it "may * * * make more sense to speak in terms of the 'redressability' of violations of new rules, rather than the 'retroactivity' of such rules." 552 US at 271 n 5. The use of "retroactivity" terminology, the Court said, falsely "suggests that when we declare that a new constitutional rule of criminal procedure is 'nonretroactive,' we are implying that the right at issue was not in existence prior to the date the 'new rule' was announced." *Id.* at 271. New constitutional rules, the Court explained, are discovered—not created. The question of whether a new rule is "retroactive" is more properly considered as whether a particular defendant who suffered a violation of the new rule prior to its announcement is entitled to *redress* for the violation. *Id.*

[30] 479 US 314 (1987).

[31] 489 US 288 (1989).

[32] *Danforth*, 552 US at 272–73.

opinions (his dissent in *Desist v. United States*,[33] and his separate opinion in *Mackey v. United States*[34]), Justice Harlan outlined what would later be adopted nearly wholesale as the current federal redressability regime—a rule of full redress (the "*Griffith* rule") for cases on direct review, and a general rule of no redress (the "*Teague* rule") for federal habeas corpus review of state-court judgments.[35] Together, these two rules establish a regime that not only accords state courts the opportunity and responsibility for developing federal constitutional law, but also restrains federal courts from undermining the constitutional decision-making of state courts by imposing later-developed constitutional rules where the state courts have already rendered a constitutional decision subject to review by the United States Supreme Court.

Griffith's rule of redressability for cases on direct review was grounded in Justice Harlan's conclusion that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[36] First, the *Griffith* Court noted, "the nature of judicial review requires that we adjudicate specific cases, and each

[33] 394 US 244, 257, 89 S Ct 1030, 22 L Ed 2d 248 (1969) (Harlan, J., dissenting).

[34] 401 US 667, 675, 91 S Ct 1160, 28 L Ed 2d 404 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part).

[35] *See Danforth*, 552 US at 273–75 (noting that Justice Harlan's views were adopted in *Griffith* and *Teague*).

[36] *Griffith*, 479 US at 322.

case usually becomes the vehicle for announcement of a new rule."[37] In particular, Justice Harlan had feared that allowing new rules to justify redress only prospectively would eliminate the obligation of lower courts to decide claims and eviscerate their "responsibility for developing or interpreting the Constitution."[38] This, Justice Harlan believed, would effectively freeze constitutional doctrine and render the lower courts "automatons."[39] Second, and equally importantly, a system of less than full redressability would produce intolerable inequalities. To give redress to one litigant and deny it to others on direct review would be treating "similarly situated defendants" differently without a principled reason for doing so.[40]

Teague's rule of non-redressability for cases on federal habeas corpus review, on the other hand, was grounded in Justice Harlan's concerns for comity and respect for the finality of state-court judgments.[41] The premise upon which both interests were implicated was that a federal habeas court reviews claims that have already been adjudicated in state court and exposed to Supreme Court review. Justice Harlan recognized that relitigation of constitutional issues in federal habeas proceedings might serve a "deterrence

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[37] *Id.*
[38] *Mackey*, 401 US at 680.
[39] *Id.*
[40] *Griffith*, 479 US at 323 (citing *Desist*, 394 US at 258–59 (Harlan, J., dissenting)).
[41] *See Danforth*, 552 US at 279.

function,"[42] "forcing trial and appellate courts in both the federal and state system to toe the constitutional mark."[43] But this function might be adequately served (and tempered by comity), Justice Harlan believed, by limiting federal habeas courts to applying constitutional rules in effect at the time of the state-court adjudication.[44] *Teague* similarly counted among the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus" the "understandabl[e] frustra[tion]" of state courts that "faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."[45] Comity was thus deployed in *Teague* to protect the ability of state courts to adjudicate federal constitutional issues and to incentivize them to do so faithfully.

The finality interest served by *Teague* was similarly premised on an initial adjudication of constitutional claims in state court. Justice Harlan relied on articles by Harvard law professor Paul Bator and by Second Circuit Judge Henry Friendly discussing the finality interests implicated by relitigating claims on collateral review.[46] Importantly, neither Bator nor Friendly embraced finality

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[42] *Desist*, 394 US 262–63 (Harlan, J., dissenting).

[43] *Mackey*, 401 US at 687.

[44] *Id.*

[45] *Teague*, 489 US at 310 (citations omitted).

[46] *Mackey*, 401 US at 690 (citing Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv L Rev 441 (1963) and Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal*

to curtail collateral review without qualification. Both recognized the existence of "general categories where … the first go-around … should not count"—where constitutional claims were not in fact subject to litigation on direct review.[47] And both suggested that the absence of a forum for claims "which could not fairly be raised at all until after final judgment" could amount to a due process violation.[48]

Bator explicitly extolled the capacity of state-court judges to determine federal constitutional issues. "[D]eciding federal questions is an intrinsic part of the business of state judges," Bator wrote,[49] and for him permitting relitigation of constitutional claims anew on federal habeas would squander "all of the intellectual, moral, and political resources involved in the legal system"—including any "sense of responsibility" among state judges.[50]

Whether cast in terms of comity or finality, the premise of *Teague* is the availability of a state forum for adjudicating in the first instance the merits of

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Judgments, 38 U Chi L Rev. 142, 146–51 (1970)). These sources were in turn relied upon in *Teague.* 489 US at 309 (citing Bator, 76 Harv L Rev at 450-451, and Friendly, 38 U Chi L Rev at 150).

[47] Bator, 76 Harv L Rev at 454; Friendly, 38 U Chi L Rev at 152 (explicitly excepting from finality's ambit on collateral attack constitutional claims, the factual bases of which "are dehors the record and their effect on the judgment was not subject to consideration and review on appeal").

[48] Bator, 76 Harv L Rev at 459–60; Friendly, 38 U Chi L Rev at 168.

[49] Bator, 76 Harv L Rev at 510–11.

[50] *Id*. at 451; *see also id.* at 506 ("The crucial issue is the possible damage done to the inner sense of responsibility, to the pride and conscientiousness, of a state judge in doing what is, after all, under the constitutional scheme a part of *his* business: the decision of federal questions properly raised in state litigation.").

constitutional issues presented, subject to review by the United States Supreme Court. Both Justice Harlan and Bator justified limiting federal habeas review by emphasizing that such review always occurs after a round of litigation in which the state courts have had the opportunity to apply federal constitutional law, subject to review by the United States Supreme Court.[51] *Teague's* deference to state courts is premised on state courts' faithful discharge of this obligation, and upon the existence of a full round of unrestricted review, as the *Griffith* rule establishes, in which constitutional innovation is permitted and even required.

