

IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of 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
Armstrong, Presiding Judge, Haselton, Chief Judge and Duncan, Judge

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TABLE OF CONTENTS

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW	
STATEMENT OF THE CASE.....	1
Question Presented.....	1
Answer and Proposed Rule of Law	1
Facts Material to Review.....	1
Summary of Argument	5
Standard of Review	5
ARGUMENT	5
CONCLUSION	23

TABLE OF AUTHORITIES

Cases Cited

<i>Ashley v. Hoyt</i> , 139 Or App 385, 912 P2d 393 (1996)	5
<i>Benzinger v. Oregon Dept. of Ins. and Finance</i> , 107 Or App 449, 812 P2d 36 (1991)	18
<i>Church v. Gladden</i> , 244 Or 308, 417 P2d 993 (1996)	13
<i>Humphrey v. Coleman</i> , 86 Or App 511, 729 P.2d 1081 (1987).....	12
<i>Stanley, Adm. v. Mueller</i> , 211 Or 198, 315 P.2d 125 (1957)	18
<i>State v. Gaines</i> ,	

346 Or 160, 206 P.3d 1042 (2009)	17
<i>Strickland v. Washington</i> , 466 US 668, 104 S Ct 2052, 80 Led 2d 674 (1984)	15
<i>Young v. Hill</i> , 347 Or 165, 218 P.3d 125 (2009)	21

Statutes and Constitutional Provisions

ORCP 39	21
ORCP 40	21
ORCP 43	21
ORS 138.580	6, 11, 12, 13, 16, 17, 18, 19, 21
ORS 135.620	17
Article 1, section 11 of the Oregon Constitution	15
Sixth Amendment to the United States Constitution	15
Fourteenth Amendment to the United States Constitution	15

Other Citations

<i>Webster's Third New Int'l Dictionary</i> (unabridged ed. 2002).....	17, 18
<i>Black's Law Dictionary</i> (9 th ed. 2009).....	17

BRIEFS ON THE MERITS OF RESPONDENT ON REVIEW

STATEMENT OF THE CASE

Question Presented

Did the Court of Appeals properly hold that the trial court erred in dismissing petitioner's formal petition for post-conviction relief for failure to comply with ORS 138.580 because petitioner attached documentation tending to support the allegations in his petition?

Answer and Proposed Rule of Law

The Court of Appeals properly hold that the trial court erred in dismissing petitioner's formal petition for post-conviction relief for failure to comply with ORS 138.580 because petitioner attached documentation tending to support the allegations in his petition .

Facts Material to Review

The facts set forth in the opinion issued by the Court of Appeals in this case succinctly state the facts essential to this court's review, and are as follows:

A jury convicted petitioner of second-degree assault constituting domestic violence, possession of methamphetamine, and two counts of endangering the welfare of a minor. The trial court imposed a total sentence of 76 months' imprisonment, with 36 months' post-prison supervision.

Petitioner filed an informal petition for post-conviction relief on October 18, 2010. The Court appointed counsel for petitioner, and petitioner filed a formal petition for post-conviction relief on February

18, 2011. Petitioner alleged that his counsel was ineffective and inadequate in four requests: specifically, (1) in filing to meet with a defense witness before trial; (2) in failing to adequately investigate the victim's hospital records; (3) in failing to present evidence of the victim's medical records during trial; and (4) in failing to cross-examine Dr. Gary Pederson regarding evidence that the victim's injury could have been the result of an abscessed tooth, rather than an assault by petitioner. U.S. Const., Amend. VI, IIV (guaranteeing the right to effective assistance of counsel); Or. Const., Art. I, sect. 11 (guaranteeing the right to adequate assistance of counsel). Petitioner attached the indictment, judgment, and trial transcripts to the formal petition.

On March 21, 2011, the state filed a motion to dismiss the petition for failing to state a claim under ORCP 21A(8) and failing to comply with the attachment requirements of ORS 138.580. ORS 138.580 provides, in relevant part, "Affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition." Petitioner filed a response and attached two affidavits, both by himself, to it.

At a hearing on April 22, 2011, the state contended that petitioner was required to attach documentary evidence to his petition sufficient to present a *prima facie* case on his claims. According to the state, to present a *prima facie* case on his first claim- counsel's ineffective and inadequate preparation of a defense witness – petitioner was required to attach an affidavit from that witness stating that she would have testified differently if counsel had met with her before trial. The state argued that in order to make out a *prima facie* case on petitioner's second and third claims – counsel's failure to investigate and present the victim's hospital records at trial – petitioner was required to attach the victim's hospital records. Finally, the state asserted that petitioner should have attached Pederson's answers to the questions that petitioner believed Pederson should have been asked, or should have indicated the steps petitioner was taking to obtain those answers.

