IN THE SUPREME COURT OF THE STATE OF OREGON

KEITH KENDON OGLE, SR., Petitioner-Appellant, Respondent on Review, v. MARK NOOTH, Superintendent, Snake River Correctional Institution, Defendant-Respondent, Petitioner on Review.	Malheur County Circuit Court No. 10108394P CA A148493 SC S061162

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, MARK NOOTH

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the District Court for Malheur County
Honorable J. BURDETTE PRATT, Judge

Opinion Filed: January 30, 2013
Before: Duncan, J.

JAMES N. VARNER #891320
Director, Oregon Appellate Consortium
521 S.W. Clay Street, Suite 205
Portland, Oregon 97201
Telephone: (503) 241-2400
Email: jamesnvarner@gmail.com

Attorney for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
RYAN KAHN #002919
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: ryan.kahn@doj.state.or.us

Attorneys for Petitioner on Review

PETER GARTLAN #87046
Chief Defender
Office of Public Defense Services
KRISTIN A. CARVETH #052157
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: kristin.carveth@opds.state.or.us

Attorneys for Amicus

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Other Authorities

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, MARK NOOTH

STATEMENT OF THE CASE

A post-conviction proceeding is unlike other civil cases in Oregon. Whereas a plaintiff in an ordinary civil case initiates an action merely by alleging facts to state a claim, a post-conviction petitioner is statutorily required to support his or her allegations with actual documentary evidence at the pleading stage. The issue in this case is what a post-conviction petitioner must do to satisfy that statutory attachment requirement.

As explained below, the text, context, and legislative history of the post-conviction statutes show that the petitioner must support the allegations in the petition with reliable and trustworthy evidence that, if credited and not controverted, would permit a court to rule in his or her favor. Permitting the petitioner to satisfy the attachment requirement with weaker evidence—like his own unsubstantiated or speculative affidavit—would undercut the legislature's purpose to eliminate unfounded petitions at the pleading stage, without the need for a detailed evidentiary hearing.

First Question Presented

ORS 138.580 provides that the post-conviction petitioner "shall" attach to his petition for relief "[a]ffidavits, records or other documentary evidence

supporting the allegations of the petition * * *." What must the petitioner do to comply with that requirement?

First Proposed Rule of Law

The text, context, and legislative history of ORS 138.580 show that, to attach evidence "supporting the allegations of the petition," the post-conviction petitioner must attach reliable and trustworthy evidence that, if credited and not controverted, would permit the court to rule in his or her favor. In other words, the petitioner must attach trustworthy documents that are sufficient to establish a *prima facie* case on the allegations in the petition.

Second Question Presented

Can the petitioner satisfy the attachment requirement by submitting his own affidavit, which contains speculative averments for which he has no personal knowledge?

Second Proposed Rule of Law

No. The text, context, and legislative history of ORS 138.580 show that the legislature did not intend to allow the petitioner to satisfy the attachment requirement by submitting his own unsubstantiated affidavit, unsupported by personal knowledge.

Statement of Procedural and Historical Facts

The Post-Conviction Hearing Act (PCHA), ORS 138.510, *et seq*., provides the exclusive method of collaterally challenging a conviction in

Oregon. ORS 138.540. Because a brief recitation of the procedures under that act will help to frame the issues on review, defendant begins with those procedures before turning to the specific facts of this case.

A. Post-conviction proceedings and the attachment requirement

A petitioner initiates a post-conviction case under the PCHA by filing a petition for relief, alleging one or more of the permissible grounds for relief. *See* ORS 138.530 (listing grounds). The contents of that petition are governed by ORS 138.580. That statute provides, in part, that:

> The petition shall be certified by the petitioner. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. * * * The petition shall set forth specifically the grounds upon which relief is claimed, and shall state clearly the relief desired. All facts within the personal knowledge of the petitioner shall be set forth separately from the other allegations and shall be certified as heretofore provided in this section.

ORS 138.580. As is particularly relevant here, that statute also contains an "attachment requirement." It provides:

> Affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition.

ORS 138.580.

At the time of filing, financially eligible petitioners will be appointed an attorney upon request. ORS 138.590. If the appointed attorney determines that the initial petition for relief is defective in form or substance, the attorney can

move to amend it within 15 days, or such further time as the court may allow. ORS 138.590(5). Counsel is entitled to amend the petition as a matter of right during that time period. *Id*.[1]

Within 30 days of the docketing of the petition for relief, the defendant is required to respond by demurrer, answer, or other motion. ORS 138.610. The case then proceeds to a hearing on the issues raised. ORS 138.620(1). The court retains authority, however, to enter "appropriate orders" regarding the amendment of the petition for relief or any other pleading, including the authority to extend the time for filing them. ORS 138.610.

At the post-conviction hearing, the court may resolve the case on issues of law raised by the defendant in a demurrer or motion. ORS 138.620(1). But if the case presents more than just an issue of law, and if the petition for relief states a ground for relief, the court shall hold a hearing at which the parties can offer "affidavits, depositions, oral testimony or other competent evidence." ORS 138.620(2). The petitioner bears the burden to establish the facts alleged by a preponderance of the evidence. *Id*. After deciding the issues raised, the post-conviction court issues a judgment either denying the petition or granting the appropriate relief. ORS 138.640.