"Federalism and comity considerations," of course, "are unique to *federal* habeas review of state convictions,"[52] and need not concern this Court in considering what redressability rules should govern Oregon post-conviction proceedings. Finality, on the other hand, is "implicated in the context of state [post-conviction proceedings] as well as federal habeas … [and] is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts."[53] Considering the logical underpinnings of *Griffith* and *Teague,* even while recognizing the finality interest present in state post-conviction proceedings, should cause this Court to reject the application of

[51] *Mackey*, 401 US 682–83 (Harlan, J., dissenting); *see also, e.g.*, Bator, 76 Harv L Rev at 512 (referring to "federal questions already adjudicated by state courts and subject to Supreme Court review").

[52] *Danforth*, 552 US at 279.

[53] *Id.* at 280.

Teague's anti-redressability rule to cases like Mr. Verduzco's, and should inform this Court's fashioning of an appropriate redressability regime for the Oregon courts considering such cases.

B. The federal redressability rules require unrestricted review of a federal constitutional claim when it is first raised in state court proceedings.

The logic of *Griffith* (holding that federal constitutional claims must be afforded an unencumbered round of review during which constitutional innovation can occur), and not the logic of *Teague* (holding that once such an unencumbered review has taken place, innovation in federal habeas corpus proceedings is inconsistent with comity and finality), pertains here. To be sure, state post-conviction review shares characteristics of both federal habeas proceedings (governed by *Teague*) and direct review proceedings (governed by *Griffith*). On the one hand state post-conviction proceedings, like federal habeas proceedings, are a form of collateral review.[54] To some degree, then, the finality interests at stake in federal habeas corpus proceedings can be present in state post-conviction proceedings. The *Page* case,[55] in which this Court adhered to *Teague*'s framework in the state post-conviction context, is an example. In *Page,* the claim raised in post-conviction proceedings (that certain facts contributing to the defendant's sentence should have been found by a jury,

[54] *See Bryant v. Thompson*, 324 Or 141, 145 n 2, 922 P2d 1219 (1996) ("Post-conviction relief is a collateral civil proceeding * * *.").

[55] *Page*, 336 Or 379.

rather than a judge[56]) was capable of resolution on direct review. State post-conviction proceedings in *Page* were a forum for *relitigation* and the finality concerns underlying *Teague* were therefore implicated.[57]

On the other hand, state post-conviction proceedings, unlike federal habeas proceedings, can in some instances be more akin to direct review proceedings—a *first* forum in which to litigate constitutional claims (and to develop facts pertaining to those claims). Because a claim of trial counsel ineffectiveness typically relies on facts outside the record, a post-conviction proceeding is the appropriate forum for first raising such a claim.[58]

Where a claim (such as Mr. Verduzco's *Padilla*[59] claim) is properly presented for initial adjudication not on direct review in state post-conviction proceedings, applying the *Teague* anti-redress rule, designed to address comity and finality concerns present when claims are *relitigated* on federal habeas review, has serious adverse consequences. The *Teague* rule takes as a given the existence of a state-court forum for adjudicating a constitutional claim, and

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[56] *See Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000).

[57] *Page*, 336 Or at 388 (noting *Teague*'s concern with protecting the finality of state-court criminal judgments).

[58] *See* Sections I(C) and I(D), *infra*; *Martinez v. Ryan*, __ US __, 132 S Ct 1309, 1317, 182 L Ed 2d 272 (2012) ("Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways *the equivalent of a prisoner's direct appeal* as to the ineffective-assistance claim.") (emphasis added).

[59] *Padilla v. Kentucky*, 559 US 356 (2010).

strives to incentivize state courts to faithfully adjudicate constitutional claims by limiting federal review.[60] Applied in the context of a claim that is properly initially adjudicated in post-conviction proceedings, the *Teague* rule deprives litigants of a forum for their claims and denies Oregon courts a role in the ongoing dialogue over the proper scope and substance of rights guaranteed by the United States Constitution.[61]

C. Ineffective assistance of trial counsel claims do not raise the finality concerns served by *Teague,* because they are properly brought for the first time in post-conviction proceedings.

The *Teague* rule's concern with finality cannot be divorced from the precise context in which it was forged. Federal habeas review of state-court judgments subjects claims that have already been subject to one full round of litigation in state court, typically including adjudication in a trial court as well as one or more appellate courts.[62] But Oregon needs no such rule to protect finality, because Oregon already has rules in place to ensure that post-conviction proceedings are not a forum for *relitigation* of constitutional claims.[63] Ineffective assistance of counsel claims like that raised by Mr.

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[60] *See* Section I(A), *supra.*

[61] *See* Section I(F), *infra.*

[62] The doctrines of exhaustion and procedural default, both referenced in *Teague*, 489 US at 297–99, generally require that a habeas petitioner have subjected his or her constitutional claims to a full round of review in the state courts before bringing them in a habeas petition.

[63] Section I(C)(1), *infra.*

Verduzco are properly brought in post-conviction proceedings for an initial round of adjudication.[64]

1. **Oregon already has finality-serving doctrines that channel claims to the right forum at the right time.**

Without incorporating the *Teague* anti-redressability rule, Oregon already has sufficient finality-serving doctrines to ensure that claims are raised at the appropriate time and by the appropriate procedural vehicle. Claims must be brought in a timely manner and are not subject to endless relitigation.

Generally the failure to bring a constitutional claim at the earliest possible moment can result in issue preclusion. Constitutional claims that could have been, but were not, raised on direct appeal may be dispensed with in post-conviction proceedings under this doctrine.[65] Oregon courts have repeatedly

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[64] Section I(C)(2), *infra.*

[65] ORS 138.550(1) and (2); *Teague v. Palmateer*, 184 Or App 577, 583, 583 n 2, 57 P3d 176 (2002) (noting that Oregon's Post-Conviction Hearing Act "codif[ies] issue preclusion principles" that had been long recognized in this Court's decisions, and that "a petitioner ordinarily is procedurally barred from raising a claim that could have been raised at trial and on direct appeal or that was raised and decided") (citing *Palmer v. State*, 318 Or 352, 358, 867 P2d 1368 (1994) (construing ORS 138.550(1) and *North v. Cupp,* 254 Or 451, 455–57, 461 P2d 271 (1969), *cert den,* 397 US 1054, 90 S Ct 1396, 25 L Ed 2d 670 (1970) (same)); *see also*,*Palmer*, 318 Or at 358 ("When a criminal defendant fails to raise an issue at trial that the defendant reasonably could have been expected to raise, the defendant cannot obtain post-conviction relief on that ground unless the defendant alleges and proves that the failure to raise the issue was due to one (or more) of a few narrowly drawn exceptions.").

enforced this procedural requirement.[66] Similarly, the claim preclusion doctrine prohibits a litigant from filing successive post-conviction petitions raising claims in a piecemeal fashion.[67] Finally, the doctrine of *res judicata* prevents relitigation in post-conviction proceedings of claims that have in fact been raised and decided on direct appeal (or in a prior post-conviction petition).[68]

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[66] *See*, *e.g.*, *Hale v. Belleque*, 255 Or App 653, 658, 298 P3d 596, *adh'd to on recons*, 258 Or App 587, 312 P3d 533, *rev den*, 354 Or 597, 318 P3d 749 (2013) (citing ORS 138.550(2) and *Palmer*, 318 Or at 354); *State v. Link*, 346 Or 187, 198, 208 P3d 936 (2009) (noting that Court of Appeals correctly held that issues as to which defendant had not assigned error would be barred in post-conviction proceedings on grounds that they reasonably could have been asserted on direct appeal but were not) (citations omitted). Claims that are properly presented for the first time in post-conviction proceedings arguably raise no retroactivity issue at all, because relief is prospective for such claims. "[A]n application of a new constitutional principle that is articulated after conviction in a post-conviction proceeding is not 'retroactive,' but prospective." *Moen v. Peterson*, 103 Or App 71, 74–75, 795 P2d 1109 *adh'd to on recons*, 104 Or App 481, 802 P2d 76 (1990) *aff'd in part and rev'd in part*, 312 Or 503, 824 P2d 404 (1991) (discussed at note 89, *infra*).