Petitioner responded that he had attached sufficient documentary evidence to comply with ORS 138.580. Petitioner's counsel stated that, "in each one of the claims in the Petitioner's petition for post-conviction relief, he does specifically state in his affidavit that each

one of those things occurred. * * * [T]here is enough evidence on the record for the Court to allow this case to go past the motion to dismiss so that we can continue to prepare for trial and submit additional exhibits.”

The court granted the state’s motion to dismiss for failure to comply with ORS 138.580, stating:

“I’m going to grant the motion to dismiss. The petition alleges that the trial counsel failed to do certain things. And, in a post-conviction relief when there is an allegation that trial counsel failed to do certain things, the Petitioner has the obligation of providing, to avoid a motion to dismiss, at least some evidence, some type of admissible evidence that suggests that there is a basis for these – for these claims. And, in a claim like this, the obligation is to show what would have happened had the attorney done what is claimed he didn’t do, or she didn’t do, and how that would have changed the outcome of the case. And, the only thing we have is [petitioner’s] affidavit saying what he thinks people would have said had certain things been done. That’s not admissible evidence. If you – if you want to show what [the witness] would have said, then you have to get something from [the witness] to show what she would have said in response to these – if certain questions had been asked. If you want to show that – that the trial counsel failed to investigate the victim’s hospital records, you need to provide those hospital records and show how that may have changed the outcome. If you want to claim that he failed to present evidence of medical records, then you have to produce those medical records and show what those medical records are and what they would do.

“And, if you are claiming that he failed to cross-examine Dr. Pederson, then you need to have something from Dr. Pederson showing what his answers would have been if certain questions would have been asked. Simply having [petitioner] submit an affidavit setting forth what he thinks somebody would have said – in fact, we don’t even have the police report. He is claiming that there is a police report that suggests [the witness] made statements to the police that were inconsistent with – with what – what was said at trial. We don’t even have the police reports and – and clearly, [petitioner’s] assumption of what the person would have said, if the certain

questions had been asked, is not – is not sufficient. It doesn't – he is not in a position to testify as to what the person would have said. You have to have something from [the witness] to show what [the witness] would have said.

“So, there's essentially nothing that has been provided to support the – the petition for post-conviction relief. So, I'm going to grant the motion to dismiss.”

The court entered a judgment on April 26, 2011, specifying that it was dismissing the petition for failure to comply with ORS 138.580. Petitioner timely filed a notice of appeal on May 2, 2011.”

Ogle v. Nooth, 254 Or App 665, 666-68, 298 P.3d 32 (2013).

Petitioner's formal petition for post-conviction relief, alleged in part:

“8.

“Petitioner, by and through counsel, alleges that he was denied effective assistance of trial counsel in violation of Article 1, Section 11 of the Oregon Constitution and the 6th Amendment of the U.S. Constitution, made applicable to the states by the 14th Amendment to the United States Constitution and *Strickland v Washington* in the following manner:

“9.

“Petitioner further alleges that he was denied effective assistance of trial counsel in violation of Article 1, Section 11 of the Oregon Constitution and the 6th Amendment of the U.S. Constitution, made applicable to the states by the 14th Amendment to the United States Constitution and *Strickland v Washington* in the following manner:

“a. Trial counsel was ineffective in failing to adequately prepare for trial in that trial counsel failed to meet with defense witness prior to trial. Had trial counsel met with Ms. prior to trial, Ms. would have understood the importance of testifying to the events of the incident in chronological order, which was necessary to support Petitioner's claim of self-defense.

“b. Trial counsel was ineffective in failing to adequately investigate the victim's hospital records prior to trial.

“c. Trial counsel was ineffective in failing to present evidence to the jury of the victim’s medical records during trial.

“d. Trial counsel was ineffective in failing to cross-examine Dr. Gary Pederson regarding the victim’s abscessed tooth.”

Formal petition for post-conviction relief at 2-3 (ER 2-3).

Summary of Argument

The Court of Appeals correctly held that the post-conviction trial court erred in allowing defendant’s motion to dismiss, under ORCP 21A(8) and ORS 138.580. Petitioner’s formal petition for post-conviction relief adequately states several claims for post-conviction relief. ORS 138.580 does not require all evidence be presented with the filing of a petition for post-conviction relief, nor does ORS 138.580 preclude the admission of additional evidence to support petitioner’s claims at the post-conviction trial. Therefore, the post-conviction trial court erred in allowing defendant’s motion to dismiss.

