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* OFFICE OF PUBLIC DEFENSE SERVICES 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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STATEMENT OF THE CASE

Defendant is correct – a post-conviction proceeding *is* unlike other civil cases in Oregon. The petitioner is typically in prison at the time the petition is filed. Although he is untrained in the law, he must file the initial pleading without the assistance of an attorney if he cannot afford to hire one. And, of course, at stake are his liberty and the stigma associated with a criminal conviction.

Oregon's Post-Conviction Hearing Act imposes an attachment requirement that does not exist in ordinary civil cases either. At the time he files his petition, the petitioner must attach "[a]ffidavits, records or other documentary evidence supporting the allegations of the petition." ORS 138.580. At issue in this case is the type and quantum of evidence a petitioner must attach to his initial pleading, such that his case can move forward to a resolution of his claims on the merits. More specifically, this court must ascertain what it means to "support[] the allegations of the petition."

The Court of Appeals rejected defendant's argument that ORS 138.580 requires a petitioner to attach documentary evidence establishing a *prima facie* case and instead held that to satisfy the attachment requirement, a petitioner need only "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). Defendant petitioned from the Court of Appeals decision, and this court allowed review. *Ogle v. Nooth*, 353 Or 747, 304 P3d 38 (2013). This court subsequently invited the Office of Public Defense Services to file an *amicus curiae* brief on the issue raised.

Question Presented and Proposed Rule of Law

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 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

In 1959, the Oregon legislature enacted the Post-Conviction Hearing Act. It was intended to consolidate the four post-conviction remedies available at that time into a single action in order to provide more complete protection for the petitioner and to reduce the volume of petitions filed in the circuit court. Under the act, a petitioner initiates a post-conviction proceeding by filing a petition in the circuit court. The petitioner must attach "[a]ffidavits, records or other documentary evidence supporting the allegations of the petition[.]" ORS 138.580. If he is financially eligible, the petitioner can ask to have an attorney appointed to represent him; appointed counsel has, as a matter of right, 15 days from the time he or she is appointed to file an amended petition. If the petition states a claim for relief, the case will proceed to an evidentiary hearing at which the petitioner has the burden of proving facts necessary to support his claims by a preponderance of the evidence.

This case requires this court to determine what the legislature intended when it required a post-conviction petitioner to attach documentary evidence "supporting the allegations of the petition[.]" Defendant contends that when the legislature used the phrase "supporting the allegations," it actually meant "establishing a *prima facie* case." That is incorrect. Nothing in the text, context, or legislative history of the PCHA supports such an onerous interpretation. Instead, "supporting the allegations" simply means tending to

substantiate the allegations of the petition. That is, the petitioner must attach some evidence that supports the allegation itself, not every element of the claim.

First, the legislature used the word "support," which in 1959 was defined as "to substantiate"; it did not use more conclusive words like "establish" or "prove." Although the dictionary definition of "support" provides little guidance on the degree of substantiation required, context supports a minimal requirement. ORS 138.620(2) provides that if the petition states a ground for relief, the petitioner is entitled to an evidentiary hearing. And at that evidentiary hearing, the petitioner has the burden of proving necessary facts by a preponderance of the evidence. The related statute demonstrates, first, that the legislature knows how to allocate a quantum of proof requirement, and the fact that it failed to specifically require the establishment of *prima facie* case in the attachment statute is therefore significant. Second, ORS 138.620(2) provides only a single prerequisite for an evidentiary hearing: that the petition states a ground for relief. It says nothing about the petition having established a *prima facie* case. If is doubtful that the legislature would not have expressed the *prima facie* requirement in the evidentiary hearing statute if, in fact, a petitioner must make such a showing before an evidentiary hearing.

The attachment requirement in ORS 138.580 must serve a different purpose than the subsequent evidentiary hearing. At the evidentiary hearing,

the petitioner has the burden of coming forward with admissible evidence to prove his claims by a preponderance of the evidence. Requiring the attachment of documents at the pleading stage, in contrast, is intended to discourage frivolous claims and force a petitioner to demonstrate that the facts underlying his claims are *capable* of corroboration.

Requiring a petitioner to attach documentary evidence that simply tends to substantiate the allegations in the petition is also consistent with the process of discovery. A petitioner cannot utilize discovery until *after* the proceeding is commenced, and it is through discovery that a petitioner can acquire the evidence he needs to prove his claims. It makes little sense to require a petitioner to establish a *prima facie* case at the time he files his *pro se* petition, or within 15 days of the appointment of counsel, when some of that evidence may only be obtainable through discovery.