[67] *See* ORS 138.550(3) (requiring all grounds for relief to be raised in a first post-conviction petition, and "any grounds not so asserted are deemed waived" unless they "could not reasonably have been raised in the original or amended petition"); *Martz v. Maass*, 110 Or App 391, 394–95, 822 P2d 750 (1991) (noting that ORS 138.550(3) "embodied" the claim preclusion doctrine regularly applied, before adoption of the Post-Conviction Hearing Act, in "*habeas corpus* proceedings to all matters that could properly have been determined in an earlier proceeding") (citing *Barber v. Gladden*, 215 Or 129, 133, 332 P2d 641 (1958), *cert den* 359 US 948, 79 S Ct 732, 3 L Ed 2d 681 (1959) and *McClure v. Maass*, 110 Or App 119, 821 P2d 1105 (1991)).

[68] ORS 138.550(2) (only grounds not asserted on direct review may be brought in post-conviction proceedings); *e.g. Howell v. Gladden*, 247 Or 138, 141, 427 P2d 978 (1967) ("[T]he crucial fact is that the assertion of an illegal search and seizure was presented to this court and was decided") (citing ORS 138.550(2)).

The Court has said, however, that *res judicata* will not prevent a litigant "from securing an opportunity for at least one full and fair hearing on all issues."[69]

Together, these doctrines result in a finely calibrated set of procedures to channel constitutional claims to the proper forum at the proper time. While the claim and issue preclusion doctrines force claims to be brought as early as possible, the *res judicata* doctrine prevents relitigation, generally ensuring that post-conviction proceedings are not a second round of litigation for claims raised in earlier direct review or post-conviction proceedings. The finality concerns underlying *Teague* are amply, precisely and completely served by these doctrines, which embody Oregon's balancing of the state interest in correcting constitutional error against the state interest in finality.

All of these doctrines may be characterized as serving "procedural finality."[70] *Teague* serves procedural finality as well,[71] but its overvaluing of

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[69] *Church v. Gladden*, 244 Or 308, 312, 417 P2d 993 (1966) (citations omitted).

[70] *See* Christopher N. Lasch, *Redress in State Postconviction Proceedings for Ineffective Crimmigration Counsel*, 63 DePaul L Rev 959, 999–1001 (2014) (describing procedural finality as a measure pegged to a litigant's opportunity to raise claims for litigation). Some jurisdictions, like Oregon, also have rules in place to serve "temporal finality" interests, *see id.* at 1000, by placing a time limit on when a first post-conviction action can be brought. ORS 138.510(3); *see also, e.g.*, 42 Pa Cons Stat Ann 9545(b)(1) (one-year statute of limitation on post-conviction petitions). Because such time limits are by nature blunt instruments, most time limitations contain explicit exceptions to allow claims to be brought where delay is not attributable to the defendant. *E.g.* 42 Pa Cons Stat Ann 9545(b)(1)(ii) (allowing exception to one-year time limit where "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence"); Ky R Crim P

finality once direct review is complete means *Teague* is not calibrated to consider claims properly raised for the first time in post-conviction proceedings, and results in the denial of a forum and elimination of Oregon courts' participation in shaping federal constitutional doctrine.[72]

2. Ineffective assistance of counsel is properly raised for initial adjudication in post-conviction proceedings.

The claim Mr. Verduzco makes—that his trial counsel was ineffective by failing to properly advise him of the adverse immigration consequences attendant to his guilty plea—is among the class of claims which cannot

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11.42(10)(a) (allowing similar exception to three-year statute of limitations for post-conviction action). Indeed, whether Oregon's "safety valve" exception to the statute of limitations (for "grounds for relief asserted which could not reasonably have been raised in the original or amended petition") was met in Mr. Verduzco's case is one of the issues this Court must decide. That question is conceptually distinct from the question of retroactivity addressed by *amici* in this brief. As the Court of Appeals wrote in *Teague v. Palmateer*:

> Issue preclusion and retroactivity are distinct concepts and traditionally have been treated as such. From the earliest cases decided under Oregon's post-conviction statutes, petitioners have been able procedurally *to assert* claims based on unanticipated and newly announced constitutional principles, but their ability *to prevail* on those claims has depended on the retroactivity of the constitutional principle at work. Such cases are legion. As we explained in *Myers v. Cupp*, 49 Or App 691, 621 P2d 579 (1980), *rev den*, 290 Or 491 (1981), whether a new constitutional rule provides an exception to issue preclusion and also is retroactive are complementary inquiries; a petitioner must satisfy both to be entitled to post-conviction relief * * *."

184 Or App at 581–84 (citations omitted).

[71] *See* Lasch, 62 DePaul L Rev at 1001–02.

[72] *See* Section I(D), *infra.*

normally be adjudicated on direct review. The United States Supreme Court has determined that ineffective assistance claims are properly brought for the first time in post-conviction proceedings.[73] Noting that "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time," the Court held that penalizing litigants for not raising ineffectiveness on direct appeal "would have the opposite effect, creating the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim."[74] Oregon similarly channels ineffectiveness claims to post-conviction proceedings, rather than direct appeal, for initial adjudication.[75]

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[73] *Massaro v. United States*, 538 US 500, 123 S Ct 1690, 155 L Ed 2d 714 (2003).

[74] *Massaro*, 538 US at 504 (citation omitted).