Standard of Review

Appellate courts review the post-conviction court’s findings of fact and conclusions of law for errors of law. The appellate court is bound by the lower court’s findings of fact if supported by evidence in the record. *Ashley v. Hoyt*, 139 Or App 385, 912 P2d 393 (1996).

Argument

Petitioner adopts the argument presented in the Appellant’s Brief filed with the Court of Appeals, and in the Petition for Review filed with this court.

Petitioner here reiterates portions of the argument from the Appellant's Brief and the Petition for Review, for this court's convenience:

In the instant case, the issue on appeal is whether the post-conviction trial court erred in allowing defendant's motion to dismiss. Defendant's motion to dismiss (OJIN case register item #13, entered March 21, 2011), filed under ORCP 21A(8) and ORS 138.580, asserts that petitioner "has failed to allege ultimate facts sufficient to constitute a claim and/or has failed to comply with the mandates of ORS 138.580", which requires that "records or other documentary evidence supporting the allegations of the petition shall be attached to the petition."

On April 22, 2011, the post-conviction trial court held a hearing on defendant's motion to dismiss petitioner's formal petition for post-conviction relief. Defendant's counsel's presented verbal argument, as follows:

"MS. SALMONY: Thank you, Your Honor. I won't repeat the bases upon which the State is moving to dismiss. But, it - - it basically boils down to a lack of documentary evidence the Petitioner is required to attach to his petition to prove his case. Well, not to prove his case but rather to present a prima facie case. And, he has not met that burden in the State's position - - opinion.

"And although, since the filing of the Defendant's motion to dismiss, the Petitioner has submitted two additional documents, two affidavits. One is typewritten and the other is handwritten. And, the State has reviewed those and still maintains that these do not constitute adequate documentary evidence. And, here is why, Your Honor.

"We have just a few claims here that have been made by the Petitioner. First, he claims in adequate preparation of defense witness, , saying that she - - had she been adequately

prepared, she would have testified differently than she did. But, we do not have, from Mr. Ogle, the - - the affidavit of saying, 'Oh, yes. I was never - - I was never prepared. Mr. Fagan did not meet with me.' We simply don't have that. Although, Mr. Ogle has said in his Exhibit 4, paragraph 2, page 1, he has said, 'I feel that my trial counsel, Mr. Fagan, was ineffective in failing to meet with . ' He does not - - that is actually incompetent evidence because he does not declare that he has personal knowledge of the fact that Mr. Fagan did not - - did not actually meet with a defense witness prior to trial. Therefore, it is the State's position that he still has presented no documentary evidence that in any way supports his claim that his attorney failed to meet with a defense witness prior to trial. Therefore, it is the State's position that he still has presented no documentary evidence that in any way supports his claim that his attorney failed to meet with a defense witness prior to trial. Obviously, the attorney is not responsible for the way in which people testify. They can meet with them, they can prepare them for testimony but the way they finally testify is not within the control of the attorney. J So, I think that's what is going on in this case.

"And again, bottom line, there is no documentary evidence to support his claim that Counsel failed to even meet with his witness.

"As for his second and third claims, they allege a failure to investigate and present at trial the victim's hospital records. Obviously, to present a prima facie case on those two claims, he has to submit - - he has to proffer the x-rays. They clearly are matters that would have been, and he even indicates tangentially, that they are in the trial attorney's file but he has not attached them to the - - to the petition, nor has he attached them to his affidavit.

"So, again, he is alleging in his affidavit that he feels that his attorney should have done things but he does not actually proffer the - - the very documents he says Counsel should have.

"As for his fourth and final claim, alleging a failure to cross-examine Dr. Gary Peterson, here again he does not proffer Dr. Peterson's answers to the questions he believes should have been asked and he also does not indicate in any way that steps are being taken to obtain

the answers to the questions that he believes Dr. Peterson should have answered.

“So, the State understands that there is a difference between the burden of proof that a petitioner has at trial, that is, he has a burden of proving by the preponderance of the evidence at trial that there was an error and prejudice. But, under 138.580, he does have - - he does have a burden to - - to meet and clearly has not met it here even with an affidavit, for example, from Counsel saying, ‘Oh yes. You know, we’ve contacted Dr. Peterson. He has indicated that this is how he will be testifying or would have testified if only he had been cross-examined differently.’ We just have nothing in this record that shows a dearth of evidence that any different kind of questioning by trial counsel in this case would have led to different testimony by the doctor, which - - you know, to support a conclusion that a different result would have ensued at Mr. Ogle’s trial.