---

[1] If the petitioner does not qualify for appointed counsel, the court still retains the authority to allow amendments to the petition, as mentioned below. ORS 138.610.

B. Petitioner seeks post-conviction relief under the PCHA, alleging various claims of inadequate assistance of counsel.

Following convictions for assault, possession of methamphetamine, and endangering the welfare of a minor, petitioner sought post-conviction relief by filing a *pro se* petition for relief. The court appointed him counsel and, about four months later, his counsel filed a formal petition for relief on petitioner's behalf. The amended petition alleged that petitioner's trial counsel in the underlying criminal case had been inadequate in four respects: (1) failing to meet with defense witness Audrey before trial, (2) failing to investigate the victim's hospital records, (3) failing to present those hospital records as evidence at trial, and (4) failing to cross-examine Dr. Gary Pederson about the victim's injury. (App Br, ER-3).

In an apparent attempt to comply with ORS 138.580's "attachment requirement," petitioner attached documents to the formal petition. In particular, he attached the indictment, the judgment, and the trial transcripts from his criminal trial. Petitioner also attached two of his own affidavits.[2] Petitioner's affidavits contained his own beliefs about what he thought his counsel should have done before and at trial, and what evidence he believed

[2] Actually, petitioner submitted those affidavits in response to the state's subsequent motion to dismiss, but the parties addressed them as though they were attached to his petition for relief.

would have been elicited or offered if his counsel had done those things. (Ex 4; Ex 5). But, as seen below, he did not attach any substantiating documents showing what evidence his counsel would have elicited with respect to any of his claims.

First, with respect to the claim that his counsel should have met with witness he submitted no statement from her. Instead, petitioner created his own hypothetical, question-and-answer colloquy in his affidavit, in which he posed questions to " and " gave responses. (Ex 5 at 2-4). Petitioner suggested that hypothetical responses came from police reports memorializing her statements. (*See* Ex 4 at 2; Ex 5 at 1). Petitioner did not, however, attach those police reports to his petition.

With respect to petitioner's second and third claims, both of which pertained to the victim's hospital records, petitioner again described some of the contents of those records in his affidavit. (Ex 4 at 2). But he did not attach the records themselves, even though he acknowledged that his trial counsel had them at trial. (Ex 5 at 2).

Finally, with respect to the claim about the cross-examination of Dr. Pederson, petitioner did not attach any statement from the doctor showing what he would have said at trial if he had been questioned differently. Instead, petitioner merely listed a few questions that he believed his counsel should have asked the doctor. (Ex 4 at 2). But unlike his hypothetical questions of

petitioner did not speculate about what the doctor's responses would have been. (Ex 4; Ex 5).

Defendant moved to dismiss the petition on the ground that petitioner failed to comply with the attachment requirement in ORS 138.580. According to defendant, that statute required petitioner to attach enough admissible, documentary evidence to support a *prima facie* case for each of his claims of inadequate assistance of counsel.[3] The post-conviction court agreed that petitioner had failed to satisfy ORS 138.580, and it granted defendant's motion to dismiss. Petitioner appealed.

C. The Court of Appeals concludes that petitioner complied with the attachment requirement, relying largely on petitioner's own affidavits.

The Court of Appeals reversed the post-conviction court's dismissal of the petition. The court began by construing the attachment provision in ORS 138.580. After evaluating the meaning of the phrases in that provision, the court held that it required a petitioner to attach documents (*i.e.*, "[a]ffidavits, records or other documentary evidence") that tended to verify, corroborate, or substantiate (*i.e.*, "supporting") the assertions that petitioner has undertaken to

---

[3] As will be discussed below, defendant no longer contends that the legislature necessarily intended that the attached evidence be, technically speaking, "admissible."

prove (*i.e.*, "the allegations in the petition"). *Ogle v. Nooth*, 254 Or App 665, 670-73, 298 P3d 32 (2013).

Applying that holding to petitioner's case, the Court of Appeals concluded that his attachments—most notably, his two affidavits—satisfied ORS 138.580. *Id.* at 672-73. Despite the fact that many of petitioner's averments in those affidavits were either speculative or were not based on his own personal knowledge (and, hence, would not have been sufficient to satisfy his burden of proof), the court held that they were sufficient to satisfy ORS 138.580. *Id.* Thus, the court reversed the post-conviction court's judgment dismissing the case. This court allowed review.

Summary of Argument

The issue in this case is what the post-conviction petitioner must do to comply with the attachment requirement in ORS 138.580, which requires the petitioner to attach documentary evidence "supporting the allegations of the petition." As explained below, the text, context, and legislative history of ORS 138.580 show that the petitioner must attach reliable and trustworthy evidence that, if credited and not controverted, would entitle the court to rule in the petitioner's favor.

First, the text of the provision shows that the legislature intended to require the attached documents to be reliable and trustworthy, and sufficient to support the allegations that a petitioner must ultimately prove. In particular, the

meaning of the word "supporting" shows that the attached evidence must be sufficient to "verify" or "substantiate" the allegations, or to "prove," "establish the truth of," or "confirm" them. Although the statute does not require the petitioner to attach *all* of his or her evidence at the pleading stage, he or she must attach at least *prima facie* evidence, or evidence that would support a determination in his favor.