Lastly, the legislative history refutes defendant's construction of the statute and supports a more moderate requirement. Nowhere in the legislative history of the Post-Conviction Hearing Act does anyone involved with the promulgation of the act use the phrase "*prima facie* case." Moreover, the purpose of the Post-Conviction Hearing Act was to provide *greater* protection for petitioners, not impose a nearly insurmountable pleading hurdle in an effort to avoid addressing the merits of claims.

The attachment requirement is minimal. A petitioner must attach documentary evidence that tends to substantiate the allegation. That requirement was met in the present case.

Statement of Procedural Facts[1]

After a jury trial in October 2009, petitioner was convicted of assault in the second degree constituting domestic violence, possession of methamphetamine, and endangering the welfare of a minor. He was sentenced to 76 months' imprisonment. App Br at ER 2.

On October 18, 2010, petitioner filed a *pro se* petition for post-conviction relief. Petition for Post-Conviction Relief, Trial Court File. In his *pro se* petition, he raised numerous claims of ineffective assistance of trial counsel. *Id.* Among the claims raised were allegations that trial counsel had been ineffective for failing to obtain testimony from witness , for failing to properly investigate the victim's hospital records, and for failing to cross-examine the doctor who examined the victim. *Id.* Petitioner did not attach any supporting documents to his *pro se* petition. *Id.* He did, however, concurrently file a motion for appointment of counsel supported by an affidavit of indigence. Motion for Appointment of Counsel, Trial Court File.

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[1] *Amicus* accepts defendant's statement of the facts but includes additional details relevant to the determination of the case.

Subsequently, the trial court appointed counsel to represent petitioner and granted post-conviction counsel 120 days to file an amended petition. Order Regarding Post-Conviction Relief Proceedings and Limited Judgment, Trial Court File.

On February 18, 2011, counsel filed a formal petition for post-conviction relief. App Br at ER 1-3. The formal petition raised the following four claims of ineffective assistance of trial counsel:

(1) Trial counsel failed to meet with witness before trial so that she would understand the importance of testifying to the events in chronological order, which would have supported petitioner's claim of self-defense;

(2) Trial counsel failed to adequately investigate the victim's hospital records before trial;

(3) Trial counsel failed to present the victim's medical records during trial; and

(4) Trial counsel failed to cross-examine Dr. Pederson about the victim's abscessed tooth.

App Br at ER 3. Petitioner attached the indictment, judgment, and trial transcripts to the formal post-conviction petition. Petitioner's Exhibit List, Trial Court File.

Defendant filed a motion to dismiss petitioner's formal post-conviction petition on the grounds that it failed to satisfy the attachment requirement of ORS 138.580. Defendant's Motion to Dismiss Formal Petition for Post-Conviction Relief (ORS 138.580), Trial Court File.

In response, petitioner filed two supplemental exhibits. Petitioner's Supplemental Exhibit List, Trial Court File. Both supplemental exhibits were affidavits from petitioner. In support of his claim that his trial counsel was ineffective for failing to meet with before trial, petitioner stated in his affidavit that trial testimony differed from what she had told police, and that his trial counsel should have met with before trial to refresh her memory. Petitioner further stated that if had testified consistently with what she told police, her testimony would have bolstered petitioner's self-defense claim. Ex 4, Trial Court File. Petitioner then included in his affidavit proposed questions and the answers he believed would have given in light of statements she had made to police. Ex 5, Trial Court File.

In support of his claims about the victim's medical records, petitioner stated that his trial counsel should have presented the medical records to the jury to demonstrate that the victim had an abscessed tooth, not a fracture. Ex 4, Trial Court File.

And in support of his claim that his trial counsel was ineffective for failing to cross-examine Dr. Pederson about the victim's abscessed tooth, petitioner stated that his counsel should have asked Pedersen why it took so long to discover the victim's fracture, and how the type of injury kept changing – it was a sprain, then an abscessed tooth, and finally a fracture. *Id.*

At the subsequent hearing on the motion to dismiss, petitioner argued that he had satisfied the minimal requirement of ORS 138.580:

> "[POST-CONVICTION COUNSEL]: In this situation, we have offered some evidence to support [petitioner's] claims. It is not the full amount of exhibits that we would intend to introduce in preparation for trial.
>
> "* * * * *
>
> [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."

4/22/11 Tr. 4-5.

