
IN THE SUPREME COURT OF THE STATE OF OREGON

KENNETH 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
Case No. 10108394P

CA A148493

S061162

BRIEF OF *AMICUS CURIAE* OREGON CRIMINAL DEFENSE LAWYERS
ASSOCIATION IN SUPPORT OF BRIEF ON THE MERITS OF RESPONDENT
ON REVIEW

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the
Circuit Court for Malheur County
Honorable J. BURDETTE PRATT, Judge

Opinion Filed: January 30, 2013
Author of Opinion: Duncan, Judge

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***AMICUS CURIAE* BRIEF ON THE MERITS**

STATEMENT OF THE CASE

The Oregon Criminal Defense Lawyers Association (OCDLA) adopts the statement of the case and argument sections of *amicus curiae*, the Office of Public Defense Services. OCDLA submits this brief to offer additional reasons to interpret ORS 138.580 to require that a petitioner must “attach documents that tend to verify, corroborate, or substantiate the assertions that the petitioner has undertaken to prove.” *Ogle v. Nooth*, 254 Or App 665, 672, 298 P3d 32 (2013).

Question Presented and Proposed Rules of Law¹

Question Presented

ORS 138.580 provides that a post-conviction petitioner must attach to his petition, “affidavits, records or other documentary evidence supporting the allegations of the petition[.]” What must a post-conviction petitioner attach to his petition in order to satisfy that requirement?

Proposed Rule of Law

To satisfy the attachment requirement of ORS 138.580, a post-conviction petitioner must attach documentary evidence that tends to substantiate the claims in the petition. He does not, at the pleading stage, need to attach

¹ OCDLA adopts *amicus curiae* OPDS’s question presented and proposed rule of law. OCDLA reproduces them here.

documentary evidence that supports every element of the claim; he simply needs to attach evidence that lends some support to the claim itself. Nothing in the text, context, or legislative history of the statute requires a petitioner to establish a *prima facie* case on the pleadings.

Summary of Argument

The legislature enacted the attachment requirement in ORS 138.580 to require a post-conviction petitioner to attach documentary evidence that tends to substantiate the claims in the petition. That interpretation of the legislature's intent is supported by contextual statutes in the Post-Conviction Hearings Act and by the discovery provisions in the Oregon Rules of Civil Procedure. The legislature established a post-conviction process in which a petitioner commences the action by filing a petition for post-conviction relief. Only after that may a petitioner utilize the rules of discovery. And only after that may an indigent petitioner obtain court-appointed counsel and state funding for expenses, including investigation.

If this court concludes that the legislature's intent remains ambiguous after examining the text, context, and legislative history of ORS 138.580, then this court should adopt the interpretation of the statute urged by *amici curiae* OPDS and OCDLA to avoid constitutional problems under the interpretation proffered by defendant. The Fourteenth Amendment to the United States Constitution requires states to provide an adequate process for people convicted

of state crimes to obtain review on the merits of alleged federal constitutional violations. That process must provide an equal opportunity for review on their merits to indigent and non-indigent people. An indigent person challenging his or her conviction will lack the financial resources to obtain documentary evidence establishing a *prima facie* case in support of each ground for relief alleged in the petition at the time of the initial filing. Indeed, in some complex cases, like capital cases, it may even take counsel months of investigation to obtain such documentary evidence. Accordingly, this court should reject defendant's proposed interpretation and conclude that, to satisfy the attachment requirement of ORS 138.580, a post-conviction petitioner must attach documentary evidence that tends to substantiate the claims in the petition.

Argument

Oregon's Post-Conviction Hearings Act (PCHA) provides the exclusive means for a person convicted of crime in an Oregon court to challenge his or her conviction on many grounds, including ineffective assistance of counsel or governmental misconduct in failing to disclose exculpatory evidence. ORS 138.530; *Bartz v. State*, 314 Or 353, 365, 839 P2d 217 (1992). As *amicus curiae* OPDS explains in its brief, the legislature enacted the PCHA to simplify collateral challenges to criminal convictions and facilitate review of those challenges on their merits to provide an "adequate state remedy" as required by the Due Process Clause of the Fourteenth Amendment to the United States

Constitution. Jack G. Collins and Carl R. Neil, *The Oregon Postconviction-Hearing Act*, 39 Or L Rev 337, 337 n 2 (1960); *Young v. Ragen*, 337 US 235, 239, 69 S Ct 1073, 93 L Ed 1333 (1949).