The context of ORS 138.580 reinforces that conclusion. In particular, the statute's use of the phrase "[a]ffidavits, records or other documentary evidence" shows an intent to require sworn or official documents, or documents that are considered to be reliable and trustworthy in court. In addition, the context shows that the legislature took pains to ensure that the attached documents must be sworn as true and correct, and cannot be based on the petitioner's own averments of fact, for which he or she has no personal knowledge.

Finally, the legislative history of ORS 138.580 shows that the legislature's purpose in enacting the law was to discourage petitioners from clogging the courts with unfounded claims. Requiring the petitioner to attach reliable and trustworthy evidence to corroborate his allegations, at the pleading stage of the case, effectuates the purpose of the requirement.

As applied to petitioner's allegations in this case, the foregoing principles show that petitioner failed to comply with ORS 138.580. Two of his claims of inadequate assistance of counsel rest on allegations that his trial counsel should

have elicited additional testimony from two witnesses. But petitioner did not attach any reliable documentary evidence to show what those witnesses would have said if they had been questioned differently at trial. Petitioner's own affidavit, which merely speculates about what one of the witnesses would have said, is not sufficient to satisfy ORS 138.580.

Petitioner's remaining claims are that his counsel should have offered certain hospital records at trial. But he did not attach those records to support his petition. Although he purported to describe some of the contents of the records in his affidavit, his description does not constitute a reliable or trustworthy piece of documentary evidence that, if credited, could permit the court to rule in his favor. For those reasons, this court should reverse the decision of the Court of Appeals, and affirm the post-conviction court's judgment dismissing the case.

ARGUMENT

A. The text of ORS 138.580 shows that the petitioner attaches evidence "supporting the allegations of the petition" by attaching reliable and trustworthy evidence sufficient to establish a *prima facie* case.

As noted, the issue in this case is what the petitioner must do to satisfy ORS 138.580's requirement to attach "[a]ffidavits, records or other documentary evidence supporting the allegations of the petition * * *." The answer to that question starts with the text of the provision, in particular, the phrase "supporting the allegations of the petition." As explained below, that

text shows that the legislature adopted ORS 138.580 with the intent of requiring a petitioner to attach reliable and trustworthy evidence that would entitle a court to rule in his or her favor.

As an initial matter, no dispute exists about the meaning of the phrase "the allegations of the petition." Those are the allegations that the petitioner is required to set forth in order to state a claim for post-conviction relief. In a claim of inadequate assistance of counsel, for example, the "allegations of the petition" are the factual contentions that the petitioner must allege in an attempt to show that: (1) his counsel failed to exercise reasonable professional skill and judgment, and (2) that the alleged failure caused him prejudice. *See Krummacher v. Gierloff*, 290 Or 867, 875-76, 627 P2d 458 (1981) (setting forth standard under Article I, section 11); *Strickland v. Washington*, 466 US 668, 687, 104 S Ct 2052, 80 L Ed 2d 674 (1984) (setting forth standard under Sixth Amendment).

The more important question, then, is the meaning of the word "supporting." Although in 1959, the word "support" was defined in several ways, the most relevant definition referred to the type of support at issue here: evidentiary support. That definition provided that "support" meant "verify [or] substantiate; as, evidence supporting a charge." *Webster's New Int'l Dictionary* 2534 (2nd ed. 1952) (hereafter, "*Webster's Second*"). The use of the words "verify" and "substantiate" in that definition is notable, as both indicate a high

level of veracity. For example, "verify" was defined as "prove to be true;" "establish the truth of;" "confirm," *id.* at 2832; or "substantiate by oath[,]" *Black's Law Dictionary* 1732 (4th ed 1951). Similarly, "substantiate" meant "impart substance, or material form or being, to" or "establish the existence of truth * * * by proof or competent evidence[.]" *Webster's Second* at 2514; *see also Black's* at 1597 (substantially the same).

In light of those definitions, evidence "supporting" the allegations of the petition is evidence that is reliable and trustworthy enough to *verify* or *substantiate* the allegations. In other words, the evidence must be reliable and trustworthy enough to *prove, establish the truth of, confirm,* or *impart substance to* the allegations.

Of course, the petitioner need not attach *all* of the evidence on which he or she might ultimately rely at the subsequent post-conviction hearing. *See* ORS 138.620 (providing for hearing at which the court can receive additional evidence, including oral testimony). But ORS 138.580 requires sufficient evidence that, if credited, would permit a ruling in the petitioner's favor on each of "the allegations of the petition." That amount of evidence—which is, functionally speaking, the lowest amount of reliable evidence that the petitioner could offer on each allegation—is often referred to as *prima facie* evidence. *See Lampos v. Bazar, Inc.*, 270 Or 256, 279, 527 P2d 376 (1974) (noting that a

"*prima facie*" case can refer to either sufficient evidence to go to a jury, or evidence that is sufficient to shift the burden of producing evidence).

B. The context of ORS 138.580 reinforces the conclusion that the attachment requirement demands reliable and trustworthy evidence to support a *prima facie* case.