Nevertheless, the trial court agreed with defendant that petitioner had failed to support his petition with sufficient documentary evidence. *See, e.g., id.* at 6 (trial court ruling, "[[i]f 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."). The court dismissed the petition. *Id.* at 6.

The Court of Appeals reversed the decision of the trial court. It applied the usual framework for determining the meaning of a statute and concluded that ORS 138.580 simply requires a petitioner to attach documents that "tend to verify, corroborate, or substantiate the assertions that the petitioner has undertaken to prove." *Ogle*, 254 Or at 672. The petitioner had satisfied that

requirement with respect to each of his claims, and the trial court should not have dismissed the petition for failure to comply with ORS 138.580. *Id.* at 672-75.

Argument

I. Introduction

Since 1867, any person convicted of a crime in state court could assert a violation of his federal constitutional rights under the Federal Habeas Corpus Act. Act of Feb 5, 1867, ch. 28 § 1, 14 Stat. 385 (codified as amended at 28 USC § 2254 (1996)). A petitioner cannot seek federal relief, however, until he has exhausted all available state remedies. 28 USC § 2254(b)(1)(A). In 1949, the United States Supreme Court recognized that the exhaustion requirement "presupposes that some adequate state remedy exists." *Young v. Ragen*, 337 US 235, 239, 69 S Ct 1073, 93 L Ed 1333 (1949). It was incumbent upon the states, then, to grant petitioners "some clearly defined method by which they may raise claims of denial of federal rights." *Id.* At that time, however, there was a confusing array of post-conviction remedies from which to choose:

> "The prisoner, frequently uncounseled, must in many cases puzzle out the tenuous distinction between habeas corpus, coram nobis, and a possible statutory motion. * * * [W]hile he tries one method of collateral attack or appeal, a period of limitations may be sealing off the correct procedure. In some cases the prisoner has had to abide long periods of unjustifiable confinement as he picked his way through alternatively incorrect procedures."

Note, *Post-Conviction Procedure*, 69 Harv L Rev 1289, 1291 (1956) (internal footnotes omitted). Unfortunately, when state procedure is murky, federal protection is compromised. A prisoner who pursued the incorrect post-conviction remedy did not properly exhaust his state remedies; he was therefore not entitled to federal review of his claims. *Id.* at 1292.

Oregon prisoners suffered the same problems as those in the rest of the country. As of 1958, at least four different post-conviction remedies existed in the state: (1) habeas corpus as provided for in the Oregon Constitution and by statute, (2) motion for relief in the nature of coram nobis[2], (3) motion to correct the record, and (4) motion to vacate the judgment. Jack G. Collins and Carl R. Neil, *The Oregon Post-Conviction Hearing Act*, 39 Or L Rev 337, 337 (1960). This court eventually held that a prisoner had no statutory right to appeal in any case aside from habeas corpus. *Id.* at 338. Under this complex system, "it [was] apparent that safeguards for the protection of constitutional rights [were] not entirely afforded by the cumbersome statutory and common-law post[-]conviction remedies." William G. Wheatley, *Coram Nobis in Oregon and the*

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[2] The writ of error coram nobis was a common law writ originating in the sixteenth century. William G. Wheatley, *Coram Nobis in Oregon and the Need for Modern Postconviction Procedure Legislation*, 38 Or L Rev 158, 158 (1959). Its purpose was to grant relief in those situations where there was an error of fact that was unknown at the time of trial and of such a substantial nature that the result would have been different if the truth had been known at that time. *Id.*

Need for Modern Postconviction Procedure Legislation, 38 Or L Rev 158, 172 (1959).

In response to the inadequacies of the post-conviction system at the time, the Uniform Post-Conviction Procedure Act was promulgated in 1955. Uniform Post-Conviction Procedure Act, 9B ULA 541 (1957). Its goal was to simplify post-conviction procedures by consolidating them into a single action and, by doing so, provide more complete protection for the petitioner. *Id.* at 549. Oregon's Post-Conviction Hearing Act (PCHA), which was based in part on the uniform act, followed in 1959. Or Laws 1959, ch. 636, §§ 1-23.

The PCHA created a right to post-conviction relief and established the procedure for resolving claims. *Ware v. Hall*, 342 Or 444, 154 P3d 118 (2007). A petitioner initiates a post-conviction proceeding by filing the petition in the circuit court. ORS 138.560. If he is financially eligible, he may request the appointment of counsel at the time he files his petition. ORS 138.590. After counsel is appointed, the petition may be amended as a matter of right within 15 days of that appointment. ORS 138.590(5). The defendant must respond within 30 days of the docketing of the petition. ORS 138.610. After a response is filed, the trial court holds a hearing on the issues raised. ORS 138.620.