“So, for all of these reasons, Your Honor, the State is - - is continuing to argue that the motion should be - - I’m sorry, that the petition should be dismissed on the State’s motion because still there is no documentary evidence as required by 138.580.

“Thank you.”

Tr. 1-4.

Petitioner’s post-conviction counsel responded, and the post-conviction trial court ruled, as follows:

“[PETITIONER’S COUNSEL]: Your Honor, we would ask the Court to deny the Defendant’s motion to dismiss. In this situation, we have offered some evidence to support Mr. Ogle’s claims. It is not the full amount of exhibits that we would to intend introduce in preparation for trial. However, it is enough that we would ask the Court not grant the motion to dismiss. For instance, we have submitted a couple of affidavits from Mr. Ogle that do state that he does believe that his trial counsel was ineffective.

“As far as Ms. Salmony’s reference to Petitioner’s affidavit, in section 2, on page 1, in that ‘I feel that my trial counsel, D. Michael Fagan, was ineffective.’ What he is stating there is that he feels that his trial counsel was ineffective. Not that he feels his trial counsel failed to meet with .

“Mr. Ogle does assert that his trial counsel did fail to meet with prior to trial.

“Furthermore, in each one of the claims in the Petitioner’s petition for post-conviction relief, he does specifically state in his affidavit that each one of those things occurred. Petitioner argues that this does mean that there is enough evidence on the record for this Court to allow this case to go past the motion to dismiss so that we can continue to prepare for trial and submit additional exhibits.

“JUDGE PRATT: Well, I’m going to grant the - - I’m going to grant the motion to dismiss. The petition alleges that the trial counsel failed to do certain things. And, in a post-conviction relief when there is an allegation that trial counsel failed to do certain things, the Petitioner has the obligation of providing, to avoid a motion to dismiss, at least some evidence, some type of admissible evidence that suggests that there is a basis for these - - for these claims. And, in a claim like this, the obligation is to show what would have happened had the attorney done what is claimed he didn’t do, or she didn’t do, and how that would have changed the outcome of the case. And, the only thing we have is Mr. Ogle’s affidavit saying what he thinks people would have said had certain things been done. That’s not admissible evidence. If you - - if you want to show what Ms. would have said, then you have to get something from Ms. to show what she would have said in response to these - - if certain questions had been asked. If you want to show that - - that the trial counsel failed to investigate the victim’s hospital records, you need to provide those hospital records and show how that may have changed the outcome. If you want to claim that he failed to present evidence of medical records, then you have to produce those medical records and show what those medical records are and what they would do.

“And, if you are claiming that he failed to cross-examine Dr. Peterson, then you need to have something from Dr. Peterson showing what his

answers would have been if certain questions would have been asked. Simply having Mr. Ogle submit an affidavit setting forth what he thinks somebody would have said - - in fact, we don't even have the police report. He is claiming that there is a police report that suggests Ms. made statements to the police that were inconsistent with - - with what - - what was said at trial. We don't even have the police reports and - - and clearly, Mr. Ogle's assumption of what the person would have said, if the certain questions had been asked, is not - - is not sufficient. It doesn't - - he is not in a position to testify as to what that person would have said. You have to have something from Ms. to show what Ms. would have said.

"So, there's essentially nothing that has been provided to support the - - the petition for post-conviction relief. So, I'm going to grant the motion to dismiss.

"* * * * *

"CLERK: He's muted.

"JUDGE PRATT: Okay. You're muted. You have to unmute it on your end, Mr. Ogle.

"CLERK: He'll n need to do it again. He didn't do it. He needs to push it harder.

"JUDGE PRATTT: There you go.

"[PETITIONER]: Can you hear me now, sir?

"JUDGE PRATT: Yes. * * *

"[PETITIONER]: I have here the police narrative in front of me that was taken the night that I was arrested. And, the statements here are in (INAUDIBLE), you mentioned - -

"JUDGE PRATT: Mr. - - Mr. Ogle - -

"[PETITIONER]: According to the alleged victim and - -

“JUDGE PRATT: Mr. Ogle? I’ve made my ruling. I’ve made my ruling. If you have other things you want to discuss, you can discuss those with your attorney. Okay. Thank you.

“(RECESS)”

Tr. 4-7.