The statutory context of ORS 138.580 confirms the conclusion that the petitioner must attach trustworthy, *prima facie* evidence to the petition. Foremost in that respect is the phrase "[a]ffidavits, records or other documentary evidence," which describes the types of documents that a petitioner must attach to satisfy the statute. The legislature's use of those words shows its intent to require documents that are legally valid or sufficient—the type of reliable or trustworthy evidence on which a court or jury could rely.

In 1959, the legal definition of "affidavit" was a written "declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer an oath." *Black's* at 80. *See also Webster's Second* at 43 (substantially the same).

The word "record" was also defined in 1959 in terms of documents that were valid or official. The legal definition was "[a] written account of some act, transaction, or instrument, drawn up, under authority of law, by a proper officer, and designed to remain as a memorial or permanent evidence of the matters to which it relates." *Black's* at 1437. Also pertinent is the ordinary dictionary definition, which includes the following descriptions: "reduction to

writing as evidence"; "[a]n official contemporaneous memorandum stating the proceedings of a court of justice; a judicial record"; "indisputable evidence of the facts recorded * * *"; and "[t]he official copy of the various legal papers used in a case, together with memoranda of the proceedings of the court." *Webster's Second* at 2081.

Finally the legal definition of the word "evidence" (as in "documentary evidence") had a similar meaning in 1959:

> Any species of proof, or probative matter, *legally presented at the trial of an issue* by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., *for the purpose of inducing belief in the minds of the court or jury as to their contention.*

Black's Law Dictionary 656 (emphasis added). *See also Webster's Second* at 886 ("That which is legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it; means of making proof; medium of proof.").

Taken together, those definitions show that each of the types of evidence that the legislature specifically identified in ORS 138.580 are highly reliable—that is, they are either sworn, official, or generally relied on by courts and juries. Thus, those contextual provisions bolster the legislature's intent to require that the evidence "supporting the allegations of the petition" be reliable and trustworthy.

Other contextual parts of ORS 138.580 reinforce that point. In particular, the statute also provides:

> The petition shall be certified by the petitioner. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. * * * All facts within the personal knowledge of the petitioner shall be set forth separately from the other allegations of fact and shall be certified as heretofore provided in this section.

Those contextual provisions of ORS 138.580 are important for two reasons.

First, by requiring that the attached documents be affirmatively sworn as "true and correct," that provision reinforces the principle that the documents must be trustworthy and reliable. If the legislature had intended for the attachment requirement to permit weaker evidence to be attached, it would have had no purpose in requiring that they be sworn as authentic.

Second, by requiring the petitioner to separately set forth and certify his or her *own* averments of fact in the petition, and by requiring that he or she have personal knowledge of them, the legislature intended that the attachment provision require evidence from reliable sources *other than* the petitioner. *See Force v. Dept. of Rev.*, 350 Or 179, 190, 252 P3d 306 (2011) (statutory provisions will be construed in a manner that will give effect to them all). In other words, the personal-knowledge provision shows that, when evidence from sources other than petitioner would be necessary to prove a particular claim, the attached evidence must come from those sources. The legislature did not intend

for the petitioner to submit his own guesswork—unsupported by personal knowledge—about what evidence he or she thinks would be available to support the allegations.

The original version of ORS 138.580 confirms that conclusion. *See Harris and Harris*, 349 Or 393, 402, 244 P3d 801 (2010) (treating prior versions of a statute as context). Originally, ORS 138.580 contained an exception to the attachment requirement, excusing the petitioner from attaching documentary evidence if he or she "state[d] why they are not attached." ORS 138.580 (1959). That exception would have been unnecessary if the petitioner could satisfy the requirement by attaching his own speculative affidavit, unsupported by personal knowledge; the petitioner *always* could have done that. Thus, the attachment requirement must require more.[4]

In sum, those contextual provisions reinforce the conclusion that, to satisfy the attachment requirement, the petitioner must "support" the allegations in the petition with reliable and trustworthy evidence that, if credited and not

---

[4] Defendant acknowledges that a petitioner may raise certain claims that might, in some circumstances, rest chiefly on his or her own averments in the petition itself. If that is the case, any supporting documents required by ORS 138.580 would likely be minimal and easy to garner (*i.e.*, transcripts or other records from the case).

controverted, would be sufficient to entitle the petitioner to relief on his allegations.[5]

C. The legislative history of ORS 138.580 shows that the attachment requirement was intended to be strict enough to eliminate unfounded claims at the pleading stage of the case.

The legislative history of ORS 138.580 further confirms the foregoing conclusions about the attachment provision. As explained below, that history shows that the attachment provision was intended to be strict enough to eliminate unfounded petitions at the start of a case, without the need for an evidentiary hearing.

1. The State of Illinois adopts the attachment requirement to discourage "indiscriminate and unfounded" petitions for relief.