As is most relevant here, ORS 138.580 lists the form and content of a petition for post-conviction relief. It currently 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."

(Emphasis added).

This court must determine what the legislature intended when it required a post-conviction petitioner to attach "documentary evidence supporting the allegations of the petition." To do so, the court applies the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and clarified in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). That is, this court reviews the meaning of the text, the context, the

legislative history of the statute, and if necessary, resorts to general maxims of statutory construction. *PGE*, 317 Or at 610-12.[3]

II. ORS 138.580 requires that a petitioner attach written assertions of facts or an event that substantiates in any way the allegations in the petition.

A. The text of the phrase "affidavits, records or other documentary evidence" is plain – it means a written declaration or assertion of facts or an event offered as proof.

Once again, the relevant portion of ORS 138.580 provides,

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

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[3] As the *Gaines* court explained:

> "The first step remains an examination of text and context. * * * But, contrary to this court's pronouncement in *PGE*, we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step – consideration of pertinent legislative history that a party may proffer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis. However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine. The third, and final step, of the interpretative methodology is unchanged. If the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."

346 Or at 171-72.

The first portion of the sentence – "[a]ffidavits, records or other documentary evidence" – refers to *what* must be attached to the petition. Those are all terms of art with specific, legal meaning. *See Dept. of Revenue v. Croslin*, 345 Or 620, 628, 201 P3d 900 (2009) (recognizing the term "damages" as a legal term of art).

At the time ORS 138.580 was enacted in 1959, "affidavit" was defined as,

> "A written or printed 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 such oath."

Black's Law Dictionary 80 (4th ed. 1957).

"Record" was defined as,

> "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 matter to which it relates."

Id. at 1437.

"Documentary evidence," was defined as,

> "*Evidence supplied by writings and documents of every kind in the widest sense of the term*; evidence derived from conventional symbols (such as letters) by which ideas are represented on material substances. Such evidence is furnished by written instruments, inscriptions, documents of all kinds, and also any inanimate objects admissible for the purpose, as distinguished from 'oral' evidence or that delivered by human beings viva voce."

Id. at 568 (emphasis added). And "evidence," in turn, was defined as,

> "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."

Id. at 656.

Synthesizing those definitions, "affidavits, records, or other documentary evidence" refers to a written declaration or assertion of an event or facts offered by the petitioner as proof. Defendant contends that "other documentary evidence" refers only to documents that are as "sworn, official, or generally relied upon by courts and juries." Pet BOM at 14. That narrow definition is at odds with the plain meaning of "documentary evidence," which is defined as "documents of every kind in the widest sense of the term."[4]

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[4] *Amicus* recognizes that, when interpreting statutory text that consists of a list of specifics followed by a general term, the specifics may serve to limit the general term under the principle of *ejusdem generis*. *See State v. Kurtz*, 350 Or 65, 74, 249 P3d 1271 (2011) (applying principle). That is, under *ejusdem generis*, the general phrase is more limited than it would be standing alone. The interpretation of the general term is limited to one or more common characteristic of the specific examples. *Id.*

Affidavits and records are both written assertions of facts or an event offered as proof. Notwithstanding the expansive dictionary definition of "documentary evidence," items that are not written assertions of facts or an event offered as proof would probably not qualify as "documentary evidence" as that term is used in ORS 138.580. For example, it may be that statutes or case law would not constitute "documentary evidence" under ORS 138.580.

Further, defendant's construction of the phrase appears materially indistinguishable from "competent evidence"[5] – a phrase the legislature used in a different section of the PCHA enacted at the same time as ORS 138.580. *See* ORS 138.620 (providing that at evidentiary hearing, trial court "may receive proof by affidavits, depositions, oral testimony or other *competent* evidence.") (emphasis added). Had the legislature wanted to restrict "documentary evidence" to evidence that was "generally relied upon by courts and juries," it would have used a more precise phrase with which it was clearly familiar: "competent evidence." The fact that it did not is significant. *See PGE*, 317 Or at 614 ("The legislature knows how to include qualifying language in a statute when it wants to do so."). Further, it is not immediately apparent to *amicus* what types of documents that are "sworn, official, or generally relied upon by courts and juries" would not already fall within the definition of "affidavits" or "records," rendering the "other documentary evidence" phrase unnecessary. *See State v. Kellar*, 349 Or 626, 636, 247 P3d 1232 (2011) (recognizing that this court should avoid interpreting a statute to create a redundancy).