As part of the PCHA, the legislature created the “attachment requirement” in ORS 138.580:

“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 Supreme Court, by rule, may prescribe the form of the certification. The petition shall identify the proceedings in which petitioner was convicted and any appellate proceedings thereon, give the date of entry of judgment and sentence complained of and identify any previous post-conviction proceedings that the petitioner has undertaken to secure a post-conviction remedy, whether under ORS 138.510 to 138.680 or otherwise, and the disposition thereof. 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 of fact and shall be certified as heretofore provided in this section. *Affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition.* Argument, citations and discussion of authorities shall be omitted from the petition but may be submitted in a separate memorandum of law.”

ORS 138.580.

The meaning of that provision presents a question of statutory interpretation. This court interprets the text of the statute in context and gives any legislative history the weight it deems appropriate. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *State v.*

Gaines, 346 Or 160, 171-72, 206 P3d 1042 (2009). If the legislature's intent remains ambiguous after examining the text, context, and legislative history, then this court resorts to maxims of statutory interpretation. *PGE*, 317 Or at 610-12. As explained above, OCDLA adopts OPDS's statutory interpretation. OCDLA offers the following arguments as contextual support for that interpretation and, if this court concludes that the meaning of ORS 138.580 remains ambiguous, OCDLA proposes a maxim of construction that supports the interpretation of the statute advanced by OPDS and by the Court of Appeals.

I. The legislature recognized that post-conviction petitioners need resources for investigation and the tools of civil discovery to obtain any documentary support for many potentially meritorious grounds for relief.

The PCHA creates a process by which a person wishing to challenge a conviction commences a post-conviction proceeding by filing a petition for post-conviction relief in a circuit court. ORS 138.560. Only after filing may an indigent petitioner obtain court-appointed counsel and state funding for expenses, including investigation. ORS 138.590. Only after commencing the post-conviction action may a petitioner use the tools of civil discovery, including subpoenas. *See* ORCP 39 (providing for depositions upon oral testimony); ORCP 40 (providing for depositions upon written questions); ORCP 43 (providing for production of documents).

Those statutes and the rules of civil procedure support OPDS's interpretation of the legislature's intent. The legislature intended to require a petitioner to attach documents that tend to substantiate the allegations in the petition. It intended to permit petitioners to then utilize the other provisions of the PCHA and the civil rules of procedure to obtain evidence necessary to attempt to prove the allegations in the petition by a preponderance of the evidence at a hearing on the merits. *See Ogle*, 254 Or App at 675 (so recognizing).

Defendant's proffered interpretation ignores those significant contextual indications of the legislature's intent in enacting ORS 138.580. The legislature did not intend to require indigent, *pro se*, typically incarcerated petitioners to attach documents establishing a *prima facie* case. Such a requirement would make it extremely difficult for an indigent inmate to prevail on any claim for relief under the PCHA, even where the claim was of unquestioned merit.

II. Defendant's proposed interpretation of ORS 138.580 could result in Oregon's post-conviction process violating the Due Process Clause.

If this court concludes that the legislature's intent remains ambiguous after examining the text, context, and legislative history, then relevant maxims of statutory interpretation should cause this court to adopt the interpretation of ORS 138.580 advanced by OPDS and OCDLA. One such maxim is that a court should interpret a statute to avoid constitutional problems. *State v. Stoneman*,

323 Or 536, 540 n 5, 920 P2d 35 (1996). Here, defendant's proposed interpretation of ORS 138.580 could violate the Due Process and Equal Protection Clauses. US Const, Amend XIV.

Due Process requires states to provide an adequate judicial process for people convicted of state crimes to raise collateral challenges to their convictions based on violations of federal constitutional rights. *Young*; *see also Bartz*, 314 Or at 367-68 (discussing minimum constitutional requirement for state post-conviction procedures.). Federal courts must grant relief in *habeas corpus* “[w]here state procedural snarls or obstacles preclude an effective remedy against unconstitutional convictions[.]” *Bartone v. United States*, 375 US 52, 54, 11 L Ed 2d, 84 S Ct 21 (1963) (*per curiam*). In fact, defendant's interpretation likely would undermine the legislature's purpose of providing people a way to exhaust state remedies because, as the Ninth Circuit has held, “the failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court.” *Harmon v. Ryan*, 959 F2d 1457, 1462 (9th Cir 1992); *see also, Kim v. Villalobos*, 799 F2d 1317, 1321 (9th Cir 1986) (holding that a state has not provided a fair opportunity to seek relief where a *pro se* inmate cannot comply with the pleading requirements of the state post-conviction process); *Hollis v. Davis*, 941 F2d 1471, 1475-76 (11th Cir 1991) (same).