In the 1940s and '50s, a movement was afoot to simplify post-conviction remedies in the United States, which up to that time had been confusing. *Bartz v. State of Oregon*, 314 Or 353, 362, 839 P3d 217 (1992); *Strong v. Gladden*,

---

[5] Defendant notes that the Court of Appeals discussed a different contextual provision in its opinion, ORS 138.620(2). Because the legislature used the phrase "competent evidence" in that statute, but not in ORS 138.580, the court held that the attachment provision was not meant to require evidence that was necessarily "admissible" or "competent." *Ogle*, 254 Or App at 671. That aspect of the court's holding is beside the point in light of defendant's more precise argument in this court. Defendant no longer argues that the documentary evidence must be technically "admissible" to satisfy the attachment provision; admissibility, *per se*, is not the relevant inquiry. As a practical matter, however, evidence that is reliable and trustworthy enough to satisfy ORS 138.580 will most often be admissible or competent evidence.

225 Or 345, 348, 358 P2d 520 (1961). The State of Illinois was one of the first states to attempt to do that, by adopting its 1949 post-conviction hearing act. Ill Rev Stat, ch 38, §§ 826-832 (1949) (reprinted in Albert E. Jenner, *The Illinois Post-Conviction Hearing Act,* 9 Fed R Dec 347, 365 (1950)). That act contained the following notable provision: "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." Ill Rev Stat, ch 38, § 827 (1949) (reprinted in Jenner, *supra*, at 365).

Later that year, Albert Jenner, Jr., the chairperson of the committee that prepared the rule on which the statute was based, wrote an article discussing the features of the Illinois act. With respect to the attachment requirement quoted above, Jenner explained that its purpose was both "an attempt to paraphrase existing requirements as to statutory *coram nobis* [cases]," and an attempt to "discourage indiscriminate and unfounded petitions." Jenner at 360. As an illustration, Jenner referred to *People v. Touhy*, 72 N.E.2d 827 (Ill Sup Ct 1947), in which the Illinois Supreme Court addressed the pleading requirements for *coram nobis* cases. *Id.* As explained below, those pleading requirements would have the effect of discouraging unfounded post-conviction petitions, by eliminating claims without evidentiary support.

In *Touhy*, the petitioner filed a petition for writ of error *coram nobis*, contending that one of the witnesses in his criminal trial for kidnapping falsely

identified him as one of the kidnappers. *Touhy*, 72 NE2d at 829. Apparently, the petitioner had information showing that the witness had subsequently admitted to a lawyer that he had falsely identified the petitioner. *Id.* Notably, the petitioner did not attach any affidavits to his petition. *Id.* The state demurred to the petition on that ground, and the trial court granted the demurrer. *Id.*[6]

On appeal, the Illinois Supreme Court upheld the trial court's demurrer based on the petitioner's failure to attach affidavits to support his claim:

> A petition, as here, based on a claim of perjury but not supported by affidavits showing the perjury, *does not allege facts but merely conclusions of the pleader based on hearsay matter*. Construing the allegations of the petition most favorably to [the petitioner], to the extent that they charge [particular witnesses] with testifying falsely upon the trial, they are hearsay and cannot be said to constitute facts.

Id. at 832 (emphasis added). That holding shows that, under Illinois law, a *coram nobis* petitioner could not rely on his or her own hearsay accounts of evidence that he *believed* was available to support his petition. Instead, the petitioner was required to submit—with his petition—affidavits from people with knowledge.

---

[6] The trial court also ruled that the petition was untimely, but that issue is not pertinent here.

Incorporating that standard into the post-conviction hearing act would, as Jenner suggested, tend to discourage "indiscriminate and unfounded" petitions at the outset of the case by allowing cases to proceed to a hearing only if they had some independent, corroborating evidence at start of the case (or an explanation about why the petitioner could not obtain it). In practice, that was how the Illinois post-conviction statue was applied in the years after its adoption.[7]

2. The drafters of the 1955 Uniform Post-Conviction Procedure Act adopt the same attachment requirement.

In 1955, about five years after Illinois adopted its post-conviction act, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Post-Conviction Procedure Act (UPCPA). Uniform Post-Conviction Procedure Act, 9B ULA 541 (1957). That act contained many of the same provisions as the Illinois act, including, most notably, the same attachment requirement. *Id.* at 557.

---

[7] *See People v. Jennings,* 102 NE2d 824, 827 (Ill 1952) ("Where there are no supporting affidavits and their absence is neither explained nor excused, the trial court should either dismiss the petition or grant a further time within which such affidavits may be obtained."); *People v. Powell*, 263 NE2d 33 (Ill 1970) (upholding dismissal of post-conviction case without a hearing where the petitioner did not attach necessary affidavits to support his allegations); *People v. Collins,* 782 NE2d 195, 199 (Ill 2002) (the petitioner's affidavit does not satisfy the attachment requirement; purpose of attachment requirement is to "show[] that the verified allegations are capable of independent corroboration.").

Although the commentary to the uniform act did not specifically address the purpose of the attachment requirement, the decision to adopt the same wording indicates that the drafters had the same purpose—to discourage unfounded petitions at the beginning of the case. And indeed, the drafters were familiar with Jenner's article, discussing that purpose, as they cited it in their prefatory comments to the act. *Id.* at 543 n 3 & 545 n 21.