ORS 138.580 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. 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 does not change the fact that post-conviction cases are civil proceedings, nor does it state that petitioner may not produce additional evidence at the post-conviction trial. Typically, evidence is introduced before the post-conviction trial courts, in the form of affidavits and live testimony. When

considering a motion to dismiss such as the motion to dismiss in the instant case filed pursuant to ORCP 21A(8) for failure to state a claim for relief, the issue is whether, *assuming the truth of the allegations*, the petitioner has alleged a prima facie claim for relief. *See, e.g., Humphrey v. Coleman*, 86 Or App 511, 515, 729 P.2d 1081 (1987) (if a motion is directed solely to the pleadings, the movant admits the truth of his adversary's well pleaded allegations but denies their sufficiency as a matter of law).

The post-conviction trial court's analysis in the instant case imposes an unreasonable requirement upon petitioner; i.e., that petitioner submit sufficient documentation to prove his claims, including all evidence that would be introduced at trial on petitioner's post-conviction claims. However, petitioner argues that ORS 138.580 does not require more than petitioner provided in this case. Concerning petitioner's first claim (paragraph 9(a) of petitioner's formal petition for post-conviction relief), petitioner alleged that petitioner's trial counsel failed to meet with a defense witness, _____ to emphasize the importance to petitioner's defense of _____ testifying to the events of the incident in chronological order. In his affidavit, introduced as petitioner's ex. 4 before the post-conviction trial court, petitioner notes that police reports show that _____ testified differently at trial than _____ statements to the police. Petitioner argues that is sufficient to withstand a

motion to dismiss for failure to state a claim and failure to provide documentation of the claim under ORS 138.580.

Additionally, in the instant case, the post-conviction trial court erroneously ignored petitioner's statements at the end of the post-conviction hearing stating that petitioner had the police report narrative right in front of him. Petitioner did all he could to raise this issue at the hearing on defendant's motion to dismiss, as required under *Church v. Gladden*, 244 Or 308, 417 P2d 993 (1966) (petitioner cannot sit idly by and later complain that post-conviction counsel failed to follow a legitimate request by petitioner). Petitioner sought to provide to the post-conviction trial court the police reports the post-conviction trial court had just noted had not been provided to the court and which the post-conviction trial court viewed as essential to petitioner's first claim, which relied in part on the police reports. Petitioner also argues that the reference to the police reports in the underlying criminal case in petitioner's allegations and in his affidavit (petitioner's ex. 4) is sufficient to withstand a motion to dismiss. The post-conviction trial court had to assume the truth of petitioner's claims that a police report existed that showed statements made at trial by were inconsistent with statements made to the police. Under the Oregon Rules of Civil Procedure, petitioner is not precluded from presenting additional evidence concerning this claim and how that

prejudiced petitioner. The post-conviction trial court erred in holding that this claim did not state a claim for post-conviction relief.

Petitioner's second and third claims allege that petitioner's trial counsel did not adequately investigate the victim's hospital records and failed to present evidence of the victim's medical records during trial. Petitioner argues that this allegation also states a claim for post-conviction relief. Petitioner's affidavit (petitioner's ex. 4) clarifies what the medical records would show (that the victim suffered from an abscessed tooth and not a fracture). Petitioner should be allowed to provide additional evidence during the post-conviction trial to prove up his claim and how he was prejudiced by the failure of trial counsel to obtain the victim's medical records. The post-conviction trial court erred in holding that these claims (in paragraph 9(b) and 9(c) of the formal petition for post-conviction relief) did not state a claim for post-conviction relief, and that petitioner had to provide all evidence prior to trial. Again, the issue on a motion to dismiss is whether the allegation, assuming its truth, states a claim for relief, not whether petitioner attached to the petition all possible evidence in support of this claim.

Petitioner's fourth claim alleges that petitioner's trial counsel was ineffective in the cross-examination of a witness, Dr. Pederson, concerning the victim's abscessed tooth. This allegation, on its face, states a claim for ineffective assistance of counsel, and thus states a claim for post-conviction relief. Petitioner

clarified in his affidavit (petitioner's ex. 4) that petitioner's trial counsel should have asked Dr. Pederson how the injury went from "a sprain, to an abscessed tooth, then to a fracture." Clearly, this claim states a complete claim for post-conviction relief, as it alleges precisely what questions petitioner's trial counsel should have asked of Dr. Pederson.

Based on the foregoing, petitioner argues that the post-conviction trial court erroneously allowed defendant's motion to dismiss. Petitioner was thereby denied the opportunity to prove at post-conviction trial that his trial counsel failed to exercise professional skill and judgment under Article 1, section 11 of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. To establish a violation of the Sixth Amendment to the United States Constitution, a petitioner must prove that counsel's representation fell below an objective standard of reasonableness and that counsel's performance prejudiced the defense. *Strickland v. Washington*, 466 US 668, 687-88, 104 S Ct 2052, 80 L Ed 2d 674 (1984). However, the post-conviction court's allowance of defendant's motion to dismiss, denied petitioner the opportunity to prove up his claims stated in his petition.