Similarly, the Equal Protection Clause requires states to provide an indigent person challenging his or her criminal conviction with access to the tools to challenge the conviction that would be available to a non-indigent person. *See* Neil and Collins, 39 Or L Rev at 338 -339 (explaining that part of the motivation for enacting the PCHA was that the Fourteenth Amendment requires Oregon courts to provide indigent post-conviction petitioners with resources to obtain review of their claims on the merits and summarizing cases). For example, to provide an “adequate and effective” direct appeal process, the state procedure must “ensure[] that an indigent’s appeal will be resolved in a way that is related to the merit of the appeal.” *Smith v. Robbins*, 528 US 259, 276-77, 120 S Ct 746, 145 L Ed 2d 756 (2000). That includes providing a transcript or other record of a lower court proceeding to an indigent person challenging his or her conviction on direct appeal. *Griffin v. Illinois*, 351 US 12, 18, 76 S Ct 585, 100 L Ed 891 (1956). The legislature was aware of *Griffin* and similar cases, and it intended to comply with them when enacting the PCHA. Neil and Collins, 39 Or L Rev at 338 -339.

Here, defendant’s proposed interpretation could cause Oregon’s post-conviction process to violate Due Process and Equal Protection. Defendant’s interpretation would require a post-conviction petitioner to attach documents to the petition that establish a *prima facie* claim to relief. However, many

meritorious claims for relief depend for meaningful documentary substantiation on tools available to a petitioner *only after filing the petition*.

For example, a petitioner may have reason to suspect that a prosecutor in his murder trial failed to disclose that a police officer who testified against him had a documented history of lying to obtain convictions in murder prosecutions. If proven, that claim would result in a court granting the petitioner relief under ORS 138.530(1)(a). The petitioner can submit an affidavit explaining the reasons for that belief and comply with the legislature's intent in ORS 138.580, as interpreted by OPDS and OCDLA. However, the petitioner cannot obtain access to the prosecutor's files or the police officer's files until after filing the petition and, likely, until after litigating discovery issues before the circuit court. If defendant's proposed interpretation of ORS 138.580 were correct, then a circuit court would be required to dismiss the petition because the petitioner could not establish a *prima facie* claim without access to those documents. That process would render the post-conviction relief process in Oregon effectively meaningless for many people challenging their convictions, and it could violate the Due Process Clause as interpreted in *Young*.

By contrast, person with the financial means to retain counsel could conduct some investigation prior to filing a petition for post-conviction relief. Retained counsel could (and indeed OCDLA members often do) pay to have prior proceedings transcribed, make public records requests for prosecutor's

files and documents and pay for production of those documents, and hire an investigator to track down potential witnesses for a post-conviction proceeding. An indigent person lacks the ability to conduct such an investigation prior to filing because the indigent person cannot pay someone to do it.

Further, in complex cases with large records, like a capital case, it is nearly impossible for a person to submit documentary evidence establishing a *prima facie* case in support of each ground for relief alleged in a petition. For example, a capital post-conviction petitioner could allege that his death sentence should be reversed because his trial attorney failed to adequately investigate mitigating factors that likely would have affected the jury's decision whether to impose death. To establish that ground for relief, a petitioner must both establish that a trial attorney exercising reasonably professional skill and judgment would have conducted further investigation and what mitigating evidence the investigation would have uncovered. *Lichau v. Baldwin*, 333 Or 350, 358-59, 39 P3d 851 (2002). That requires significant investigation from post-conviction trial counsel, including reviewing the entire record of the trial and direct appeal. OCDLA members' experience reveals that such an investigation in a post-conviction capital case can take many months and, in some cases, years.

Thus, defendant's proposed interpretation of ORS 138.580 disadvantages indigent people much more than non-indigent people. An indigent person

would have his or her petition dismissed by the post-conviction court for failing to attach documents establishing a *prima facie* case. A non-indigent person with the same claim would get to litigate the claim on the merits because the non-indigent person could pay to obtain documents to attach to the petition. That disparity in treatment based solely on a person's indigence could violate the Equal Protection Clause of the Fourteenth Amendment. Accordingly, this court should interpret ORS 138.580 to require that a petitioner must attach documentary evidence that tends to substantiate what the petitioner expects to prove in the petition.

CONCLUSION

For the reasons discussed above, this court should adopt the interpretation of ORS 138.580 urged by *amicus curiae* OPDS and by OCDLA in this brief. Under that interpretation, this court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(d) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2459 words.

Type size

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 Respondent Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on September 26, 2013.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this *Amicus* Brief on Merits for Respondent Review will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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