Other, more general prefatory comments also showed the drafters' intent to eliminate groundless post-conviction claims from overburdened court dockets. For example, the committee described the "weaknesses in the present system" as "the existence of an overwhelming burden of invalid claims upon state and federal court dockets, and the delays in granting relief to valid petitions." *Id.* at 548. The committee also quoted the following observation, from a report on *habeas corpus* relief:

> If a person has been unconstitutionally imprisoned * * *, the situation becomes abhorrent to our sense of justice. *On the other hand, if there has been no violation of constitutional right, and if from 90 to 99 per cent of the claims are groundless, the wear and tear on the judicial machinery, resulting from years of litigation in thousands of cases, State and Federal, becomes a matter of serious import to courts and judges*, who, after all, are dedicated to the task of clearing their dockets with reasonable expedition.

Id. at 547-48 (citing Report of the Special Committee on Habeas Corpus to the Conference of Chief Justices, Appendix, at 11; emphasis added). The

NCCUSL's concerns are consistent with a strict reading of the attachment requirement, to eliminate unfounded claims from the start.

The drafters of the uniform act also included at least two other provisions that, although differing from the Illinois act, tended to reinforce the importance and purpose of the attachment requirement. First, the drafters highlighted the distinction between a petitioner's *own* averments of fact, and the documentary evidence that he or she could attach to support the petition. In particular, the drafters included the precursor to ORS 138.580 requiring that "[f]acts within the personal knowledge of the petitioner * * * must be sworn to affirmatively as true and correct[,]" and that "[a]ll facts within the personal knowledge of the petitioner shall be set forth separately from other allegations of fact[.]" *Id.* at 557. Those sections tended to emphasize the implicit distinction, found in cases like *Touhy*, that a petitioner's hearsay was not a substitute for an affidavit from someone with knowledge.

Second, whereas the Illinois act had a five-year statute of limitations for post-conviction claims, Jenner, *supra*, at 365 (§ 826 of the act), the UPCPA did not have a statute of limitations, *see, generally*, UPCPA, 9B ULA at 550-63. The lack of a statute of limitations tends to reinforce the principle that the attachment provision required trustworthy evidence, by giving the petitioner ample time to gather it.

Taken together, that evidence shows that, by incorporating Illinois's attachment requirement into the model act, the NCCUSL sought the same goal of eliminating groundless and invalid claims at the pleading stage, without burdening the court with an evidentiary hearing. Requiring the petitioner to attach evidence at the start of the case (or explain why he or she could not do so) tended to effectuate that goal by eliminating claims that the petitioner would be unable to support with evidence.

3. The Oregon legislature adopts the same requirement and, over time, makes it stricter.

In 1959, about four years after the uniform post-conviction act was adopted, the Oregon legislature enacted Oregon's Post-Conviction Hearing Act. Or Laws 1959, ch 636, §§ 1-24. It based the act on both the 1949 Illinois post-conviction act and the 1955 uniform act. *See Datt v. Hill*, 347 Or 672, 680, 227 P3d 714 (2010) (stating that the PCHA was based on the UPCPA); Jack G. Collins and Carl R. Neil, *The Oregon Post-Conviction Hearing* Act, 39 Or L Rev 337, 340 (1960) (stating that the act was based, in part, on the Illinois act and the UPCPA). Notably, the legislature adopted essentially the same attachment requirement from both the Illinois and the uniform act (although it stated it slightly differently). Or Laws 1959, ch 636, § 8.

The fact that the legislature chose to include virtually the same attachment requirement that had been adopted by Illinois and by the drafters of

the uniform act is important in two respects, one general and one specific. First, as a general matter, it shows that the legislature must have had the same purpose in adopting the requirement—eliminating groundless claims at the start of a post-conviction case. That general "weeding out" purpose is consistent with a stricter attachment rule, requiring reliable and trustworthy evidence that would permit a ruling in the petitioner's favor.

Second, and more specifically, the legislature's adoption of the attachment requirement is an indication that it sought to incorporate the Illinois principle from the *Touhy* case—that a petitioner could not satisfy the requirement by relying on his own, unsubstantiated statements about what he believed the facts would show. In other words, in light of *Touhy*, the legislature would not have contemplated that a petitioner could satisfy the requirement with his own affidavit unsupported by personal knowledge. *Cf. Elk Creek Management Co. v. Gilbert,* 353 Or 565, 574-76, ___ P3d ___ (2013) (considering comments to a uniform act, and cases cited in those comments).

Although Oregon's post-conviction act has been amended a number of times since 1959, none of those amendments has shown a legislative intent to relax the standards for the pleading requirements. And to the contrary, those changes have actually strengthened them.

The first notable change to Oregon's PCHA came in 1989, when the legislature amended the statute of limitations for post-conviction actions. In

particular, the legislature eliminated the provision stating that no statute of limitations applied, and it inserted a statute of limitations of 120 days. Or Laws 1989, ch 1053, §18. The purpose of the new limitation was to save money for the state's indigent defense program (presumably, by limiting the number of claims filed). *Bartz*, 314 Or at 358.