[75] As noted above, Oregon law prevents litigants from first raising claims in post-conviction proceedings that should have been raised on direct review. *See* Section I(C)(1), *supra.* Because they rely on evidence outside the record on appeal, ineffective assistance of counsel claims are regularly litigated in Oregon post-conviction proceedings. *See, e.g.*, *State v. Dell*, 156 Or App 184, 188, 967 P2d 507 (1998) (stating that "claims of inadequate assistance of counsel may not be raised on direct appeal") (citing *Bryant*, 324 Or at 149; *State v. McKarge*, 78 Or App 667, 668, 717 P2d 656 (1986)); *State v. Robinson*, 25 Or App 675, 675, 550 P2d 758 (1976) (stating that ineffectiveness is an issue that "except in rare instances * * * can be properly resolved only in a postconviction proceeding in which evidence can be taken") (citing *Turner v. Cupp*, 1 Or App 596, 465 P2d 249 (1970)); *State v. Sweet*, 30 Or App 45, 48, 566 P2d 199 (1977) (stating post-conviction proceeding is the "proper method for raising this issue") (citing *Robinson*, 25 Or App 675 and *Cupp*, 1 Or App 596); *State v. George*, 90 Or App 496, 498, 752 P2d 1265 (1988) (holding ineffectiveness claim could not be raised on direct appeal) (citing ORS 138.050); *see also Sexton v. Cozner*, 679 F3d 1150, 1159 (9th Cir 2012), *cert den*, __ US __, 133 S Ct 863, 184 L Ed 2d 677 (2013) (noting that "the State of Oregon required

Ineffectiveness claims typically rely on facts that "are dehors the record and their effect on the judgment was not subject to consideration and review on appeal."[76] Both Professor Bator and Judge Friendly, whose views on finality were ultimately enshrined in *Teague,* excluded such claims from their broader view that finality should foreclose collateral review of criminal judgments. Professor Bator specifically excluded claims involving denial of the right to counsel,[77] of which a claim of ineffective assistance is a subspecies. Both Professor Bator and Judge Friendly excluded claims involving defects in a guilty plea.[78] A claim that a guilty plea was caused by ineffective assistance of counsel is a claim that the plea was rendered involuntary by virtue of counsel's deficient performance,[79] and such ineffectiveness claims are properly brought in post-conviction proceedings.

[habeas petitioner] to raise [ineffectiveness claims] in a collateral proceeding") (citing *Robinson*, 25 Or App 675).

[76] Friendly, 38 U Chi L Rev at 152.

[77] Bator, 76 Harv L Rev at 454.

[78] *See* Bator, 76 Harv L Rev at 458 (indicating claims involving coerced guilty pleas could properly be brought in post-conviction proceedings); Friendly, 38 U Chi L Rev at 152 (same for guilty plea procured by improper means).

[79] *See Hill v. Lockhart*, 474 US 52, 106 S Ct 366, 88 L Ed 2d 203 (1985) (holding that where defendant enters a plea upon the advice of counsel the voluntariness of the plea is determined by the test for ineffective assistance of counsel).

D. The United States Supreme Court has recognized that for purposes of procedural finality, ineffectiveness claims properly brought for the first time in post-conviction proceedings should be treated as though on direct appeal.

The United States Supreme Court recently recognized, in *Martinez v. Ryan*,[80] that in assessing the finality interest owing to a state-court adjudication challenged on federal habeas review, claims of ineffective assistance of counsel brought properly for the first time in post-conviction proceedings should be treated as though they were being pursued on direct review.

Martinez concerned the application of the procedural default doctrine, which—like *Teague*—serves interests in comity and procedural finality that arise when a federal court reviews a state-court judgment in habeas proceedings. In *Martinez,* the Court considered whether the procedural default of failing to raise a claim of ineffective assistance of trial counsel could be excused by the absence or ineffectiveness of post-conviction counsel. Ordinarily the absence or deficiency of counsel is recognized as "cause" to excuse a procedural default in state court proceedings only if it amounts to a denial of the *constitutional* right to counsel.[81] And because generally there is no constitutional right to counsel in state post-conviction proceedings, the Court

[80] __ US __, 132 S Ct 1309 (2012).
[81] *See Coleman v. Thompson*, 501 US 722, 752, 111 S Ct 2546, 115 L Ed 2d 640 (1991) (citation omitted).

had held previously that the absence or deficiency of post-conviction counsel would not constitute "cause" for a procedural default.[82]

But in *Martinez v. Ryan* the Court reassessed this calculus. The *Martinez* Court began by noting that the procedural default rule is among those rules, specific to federal habeas corpus review of state-court judgments, "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism."[83] Nonetheless, finality did not carry the day—precisely because Martinez's claim of ineffective trial counsel would have been properly brought for the first time in post-conviction proceedings. "Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial," wrote the Court, "the collateral proceeding is in many ways *the equivalent of a prisoner's direct appeal* as to the ineffective-assistance claim."[84]

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[82] *Id.* at 752–53.

[83] __ US __, 132 S Ct at 1316.

[84] *Id.* at 1317 (emphasis added). The Ninth Circuit has held that the *Martinez* rule applies in Oregon. *Sexton v. Cozner*, 679 F3d at 1159 (noting that "the State of Oregon required [habeas petitioner] to raise [ineffectiveness claims] in a collateral proceeding") (citing *Robinson*, 25 Or App 675); *see also Trevino v. Thaler*, __ US __, 133 S Ct 1911, 1921 (2013) (holding that the *Martinez* rule applies in jurisdictions that do not *require* ineffectiveness claims to be brought in postconviction proceedings, if the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal * * *.").

In light of the similarities between direct review proceedings and "initial-review collateral proceedings" presenting the first opportunity to raise a claim, the Court essentially imported the rules for direct review proceedings. Thus, because absent or ineffective counsel on direct review will constitute "cause" to excuse a procedural default, the same rule applies to absent or ineffective counsel on post-conviction review of a claim properly brought for the first time in post-conviction proceedings—even though the absence or ineffectiveness does not in that instance amount to a *constitutional* denial of counsel.

Martinez confirms that claims of ineffective assistance like that raised by Mr. Verduzco, that are properly raised for the first time in post-conviction proceedings, do not implicate finality any more than claims raised on direct review. Finality, the principal policy consideration that might support application of the *Teague* rule here, is absent. Instead, *Martinez* demonstrates that because claims of ineffectiveness are generally encouraged to be brought in post-conviction proceedings for the first time,[85] it is the policy concern animating the *Griffith* rule of retroactivity that is implicated—"the opportunity to … obtain an adjudication on the merits of his claims."[86]

As the Court wrote in *Griffith*, "the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for

[85] *See* Section I(C)(2), *supra.*
[86] *Martinez,* __ US __, 132 S Ct at 1317.

announcement of a new rule."[87] This "basic norm[] of constitutional adjudication,"[88] supported the *Griffith* Court's determination that a rule of redressability must apply to cases on direct review, and is no less applicable to cases like Mr. Verduzco's. Just as absent or ineffective post-conviction counsel in *Martinez* was deemed "cause" to excuse a procedural default because it threatened the opportunity for "an adjudication on the merits," even so would applying *Teague*'s anti-redressability rule in post-conviction proceedings render the Oregon courts powerless to reach the merits of many ineffectiveness claims. The *Griffith* redressability rule is appropriate in this instance, to ensure that claims properly brought for the first time in post-conviction proceedings are brought in a forum capable of reaching the merits.[89]

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[87] *Griffith*, 479 US at 322.