In addition to the foregoing arguments made in petitioner's Appellant's Brief filed with the Court of Appeals, petitioner also notes that the decision of the Court of Appeals issued in this case provides additional argument in support of

petitioner's argument that the trial court erred in dismissing the formal petition for post-conviction relief in this case. Specifically, the Court of Appeals stated:

On appeal, petitioner argues that the trial court erred in dismissing his petition for failing to comply with ORS 138.580. Petitioner renews his argument that he attached sufficient documentary evidence to his petition to satisfy ORS 138.580. The state responds that the trial court correctly dismissed the petition for failing to comply with ORS 138.580. [footnote omitted] In the state's view, that provision requires "a post-conviction petitioner to present more than mere allegations before allowing the case to go beyond the pleading state," in contrast to the more lenient requirements of typical civil fact pleading. The state argues that ORS 138.580 requires a petitioner to attach admissible evidence that substantiates the allegations necessary to his claims for relief enough to make out a *prima facie* for each claim. [footnote omitted] For a claim of ineffective or inadequate assistance of counsel, the state asserts that a petitioner must "attaché evidence supporting both elements necessary to the claim: (1) what aspect of counsel's performance was inadequate, and (2) how did that performance tend to affect the result of the prosecution."

The state argues that, to comply with the attachment provision with respect to his first claim, petitioner had to submit evidence showing that trial counsel did not meet with the defense witness, as well as an affidavit or declaration from the witness explaining how her testimony would have differed if counsel had met with her before trial. The state contends that, to comply with the attachment provision with respect to his second and third claims, petitioner had to attach documents showing that his trial counsel did not obtain the hospital records, and petitioner also had to attach the records themselves. Finally, the state argues that, to comply with the attachment requirement with respect to his fourth claim, petitioner had to attach documents showing what cross-examination his trial counsel should have conducted with Pederson and how Pederson would have testified if counsel had cross-examined him differently.

We review a post-conviction court's legal conclusions for legal error. ORS 138.220; *Horn v. Hill*, 180 Or.App. 139, 141, 41 P.3d 1127 (2002). To determine whether the court erred in concluding that

petitioner's attached documentation failed to satisfy requirements of ORS 138.580, we must interpret that provision, examining its text and context. *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042 (2009). In ascertaining the meaning of words of common usage, a dictionary provides guidance. *See id.* at 175, 175 nn. 13-15, 206 P.3d 1042. The first phrase of the attachment provision of ORS 138.580 is "Affidavits, records or other documentary evidence." The key term is "documentary evidence." The word "documentary" is defined as "being or consisting of documents: contained or certified in writing * * *". *Webster's Third New Int'l Dictionary* 666 (unabridged ed. 2002). The relevant meaning of "evidence" is "something that furnishes or tends to furnish proof* * * specif." something legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it * * *." *Id.* at 788. The legal definition of "evidence" is quite similar, "Something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact * * *." *Black's Law Dictionary* 635 (9th ed. 2009). Finally, the legal definition of "documentary evidence" is "[e]vidence supplied by a writing or other document, which must be authenticated before the evidence is admissible." *Id.* at 637.

We also look to how "evidence" is used in other parts of the Post-Conviction Hearing Act (PCHA) to discern whether, as the state asserts, the legislature intended "evidence" to mean "admissible evidence." ORS 138.620(2), which describes the post-conviction hearing process, states that, "[i]f the petition states a ground for relief, the court shall decide the issues raised and may receive proof by affidavits, depositions, oral testimony or other competent evidence." "Competent evidence" is a synonym for "admissible evidence." [footnote omitted] The legislature's decision to require "competent evidence" at the post-conviction hearing contrasts with its decision to require a petitioner to attach "evidence" supporting his petition in ORS 138.580. The contrast demonstrates that the legislature knew how to require a post-conviction petitioner to present admissible evidence and suggests that the "evidence" that a petitioner attaches pursuant to ORS 138.580 need not necessarily meet the admissibility requirements that will be applied at the later hearing. We therefore conclude that "documentary evidence" means written documents that

are submitted to the post-conviction court that tend to prove or disprove the existence of an alleged fact.