Four years later, in 1993, the legislature amended the statutes again. Among other things, those amendments: (1) lengthened the statute of limitations from 120 days to two years, (2) gave the post-conviction court authority to unilaterally dismiss "meritless" post-conviction cases, and, most importantly, (3) eliminated the exception to the attachment requirement that allowed petitioners to state why they could not attach evidence to support their claims. Or Laws 1993, ch 517, §§ 1, 3, 4. In explaining that final change, former Assistant Attorney General Brenda Peterson made the purpose clear:

> [PETERSON:] The other thing the proposed amendments would do would be to amend ORS 138.580 to delete a portion of a sentence at the end of that statute which essentially would provide after amendment that * * * a petitioner in a post-conviction case – *needs to attach affidavits, records or other evidence supporting the allegations in the petition. Period. And they would not have the out that they currently have that they could just explain why they didn't do so.*

Tape Recording, House Committee on Judiciary, Subcommittee on Crime and Corrections, HB 2352, Apr 7, 1993, Tape 70, Side A (emphasis added).

The 1993 changes to the post-conviction statutes tended to strengthen the legislature's earlier intent to eliminate unfounded petitions at the pleading stage. In addition to giving the court more authority to dismiss "meritless" claims, the legislature strengthened the attachment requirement with a trade: In exchange for having more time to prepare and file a petition for relief (two years), the petitioner *must* attach evidence to support the allegations. The petitioner could no longer simply say why he or she was unable to do so.[8]

In sum, the legislative history of ORS 138.580 shows that the attachment provision was intended to eliminate groundless post-conviction claims from the start, without the need for an evidentiary hearing. That purpose, which the Oregon legislature has reinforced over time, is consistent with a stricter attachment rule, requiring reliable and trustworthy evidence that, if credited, would permit a ruling in the petitioner's favor.

D. In this case, the petitioner did not attach sufficient affidavits, records, or other documentary evidence to satisfy ORS 138.580.

Having set forth the meaning of ORS 138.580's attachment requirement, the question becomes whether petitioner satisfied it in this case. In particular,

---

[8] In that respect, Oregon has actually departed from the drafters of the uniform act, who, in 1980 *relaxed* the attachment requirement by making it optional. *See* Uniform Post-Conviction Procedure Act § 4 (1980) (reprinted in 11 ULA 203, 208 (2003)) ("Affidavits or other material supporting the application may be attached, but are unnecessary.").

the question is whether petitioner attached reliable and trustworthy documentary evidence that, if credited and not contradicted, would permit the post-conviction court to rule in his favor on each of his claims. As explained below, the answer to that question is no.

1. Counsel's alleged failure to "meet with" witness

In petitioner's first claim, he alleged that his trial counsel performed inadequately by failing to "meet with defense witness Audrey so that counsel could have ensured that she understood "the importance of testifying to the events of the incident in chronological order[.]" (App Br, ER-3). To ultimately satisfy his burden of proof on that claim, a petitioner would be required to prove, at a minimum, that his counsel did not actually meet with and that his failure to do so had some effect on her testimony. But petitioner attached no reliable and trustworthy evidence to support a finding on either of those allegations.

First, he attached no documents to show that his trial counsel did not, in fact, meet with before trial to convey a message about her testimony. That evidence could have taken several forms—an affidavit from herself, an affidavit from his trial counsel, or even counsel's file documents indicating that he did not talk to Instead, petitioner submitted only his own affidavit, in which he averred—without explaining the factual basis for his knowledge—that his counsel did not meet with Because that evidence

was not reliable or trustworthy enough to allow the post-conviction court to rule in his favor, it did not satisfy ORS 138.580.

Petitioner also failed to attach any documentary evidence, in the form of a declaration or affidavit from showing how her testimony would have been any different if counsel had met with her before trial. Instead, petitioner submitted his own affidavit in which he speculated about what would have said on the stand in response to certain questions. (Ex 5 at 2-4). That was not sufficient. Petitioner's speculation about what would have said is not reliable or trustworthy enough to satisfy the standard of ORS 138.580. Although petitioner suggested that the responses that he attributed to came from police reports memorializing her statements—evidence that, if sufficiently reliable, might have satisfied ORS 138.580—he did not attach those documents to his petition either. (*See* Ex 5 at 1). For those reasons, petitioner did not satisfy ORS 138.580 with respect to that claim.

2. Counsel's alleged failures regarding the victim's hospital records

Petitioner's second and third claims are related. In those claims, he alleged that his trial counsel failed to "adequately investigate the victim's hospital records," and that counsel failed to "present [that] evidence to the jury" at trial. (App Br, ER-3). To satisfy his burden of proof with respect to that claim, petitioner would have to show: (1) that his counsel did not conduct

investigation about those records and that he made a mistake by not offering them, and (2) that the records would have made a difference at trial. Again, petitioner attached no reliable or trustworthy evidence to support those allegations.

First, petitioner did not attach any documentary evidence from his counsel showing that he did not, in fact, investigate the hospital records, or have a particular reason for not offering them at trial. Petitioner's own, unfounded speculation about his counsel's understanding of the medical records and reasons for not offering them, (*see* Ex 4 at 2), was insufficient to satisfy his burden under ORS 138.580.