[88] *Id.*

[89] Indeed, prior to *Page*, 336 Or 379, which incorrectly held the *Teague* rule was mandatory on Oregon courts, *see Danforth,* 552 US at 277 n 14, the Court of Appeals correctly considered, in circumstances akin to those presented here, the importance of the fact that post-conviction proceedings are the first forum for ineffectiveness claims. The question facing the Court of Appeals was whether a decision on ineffectiveness could be relied upon by a post-conviction petitioner. The Court of Appeals initially held that because post-conviction proceedings are not a forum for *relitigation* of claims, but for litigation in the first instance of claims that could not have been brought on direct review, applying *any* anti-redressability rule would be inappropriate: "[A]n application of a new constitutional principle that is articulated after conviction in a post-conviction proceeding is not 'retroactive,' but prospective." *Moen v. Peterson,* 103 Or App 71, 74–75, 795 P2d 1109, 1111 *adh'd to on recons*, 104 Or App 481, 802 P2d 76 (1990) *aff'd in part and rev'd in part*, 312 Or 503, 824 P2d 404 (1991).

On reconsideration, the Court of Appeals acknowledged that the retroactivity test announced in *State v. Fair*, 263 Or 383, 502 P2d 1150 (1972)

E. Oregon's interest in additional rules serving finality is minimal, given the finality protections embodied in the substantive law governing ineffective assistance of counsel claims.

The *Teague* antiredressability rule is superfluous given the particular claim at issue here, ineffective assistance of counsel, which has built in safeguards to protect the finality of criminal judgments. Both the deficient performance and prejudice components of the legal standard safeguard the finality interest Oregon has in criminal judgments. A *Teague* redressability analysis is unnecessary given these protections.

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had in fact been applied in post-conviction proceedings in at least one case, contrary to the pronouncement by the Court of Appeals in its original opinion that "[t]he *Fair* test has not been expressly applied in post-conviction relief cases."_*Moen v. Peterson*, 104 Or App at 484 (citing *Kellotat v. Cupp,* 78 Or App 61, 714 P2d 1074 (1986)). But the Court of Appeals noted the important difference between the case before it and the *Kellotat* case: The *Kellotat* case involved a constitutional claim that was susceptible to being litigated on direct appeal. "Unlike the claim in *Kellotat,* [the] ineffective assistance of counsel [claim before the Court of Appeals in *Moen*] was not, nor could it have been, an issue on direct appeal." *Moen v. Peterson,* 104 Or App at 485. The opinion on reconsideration adhered to the original holding of the Court of Appeals. The Court of Appeals held that the petitioner would be entitled to relief even if the *Fair* test were applied, but it appears that the dispositive fact for the Court of Appeals was that the constitutional claim at issue—effective assistance of counsel—was one that was not, and could not have been presented on direct appeal.

This Court reviewed the decision of the Court of Appeals, but because the Court held that the constitutional rule at issue was not a "new rule," it was unnecessary to decide whether the *Fair* retroactivity test was applicable to a claim of ineffectiveness properly raised for the first time in post-conviction proceedings. *Moen v. Peterson,* 312 Or at 510.

Strickland v. Washington[90] established the now-familiar two-part test for ineffective assistance of counsel. *Padilla* relies on *Strickland,* which requires a defendant to prove not only that trial counsel's performance was deficient, but also that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[91]

Both prongs of the *Strickland* test protect finality. In evaluating whether counsel's performance was constitutionally deficient, *Strickland* eschews a *post hoc* judgment: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct *from counsel's perspective at the time.*"[92] Reviewing courts are thus explicitly instructed not to judge counsel's conduct by standards of performance that evolve later—by this requirement, ineffective assistance of counsel claims are already frozen in amber.

The *Strickland* Court's discussion announcing the standard for assessing deficient performance indicates the Court was motivated by its concern with the finality of judgments:

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[90] 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984).

[91] *Id.* at 694.

[92] *Id.* at 689 (emphasis added); *see also id.* at 690 (instructing post-conviction courts to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed *as of the time of counsel's conduct*" and measured against "*prevailing* professional norms") (emphases added).

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense.[93]

Teague's anti-redressability rule is not required to serve finality concerns where the legal standard by which claims are tested is specifically linked to the time of the alleged error.

The *Strickland* Court also included a prejudice component in announcing the test for ineffective assistance of counsel. Here the Court explicitly considered finality. The Court rejected the idea that counsel's deficient performance should merit automatic reversal, with no prejudice requirement, and instead sought to fashion a test that would identify errors of counsel "sufficiently serious to warrant setting aside the outcome of the proceeding."[94] The Court also rejected a prejudice test that would require a defendant to demonstrate prejudice by a preponderance of the evidence. The Court noted that such a test would "reflect[] the profound importance of finality in criminal proceedings,"[95] but decided that "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is

[93] *Id.* at 690.
[94] *Id.* at 693.
[95] *Id.*

reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower."[96]

Thus, in calibrating the prejudice prong of the *Strickland* test, the Court explicitly considered the finality owed to state-court judgments. In essence, the *Strickland* rule was designed for post-conviction proceedings. Superimposing a second finality-serving doctrine, the *Teague* anti-redressability rule, on ineffective assistance of counsel claims properly brought for the first time in post-conviction proceedings, skews the fine balance struck by the Court in *Strickland.* This is particularly so given that *Teague* gives overwhelming voice to finality, denying redress in nearly all claims brought after the conclusion of direct review. The *Strickland* Court rejected this overemphasis on finality in fashioning its prejudice prong.

The additional protection of finality offered by the *Teague* rule upsets the delicate balance struck by the *Strickland* test.

F. Oregon has an interest in developing constitutional law concerning claims properly brought for the first time in post-conviction proceedings.

Oregon's courts, no less than federal courts, have the duty to adjudicate federal constitutional claims.[97] *Teague* and *Griffith* were meant to ensure this

[96] *Id.* at 694.

[97] Or Const, Art XV, § 3 (requiring judicial officers to "take an oath or affirmation to support the Constitution of the United States"); *see* US Const, Art VI, cl 2 ("This Constitution * * * shall be the supreme Law of the Land; and the

principle.[98] But importing *Teague* in the context presented by Mr. Verduzco's claim would undermine it, denying Oregon courts the important opportunity to discharge their constitutional obligation. It would prevent Oregon courts from developing federal constitutional law concerning ineffective assistance of counsel (and all other claims that are properly first brought in post-conviction proceedings), realizing Justice Harlan's fear that a rule of prospectivity would reduce the lower courts "largely to the role of automatons, directed by [the Supreme Court] to apply mechanistically all then-settled federal constitutional concepts to every case before them."[99]

Teague, when applied in federal habeas corpus proceedings, "eliminates a previously available federal forum in which state prisoners may argue for new federal procedural rules."[100] Applying *Teague* to claims properly initially brought in Oregon post-conviction proceedings eliminates a state forum for

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Judges in every State shall be bound thereby * * *."); *see also Marbury v. Madison,* 5 US (1 Cranch) 137, 176, 2 L Ed 60 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is."); *Arizona v. Evans,* 514 US 1, 8, 115 S Ct 1185, 131 L Ed 2d 34 (1995) ("State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution."); *Robb v. Connolly,* 111 US 624, 637, 4 S Ct 544, 28 L Ed 542 (1884) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States * * * for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it * * *.").