The next phrase of the attachment provision is “supporting the allegations of the petition.” ORS 138.580. The key words in that phrase are “supporting” and “allegations.” The legislature could have chosen to use a word denoting that a petitioner was required to conclusively demonstrate a point, such as “prove” or “establish,” but it did not. As pertinent here, “support” means “to serve as verification, corroboration, or substantiation of * * *.” *Webster’s* at 2297. “Allegation” is defined as “something assert or declared * * * specif.: a statement by a party to a legal action of what he undertakes to prove * * *.” *Id.* at 55. Thus, “supporting the allegations of the petition” means documentary evidence that verifies, corroborates, or substantiates the assertions that the petitioner has undertaken to prove.

The final phrase of the attachment provision, “shall be attached to the petition,” is straightforward. The general rule is that “ ‘shall’ connotes the imperative.” *Benzinger v. Oregon Dept. of Ins. and Finance*, 107 Or.App. 449, 451, 812 P.2d 36 (1991) (quoting *Stanley, Adm. v. Mueller*, 211 Or. 198, 208, 315 P.2d 125 (1957)). The state asserts that the legislative history of ORS 138.580 also shows that the attachment requirement is compulsory. We agree. In 1959, when the legislature enacted the original PCHA, the attachment provision of ORS 138.580 provided: “Affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition *or the petition shall state why they are not attached.*” Or. Laws 1959, ch. 636, sect. 8 (emphasis added). In 1993, the legislature amended ORS 138.580, deleting the emphasized language. Or. Laws 1993, ch. 517, sect. 4. At a 1993 hearing before the house Judiciary Subcommittee on Crime and Corrections, Assistant Attorney General Brenda Peterson testified regarding the change:

“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 an inmate – 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, H.B. 2352, Apr. 7, 1993, Tape 70, Side A (statement of Brenda Peterson). The plain language and legislative history of the attachment provision demonstrate that the legislature intended that it be mandatory. Thus, we conclude that the attachment provision requires a petitioner to attach documents that tend to verify, corroborate, or substantiate the assertions that the petitioner has undertaken to prove.

We now consider whether the post-conviction court erred in concluding that petitioner failed to attach sufficient documentation to comply with ORS 138.580. Petitioner attached the indictment, judgment, and trial transcripts to his formal petition for post-conviction relief, filed on February 18, 2011. The state moved to dismiss on March 21, and petitioner attached supplemental exhibits – two affidavits by petitioner – on April 14. The first affidavit explained why petitioner believed his trial counsel had been ineffective and inadequate. That affidavit identified the actions that petitioner believed trial counsel had failed to take and how petitioner believed that failure had prejudiced his case. The second affidavit was handwritten by petitioner. It provided additional questions (and proposed answers) that petitioner believed his counsel should have asked the victim and a defense witness.

We hold that the trial court erred in granting the state's motion to dismiss for failure to comply with the attachment requirement of ORS 138.580. Petitioner attached several documents tending to corroborate the assertions that he made in his petition. Petitioner's first claim is that trial counsel failed to meet with a key defense witness before trial. Petitioner's first affidavit supports his claim by explaining that, if counsel had met with the witness and reviewed her statements in the police reports with her, she would have testified to the events in chronological order, which would have helped petitioner prove that he acted in self-defense. The state argues that petitioner failed to comply with ORS 138.580 because he submitted no evidence showing that counsel *did not* meet with the witness before trial. The state also argues that petitioner should have submitted an affidavit from the witness explaining how she would have testified differently if counsel had met with her before trial. Although the state's suggested evidence

would have strengthened petitioner's case, petitioner's evidence nevertheless supports his claim. His affidavits indicate that his counsel did not meet with the witness in that they suggest how, *if* counsel had met with her, she would have testified differently, and they also suggest that the different testimony would have been more favorable to petitioner's case.

Petitioner's second and third claims allege that counsel failed to properly investigate the victim's medical records or present that evidence to the jury. Petitioner's first affidavit states that the victim's medical records show that she had an abscessed tooth, not a fracture, and that counsel failed to present this fact to the jury. The state argues that petitioner was required to attach the victim's hospital records. Because petitioner's affidavit corroborates the allegations in his petition, he was not required to attach the hospital records.

Petitioner's fourth claim is that counsel was ineffective and inadequate in failing to cross-examine Pederson regarding the victim's tooth. The trial transcript, which petitioner attached to his formal petition, shows that counsel did not cross-examine Pederson on that point. The state argues that petitioner was required to attach evidence showing what additional cross-examination his counsel should have conducted with Pederson and how Pederson would have answered differently if that cross-examination had been conducted. In his first affidavit, petitioner asserts that his trial counsel should have asked Pederson why it took him two and a half weeks to discover the victim's fracture. He also asserts that his counsel should have asked Pederson how the diagnosis could progress from a sprain, to an abscessed tooth, to a fracture. Petitioner asserts that trial counsel's failure to ask those questions prejudiced his case. The cross-examination that petitioner suggests in his affidavit would have tended to cast doubt on whether the victim's injury was actually caused by petitioner. Consequently, the affidavit supports petitioner's allegation in his petition that his trial counsel was ineffective and inadequate by failing to cross-examine Pederson regarding the victim's tooth.