Second, petitioner did not attach the hospital records that he believes his counsel should have offered at trial (despite his acknowledgment that his counsel actually possessed them). (Ex 4 at 2; noting that his attorney "had [the records] in his possession"). Although he purported to describe his interpretation of parts of the records in his own affidavit, (*see* Ex 4 at 2), his averments were insufficiently reliable and trustworthy to permit a ruling of prejudice in his favor. As explained earlier, the legislature did not intend for the petitioner to satisfy the attachment requirement by attaching his own unsubstantiated affidavit; it sought to require, instead, the supporting documentary evidence itself. For those reasons, petitioner failed to comply with ORS 138.580 regarding his second and third claims.

3. Counsel's alleged failure regarding the cross-examination of Dr. Pederson

Finally, petitioner claimed that his trial counsel was inadequate for not conducting different cross-examination of Dr. Pederson regarding "the victim's abscessed tooth." (App Br, ER-3). To ultimately prove that claim, petitioner would be required to show, at a minimum, what cross-examination his counsel did, and what Dr. Pederson would have said under oath if he had been cross-examined differently. Although petitioner attached the trial transcript supporting the first contention, he attached no evidence to support the second one.

In particular, petitioner attached no evidence—reliable, trustworthy, or otherwise—to show what Dr. Pederson would have said if his counsel had cross-examined him differently. Instead, petitioner merely set forth in his affidavit two questions that he believes his counsel should have asked the doctor, but with no evidence of the doctor's response. (Ex 4 at 2).[9] Thus, petitioner submitted no evidence that, if credited, could show that he was prejudiced by his counsel's performance.

4. Petitioner's potential difficulty in gathering evidence has no bearing on the meaning or application of ORS 138.580.

---

[9] Unlike with witness petitioner did not even guess at what the doctor's answers would have been.

One additional point deserves a brief mention: In rejecting defendant's argument that ORS 138.580 required petitioner to attach evidence sufficient to permit the post-conviction court to rule in his favor, the Court of Appeals relied on the timing of formal discovery under the Oregon Rules of Civil Procedure. *Ogle*, 254 Or App at 675. The court pointed out that the ORCPs do not allow for discovery until after the petition is filed, and thus, "[i]t would be incongruous to require a petitioner to attach documents making out a *prima facie* case on his claims before he had the opportunity to obtain discovery on those claims." *Id*.

The court was incorrect in believing that the post-conviction statutes must be read to be congruous with the ORCPs. As an initial matter, the ORCPs were not in effect in 1959, negating the possibility that the legislature intended them to be read in conjunction with the post-conviction hearing act. But in any event, the ORCPs apply to post-conviction cases only to the extent that they do not conflict with post-conviction statutes. ORCP 1A (making ORCPs applicable "except where a different procedure is specified by statute or rule"); *Mueller v. Benning*, 314 Or 615, 621 n 6, 841 P2d 640 (1992) (same). Here, the post-conviction statutes *do* conflict with the ORCPs pleading requirements, by requiring a petitioner to attach evidence to support his allegations at the start of the case.

The Court of Appeals' concern about discovery is also unfounded as a practical matter. Oregon's post-conviction statutes contain methods through which a petitioner could garner evidence to attach to the petition, even after the initial petition is filed. First, any petitioner who qualifies for appointed counsel (like petitioner) will have an opportunity, as a matter of right, to file an *amended* petition for relief to correct any defects with the petition.[10]

Second, the post-conviction court retains broad authority (even in cases where the petitioner does not qualify for court-appointed counsel) to allow amendments to the petition for relief, including the authority to allow continuances in which to file them. *See* ORS 138.610 ("The court may make appropriate orders as to the amendment of the petition or any other pleading, * * * or as to extending the time of the filing of any pleading other than the original petition."). Thus, even if a petitioner was unable to garner certain evidence to support a claim at the outset, the PCHA gives a method through which a petitioner could subsequently do so.

---

[10] In this case, petitioner's appointed counsel had about four months to compile and file a formal petition for relief. Four months was ample time to conduct additional investigation and discovery to obtain evidence to support the allegations.

CONCLUSION

The attachment requirement in ORS 138.580 requires a post-conviction petitioner to attach reliable and trustworthy evidence that, if credited and not controverted, would allow a finding in the petitioner's favor. The petitioner cannot satisfy that requirement by submitting his or her own unsubstantiated affidavit, unsupported by personal knowledge. Because, in this case, petitioner failed to attach any reliable evidence to support any of his allegations, the post-conviction court correctly dismissed his petition.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Ryan Kahn
RYAN KAHN #002919
Assistant Attorney General
ryan.kahn@doj.state.or.us

Attorneys for Petitioner on Review
Mark Nooth, Superintendent, Snake River Correctional Institution

RPK:chc/4493515

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 8, 2013, I directed the original Brief on the Merits of Petitioner on Review, Mark Nooth to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon James N. Varner, attorney for respondent on review, Peter Gartlan and Kristin A. Carveth, attorneys for amicus by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,552 words. I further 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(2)(b).

/s/ Ryan Kahn

RYAN KAHN #002919
Assistant Attorney General
ryan.kahn@doj.state.or.us

Attorney for Petitioner on Review
Mark Nooth, Superintendent, Snake River Correctional Institution

RPK:chc/4493515