[98] *See* Section I(A), *supra.*

[99] *Mackey,* 401 US at 680 (Harlan, J.).

[100] Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine,* 35 NM L Rev 161, 191 (2005).

doing so—a state forum that is all the more important for constitutional development given *Teague*'s removal of a federal forum.

The importance of Oregon's voice in developing federal constitutional law should not be underestimated. The Supreme Court relies on state courts to serve as proving grounds for constitutional arguments.[101] Application of *Teague* to claims properly presented initially in post-conviction proceedings would effectively remove this Court's voice from the important ongoing dialogue over the shape and scope of federal constitutional rights.

G. Conclusion

Because Mr. Verduzco's claim of ineffective assistance of trial counsel was properly brought initially in post-conviction proceedings, it should be subject to the principles supporting redressability articulated in *Griffith v. Kentucky* and not the anti-redressability principles behind *Teague*.

II. OREGON CAN AVOID THE PROBLEMS THAT HAVE PLAGUED THE *TEAGUE* RULE.

As is shown above, the *Teague* rule is both inappropriate and unnecessary when applied to claims properly brought for the first time in

[101] *See Johnson v. Texas,* 509 US 350, 379, 113 S Ct 2658, 125 L Ed 2d (1993) (O'Connor, J., dissenting) (referring to the Supreme Court's practice of allowing "emerging constitutional issues" to "percolate" in the state courts); *Maryland v. Baltimore Radio Show,* 338 US 912, 917–18, 70 S Ct 252, 94 L Ed 562 (1950) (noting the Supreme Court may deny certiorari to allow constitutional issues to be "further illumined by the lower courts").

Oregon post-conviction proceedings.[102] By eschewing the *Teague* rule or modifying its application to such claims, this Court can avoid the three principle problems that have plagued administration of the *Teague* rule.

A. Avoiding the *Teague* anti-redressability rule eliminates the intractable "new rule" inquiry.

The very first step of the *Teague* inquiry—determining whether a constitutional rule is a "new rule" that triggers *Teague*'s anti-redressability rule—has drawn scathing criticism for its unpredictability.[103] According to the authors of the seminal work on federal habeas corpus, "[t]he inherent ambiguity of the term 'new rule' and the Court's repeated changes of direction in defining it have left the lower courts floundering."[104] Some have claimed the "new rule" test has served as little more than "a screen for covert rulings on the merits."[105]

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[102] *See* Section I, *supra*.

[103] *See, e.g.,* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies,* 104 Harv L Rev 1731, 1742 (1991) (describing the "new rule" inquiry as a "threshold uncertainty" contributing to the unpredictability of the *Linkletter* era); John Blume & William Pratt, *The Changing Face of Retroactivity*, 58 UMKC L Rev 581, 588 (1990) (noting that *Teague* defines a "new rule" in two contradictory ways, each representing one end of the "newness" spectrum).

[104] 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 25.5 at 1202 (5th ed 2001).

[105] *Id.; see also* Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996,* 25 Am J Crim L 203, 287 (1998) ("*Teague* and its progeny have failed to provide sufficient guidance for determining when a rule is new, thus leaving federal courts a zone of discretion with which they can make outcome determinative decisions without necessarily reaching the merits of the claims.").

This Court, of course, need look no further than the aftermath of *Padilla* to appreciate the indeterminacy of *Teague*'s "new rule" inquiry.[106] Courts across the country spent considerable intellectual resources attempting to determine whether *Padilla* announced a "new rule" of constitutional criminal procedure. Numerous decisions analyzed the "new rule" jurisprudence of *Teague* and its progeny, the substantive law of *Strickland* and its progeny, this Court's jurisprudence, and the *Padilla* decision itself, and concluded that *Padilla* did not announce a "new" rule.[107] Other decisions, equally searching, reached the contrary conclusion.[108]

It is fortunate, then, that this Court is not required to follow *Teague.* The indeterminacy of the *Teague* "new rule" inquiry has brought the courts into disrepute for employing "a screen for covert rulings on the merits."[109] Oregon can avoid the indeterminacy of the "new rule" test by declining to apply *Teague* to claims properly first raised in post-conviction proceedings.

Alternatively, in applying the *Teague* framework to such claims, this Court should adhere to a definition of "new rule" that recognizes the lesser finality interests at stake. The Supreme Court's extraordinarily expansive

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[106] *See Chaidez v. United States,* __US__, 133 S Ct 1103, 1107 n 2, 185 L Ed 2d 149 (2013) (citations omitted) (describing circuit split on issue of whether *Padilla* is a "new" constitutional rule).

[107] *E.g. Commonwealth v. Clarke,* 460 Mass. 30, 949 NE2d 892 (2011).

[108] *E.g. United States v. Chang Hong,* 671 F3d 1147, 1154-55 (10th Cir 2011), *reh'g and reh'g en banc denied*, as amended (Sept. 1, 2011).

[109] Hertz & Liebman, § 25.5 at 1202.

definition of "new rule" to encompass any rule not "apparent to *all* reasonable jurists"[110] must be rejected in favor of a more commonsense test focusing on whether a new rule overturned past precedent or merely applied a general constitutional rule in a new context.[111]

B. Avoiding the *Teague* anti-redressability rule allows selection of an appropriate "trigger point" for determining questions of redressability.

The *Teague* rule has also been criticized for the arbitrariness of using the conclusion of direct review as a "trigger point" to separate those who will receive redress for a constitutional violation from those who will not. As Justice White put it, "otherwise identically situated defendants may be subject to different constitutional rules, depending on just how long ago now-unconstitutional conduct occurred and how quickly cases proceed through the criminal justice system."[112]

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[110] *Chaidez,* __ US __, 133 S Ct at 1107, quoting *Lambrix v. Singletary,* 520 US 518, 527–28, 117 S Ct 1517, 137 L Ed 2d 771 (1997).

[111] *See Commonwealth v. Sylvain,* 466 Mass 422, 433, 435-36, 995 NE2d 760 (2013) (holding *Padilla* was not a "new" rule but rather a decision "appl[ying] a general standard [announced in *Strickland*]—designed to change according to the evolution of existing professional norms—to a specific factual situation") (citations omitted).

[112] *Griffith,* 479 US at 331 (White, J., dissenting); *see also Schriro v. Summerlin,* 542 US 348, 358, 124 S Ct 2519, 159 L Ed 2d 442 (2004) (Breyer, J., dissenting) (criticizing use of *Teague* trigger point in determining which death-row inmates would benefit from the Court's decision in *Ring v. Arizona,* 536 US 584, 122 S Ct 2428, 153 L Ed 2d 556 (2002)).