In sum, petitioner set out the theories, both factual and legal, underlying his claims and attached his affidavits in support of those theories. By doing so, he made a showing sufficient for him to be

allowed to proceed with the development of his case, through discovery and the use of subpoenas to secure witnesses and documents, and to a post-conviction hearing where he could present his case. [footnote omitted]

The state would require petitioner to attach admissible evidence that substantiates the allegation necessary to his claims for relief such that he can make out a *prima facie* case on each claim. We decline to adopt the state’s interpretation of the attachment requirement for three reasons. First, as discussed earlier, ORS 138.580 does not require that the attached evidence be admissible. Instead, the evidence need only tend to support the allegations in the petition.

We also reject the state’s interpretation of the attachment provision because nothing in the text of ORS 138.580 indicates that petitioner must attach documentary evidence sufficient to make out a *prima facie* case on each of his claims. Rather, as explained earlier, the attached evidence need only support – that is, verify, corroborate, or substantiate – the allegations in the petition.

Finally, we decline to adopt the state’s reading of the attachment provision because it is at odds with the post-conviction process the legislature has created. The post-conviction statutes set forth the following steps for post-conviction relief: First, a petitioner files a petition. ORS 138.580. Next, the defendant must file a response within 30 days after the docketing of the petition. ORS 138.610. If the petition states a ground for relief – that is, if it is not subject to dismissal as a meritless petition under ORS 138.525 – the court holds a hearing. ORS 138.620. At the hearing, the court “may receive proof by affidavits, depositions, oral testimony or other competent evidence.” ORS 138.620(2). Because a petitioner may seek discovery only after an action commences, the statutory scheme envisions the petitioner obtaining additional evidence after the petition is filed and before the court conducts the hearing. *See* ORCP 39 (a party may seek discovery after an action commences); ORCP 40 (same); ORCP 43 (same); *Young*, 347 Or. At 171, 218 P.3d 125 (Oregon Rules of Civil Procedure apply to post-conviction relief proceedings unless the post-conviction statute provides otherwise). [footnote omitted] It would be incongruous to require a petitioner to

attaché documents making out a *prima facie* case on his claims before he had the opportunity to obtain discovery on those claims.

The trial court erred in dismissing the petition for failure to comply with ORS 138.580 because petitioner attached documentation tending to support the allegations in his petition.

Ogle v. Nooth, 254 Or App 665, 668-675, 298 P.3d 32 (2013).

The essence of the rationale expressed in the foregoing discussion from the opinion of the Court of Appeals is that the whole point is that a post-conviction case should not be dismissed and petitioner should not be denied the opportunity for an evidentiary hearing and the opportunity to pursue the discovery process when there is some support for the allegations, including a petitioner's own affidavit. As the Court of Appeals noted, the statutory scheme regarding post-conviction cases envisions the petitioner obtaining additional evidence after the petition is filed and before the court conducts the hearing. The defendant (state) in this case is conflating the requirement of some support for post-conviction claims with a requirement that petitioner prove the case at the time of filing of the petition. As petitioner argued in the Appellant's Brief in this case, set forth above,

"The post-conviction trial court's analysis in the instant case imposes an unreasonable requirement upon petitioner; i.e., that petitioner submit sufficient documentation to prove his claims, including all evidence that would be introduced at trial on petitioner's post-conviction claims. However, petitioner argues that ORS 138.580 does not require more than petitioner provided in this case."

CONCLUSION

For the above reasons, this court should affirm the decision of the Court of Appeals and should reverse the post-conviction trial court's decision, with instructions to allow the post-conviction proceeding to proceed, including allowing petitioner to pursue the discovery process to obtain additional evidence in support of his claims, in the usual course.

Respectfully Submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I filed the original Brief on the Merits, with the State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem, OR 97301-2563, on September 26, 2013, by electronic filing.

I further certify that I served the Brief on the Merits upon Ryan Kahn, Assistant Attorney General, attorney for Petitioner on Review, on September 26, 2013, and upon Kristin A. Carveth, attorney for amicus, by electronic filing.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)

I certify that that this brief complies with the word-count limitation and that the word count is 7,070 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(4)(f).

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