Of course, any anti-redressability rule requires a "trigger point—a way of separating those who will benefit from a new decision from those who will not" and any trigger point "creates distinctions that are subject to serious fairness objections; the only question is which method has the fewest shortcomings."[113] *Teague*'s selection of the close of direct review as a "trigger point" has a certain logic for claims brought in federal habeas corpus proceedings challenging a state-court judgment: *Teague* gives effect to comity and finality concerns by preventing relitigation in federal court, based on a (presumably more favorable) "new" constitutional rule, of claims already decided in state court.

But applying *Teague*'s direct review "trigger point" to claims properly brought for the first time in post-conviction proceedings (like Mr. Verduzco's claim of ineffective assistance of counsel) makes no sense at all. Such claims are not ordinarily properly brought on direct review,[114] and the close of direct review proceedings is a "trigger point" that is on the one hand completely unrelated to the claims to be decided, and on the other hand guaranteed to deny litigants bringing these claims even one forum in which the constitutional doctrine at stake may be developed. The *Teague* "trigger point" applied to these claims is, to put it mildly, "subject to serious fairness objections."[115]

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[113] Toby J. Heytens, *Managing Transitional Moments in Criminal Cases,* 115 Yale LJ 922, 987–90 (2006).

[114] *See* Section I(C)(2), *supra.*

[115] Heytens, 115 Yale LJ at 990.

Applying the *Teague* rule, with its "trigger point" at the close of direct review proceedings, to claims properly brought first in Oregon post-conviction proceedings, makes no sense and works a positive unfairness on the litigants. If the Court retains the *Teague* framework for such claims, it should do so with a modification of the trigger point for such claims. Because claims properly brought for the first time in post-conviction proceedings are analogous to those brought on direct review,[116] the finality concerns animating *Teague* are not triggered until the close of post-conviction review. The proper "trigger point" for an anti-redressability rule like *Teague*'s, applied to such claims, would be the close of post-conviction review.[117]

Such a "trigger point" would also ensure that the policies underlying the *Griffith* rule of redressability are given effect throughout the first full round of litigation of such claims. Just as the policies underlying *Griffith* require redress for claims through the direct review track, even so do they require redress for claims properly brought for the first time in post-conviction proceedings through the post-conviction review track. Modifying the "trigger" point for applying *Teague* to such claims is the only way to fulfill *Teague*'s premise—that all federal constitutional claims are subject to one unrestricted adjudication

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[116] *See* Section I(D), *supra* (discussing the reasoning of *Martinez v. Ryan*).

[117] *See Moen v. Peterson,* 103 Or App at 74–75 (discussed at note 91, *supra*) (holding retroactivity test should not be applied to claim of ineffective assistance of counsel properly brought for the first time in post-conviction proceedings).

in state court, followed by the potential of review by the United States Supreme Court.[118]

C. Avoiding the *Teague* anti-redressability rule escapes *Teague*'s overly narrow definition of "watershed" rules and allows Oregon's courts to weigh the state's interest in finality against the state's interest in correcting constitutional errors.

Applying the *Teague* rule in Oregon post-conviction proceedings imports a third much-criticized aspect of *Teague*: its overly narrow exception for "watershed" rules of constitutional criminal procedure. In theory, *Teague* allows full redressability for such "watershed" rules. But in practice, the Court has not recognized a single "watershed" rule since *Teague* was announced.[119] *Teague*'s "watershed" exception has been criticized as being so narrow as to be "virtually non-existent,"[120] and has been assailed as relying upon "a deeply flawed epistemology."[121]

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[118] *See* Section I(A), *supra.*

[119] As is discussed more fully below, *see* Section III, *infra,* the Court has repeatedly pointed to expansion of the right to counsel as the "paradigmatic example of a watershed rule of criminal procedure," *Gray v. Netherland,* 518 US 152, 170, 116 S Ct 2074, 135 L Ed 2d 457 (1996) (citation omitted).

[120] Entzeroth, 35 NM L Rev at 195–96; *see also* Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might,* 95 Cal L Rev 1677, 1694 (2007) ("[N]o new procedural rule has yet satisfied the *Teague* exception, and the Court has strongly intimated that none shall.")

[121] David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants,* 19 Hastings Const LQ 23, 39–41 (1991).

In applying the *Teague* framework as a matter of state law, this Court should expand the "watershed" exception. A broader watershed exception would reflect the difference between the balance of comity and finality concerns in the federal habeas setting in which *Teague* was forged and the state post-conviction setting in which Mr. Verduzco's claim was raised. The *Teague* rule, as noted above,[122] was designed to serve interests in comity and finality. Nonetheless *Teague* recognized that violations of "watershed" rules are so unjust as to outweigh not only the finality concerns underlying *Teague* but the comity concerns as well.[123] In state post-conviction proceedings, where comity is not an issue and finality concerns are lessened,[124] a different balance must be struck.

The *Teague* "watershed" exception has two requirements—a new rule must not only be "implicit in the concept of ordered liberty," it must also be a rule that promotes the accuracy of the fact-finding process.[125] This Court can broaden *Teague*'s watershed exception as a matter of state law either by eliminating one of these requirements or by construing those requirements as more easily met.[126]

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[122] Section I(A), *supra.*

[123] *See Teague,* 489 US at 311–13.

[124] *See* Section I, *supra.*

[125] *Teague,* 489 US at 311–12.

[126] *Cf. Sylvain* (interpreting the "new rule" component of *Teague* differently from the Supreme Court, resulting in greater redressability of *Padilla* violations).

The *Teague* decision imported the accuracy requirement despite the expressed views of Justice Harlan, whose opinions on retroactivity were so influential with the Court. Justice Harlan endorsed the first "watershed" requirement—that a new constitutional rule be "implicit in the concept of ordered liberty," but not the accuracy requirement. Although he had earlier favored an accuracy requirement, in *Mackey* Justice Harlan explicitly rejected it, in part because Justice Harlan found "inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values."[127]

Eliminating the accuracy requirement of the *Teague* "watershed" exception, and adopting the "watershed" exception as proposed by Justice Harlan in his *Mackey* opinion, accommodates the lessened interest in finality present in state post-conviction proceedings, while eliminating the watershed rule's "inherently intractable" indeterminacy.

As is shown more fully below,[128] the right to counsel has always been considered a "bedrock procedural element" that is "implicit in the concept of ordered liberty." It has been on the second of *Teague*'s requirements—the

[127] *Mackey,* 401 US at 693–95 (Harlan, J.); *see also* Bator, 76 Harv L Rev at 449 (urging a focus "not so much [on] the substantive question whether truth prevailed" but on whether fair process had been afforded for determining the facts).

[128] *See* Section III, *infra.*

accuracy requirement criticized by Justice Harlan—that some federal courts[129] have grounded the conclusion that *Padilla* is not a "watershed" rule.[130] Eliminating the accuracy requirement is one path to granting redress for *Padilla* violations in state post-conviction proceedings.

Relaxing *Teague*'s accuracy requirement is another way for Oregon to accommodate *Teague* to the state post-conviction context presenting a lack of comity concerns and lessened finality concerns. Applying the *Teague* framework as modified to eliminate or lessen the accuracy requirement, this Court should hold that the *Padilla* rule, defining the scope of the right to counsel, is a "watershed" rule when applied to claims of ineffective assistance of counsel properly raised for the first time in state post-conviction proceedings.[131]

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[129] The United States Supreme Court has yet to address the question of whether *Padilla* is a "watershed" rule. *See Chaidez*, __ US __, 133 S Ct 1103, 1107 n 3 (2013) (noting Chaidez did not argue *Padilla* was a "watershed" rule).

[130] *See, e.g.*, *Chang Hong,* 671 F3d at 1158 (holding "*Padilla* does not concern the fairness and accuracy of a criminal proceeding, but instead relates to the deportation consequences of a defendant's guilty plea"); *United States v. Mathur,* 685 F3d 396, 397 (4th Cir 2012), *cert. denied,* __ US __, 133 S Ct 1457, L Ed 2d 362 (2013) (holding *Padilla* does not "enhance the 'accuracy of the factfinding process'").

[131] Support for such a conclusion can be found in *Moen v. Peterson,* 104 Or App at 486. There, the Court of Appeals rejected the State's argument that the constitutional rule at issue, regarding ineffective assistance of counsel with respect to advice concerning a guilty plea, was "not central to the fact-finding process." The Court of Appeals noted: "A plea of guilty or no contest eliminates fact-finding from the trial" and concluded that the constitutional rule at issue "substantially affects the determination of guilt and the fact-finding process." *Id.* at 486–87, 802 P2d at 78–79.

III. THE *PADILLA* RULE IS A "WATERSHED" RULE OF CONSTITUTIONAL CRIMINAL PROCEDURE.

Even if this Court declines to modify the *Teague* "watershed" exception as applied to claims properly raised for the first time in state post-conviction proceedings,[132] this Court should conclude that the *Padilla* rule would satisfy the *Teague* definition of a "watershed" rule.

Justice Harlan used the *Gideon* decision extending the right to counsel to all felony cases as an example of a decision that "alter[ed] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."[133] And United States Supreme Court cases applying the *Teague* "watershed" exception repeatedly reference *Gideon* as the paradigmatic "watershed" rule.[134] In *Strickland,* the Court specifically linked the effective assistance of the counsel to the reliability of the outcome, and in doing so explicitly addressed the finality concerns which serve as a counterweight to declaring any rule a "watershed" rule: "An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is

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[132] *See* Section II(C), *supra.*

[133] *Mackey,* 401 US at 693–94 (Harlan, J.) (citing *Gideon v. Wainwright,* 372 US 335, 349, 83 S Ct 792, 9 L Ed 2d 799 (1963)).

[134] *Whorton v. Bockting,* 549 US 406, 419–21, 127 S Ct 1173, 167 L Ed 2d 1 (2007); *Beard v. Banks,* 542 US 406, 417–18, 124 S Ct 2504, 159 L Ed 2d 494 (2004) ("lawyers in criminal courts are necessities, not luxuries. *The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."*) (quoting *Gideon,* 372 US at 344 (emphasis original)); *Kitchens v. Smith,* 401 US 847, 91 S Ct 1089 (1971) (reversing state-court judgment holding *Gideon* not retroactive, and holding "*Gideon* is fully retroactive").

reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower."[135]

In a *per curiam* decision in 1968 the Court held that the right to counsel at sentencing must be given retroactive effect. The Court did not distinguish between the right to counsel at sentencing and the right to counsel at any other critical juncture in a criminal case:

> This Court's decisions on a criminal defendant's right to counsel at trial, at certain arraignments, and on appeal, have been applied retroactively. The right to counsel at sentencing is no different. As in these other cases, the right being asserted relates to 'the very integrity of the fact-finding process.' …. The right to counsel at sentencing must, therefore, be treated like the right to counsel at other stages of adjudication.[136]

The Supreme Court's recent decisions concerning the Sixth Amendment right to effective counsel during plea negotiations—including *Padilla*—reaffirm the Court's commitment to the right to counsel as a "bedrock procedural element." Just as it did in *McConnell v. Rhay,* the Court has rejected in these recent cases a concern with accuracy that focuses only on the result of the criminal trial, and recognized the reality of today's criminal justice system:

> Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." … In today's criminal justice system,

[135] *Strickland,* 466 US at 694.

[136] *McConnell v. Rhay,* 393 US 2, 3-4, 89 S Ct 32, 21 L Ed 2d 2 (1968) (per curiam) (citations omitted).

therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.[137]

The line of Supreme Court cases described above, culminating in *Frye* and *Cooper,* suggest it is reasonable to believe the Court will treat the expanded scope of the Sixth Amendment in *Padilla* as a "watershed" constitutional rule requiring retroactive application.[138] While *Teague*'s "watershed" exception has been excoriated by commentators who have criticized Justice O'Connor's narrowing of Justice Harlan's formulation of the "watershed" exception in *Mackey,*[139] one consistency between Justice Harlan's *Mackey* opinion and the *Teague* formulation is clear: An expansion of the right to counsel clearly qualifies as a "watershed" rule no matter what test is used.

CONCLUSION

The federal redressability regime embodied in *Griffith* and *Teague* was meant to encourage state courts to interpret the federal constitution, and to establish state courts as coequal developers of federal constitutional law by

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[137] *Missouri v. Frye,* __ US __, 132 S Ct 1399, 1407, 182 L Ed 2d 379 (2012) (citations omitted); *see also Lafler v. Cooper,* __ US __, 132 S Ct 1376, 1385–86, 182 L Ed 2d 398 (2012) (reaffirming that the Sixth Amendment does not exist solely to guarantee a fair trial, but extends its scope to pre-trial and post-trial proceedings).

[138] In *Chaidez,* the Court noted that the question of whether *Padilla* was a "watershed" exception to the *Teague* rule was not before the Court. __ US __, 133 S Ct at 1107 n 3.

[139] *E.g.,* Roosevelt, 95 Cal L Rev at 1694 ("*Teague* combined the two Harlan formulations [from *Desist* and *Mackey*], an innovation with little obvious justification other than, perhaps, that a conjunction is harder to satisfy than either element alone.").

limiting federal review of their interpretations. Applying a rule of redress to claims like Mr. Verduzco's that are properly raised for the first time in state post-conviction proceedings furthers these goals.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this petition complies with the word-count limitation in ORAP 5.05(2)(b)) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 11,391 words.

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original *Amicus* Brief on the Merits in support of Petitioner on Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 1, 2014.

I further certify that I directed the *Amicus* Brief on the Merits to be served on October 2, 2014, by having the document delivered to the following:

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