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[5] Defendant recognizes this fact, as he asserts in his brief that "evidence that is reliable and trustworthy enough to satisfy ORS 138.580 will most often be admissible or competent evidence." Pet BOM at 17 n 5.

Under the plain text of the statute, "affidavits, records or other documentary evidence" simply means a written assertion of facts or an event offered as proof.

B. "Supporting the allegations in the petition" means tending to substantiate what the petitioner expects to prove.

i. "Support" means to substantiate or verify, but the dictionary definition provides no guidance on the degree of substantiation required.

The second portion of the sentence – "supporting the allegations of the petition" – describes *the purpose* of the attached documents. That is, what quantum of documentary evidence is necessary to satisfy ORS 138.580?

First, *amicus* agrees with defendant that "the allegations of the petition" refers to the facts the petitioner expects to prove to support his claim. *See Black's Law Dictionary* at 99 (defining "allegation" as "[t]he assertion, declaration, or statement of a party to an action, made in a pleading, setting out what he expects to prove."). When the claim is one of ineffective assistance of counsel, the petitioner must prove, by a preponderance of the evidence, facts to support a finding that his attorney's performance fell below an objective standard of reasonableness, and that but for counsel's error, the results of the proceeding would have been different. *See Strickland v. Washington*, 466 US 668, 688, 694, 104 S Ct 2052, 80 L Ed 2d 674 (1984) (articulating standard under Sixth Amendment).

Amicus and defendant diverge on the meaning of the word "support," however. Defendant argues that to "support" the allegations, the petitioner must attach sufficient evidence to make a *prima facie* case on every allegation in the petition.[6] Pet BOM at 12-13. In other word, the petitioner must produce sufficient evidence at the time he files his initial petition, or within 15 days of

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[6] Defendant equates "*prima facie* case" with "sufficient evidence that, if credited, would permit a ruling in the petitioner's favor on each of the 'allegations of the petition.'" Pet BOM at 12; *see also id.* at 9 (*prima facie* evidence is "evidence that would support a determination in his favor").

As the United States Supreme Court recognized, the term "*prima facie* case" may be used in two different ways:

> "The phrase '*prima facie* case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940)."

Texas Dept. of Community Affairs v. Burdine, 450 US 248, 254, n 7, 101 S Ct 1089, 67 L Ed 2d 207 (1981).

Defendant generally uses the term "*prima facie* case" in the latter way – that is, to describe the petitioner's burden of producing sufficient evidence that, *if credited,* would permit the trier of fact to infer the facts necessary to prove the claim. But then defendant appears to add an additional requirement: that the trial court also ensure the reliability of the documentary evidence. *See* Pet BOM at 2 ("petitioner must attach *reliable and trustworthy* evidence that, if credited and not controverted, would permit the court to rule in his or her favor.") (emphasis added). But at this stage in the proceeding, which precedes the evidentiary hearing, the trial court should not be making credibility determinations. *See, e.g.*, *Reeves v. Sanderson Plumbing, Inc.*, 530 US 133, 142, 120 S Ct 2097, 147 L Ed 2d 105 (2000) (determining whether a *prima facie* case was established involves no credibility assessment).

the appointment of counsel, to permit the trial court to infer all of the facts necessary to support each claim. That is a substantial requirement to impose at the pleading stage, and one the legislature surely would have specifically articulated if it had intended the petitioner to do so prior to the evidentiary hearing.

"Support" is not a legal term of art, but rather a word of common usage that should be given its plain, natural, and ordinary meaning. *PGE*, 317 Or at 611. In 1959, the most relevant definition of "support," was the following:

> "**Support:** * * * **4.** To verify; substantiate; as, evidence *supporting* a charge."

Webster's New Int'l Dictionary 2534 (2nd ed. 1959).

Unfortunately, that definition fails to answer the precise question presented by this case – what degree of verification or substantiation must the documentary evidence provide? Does the documentary evidence have to be such that it *proves* the allegations in the petition if uncontradicted, as defendant asserts? Of course, the legislature chose to use the word "support" rather than "prove" or "establish." Is it enough, then, that the documentary evidence tends to substantiate or verify the allegations in any way? Because the dictionary definition cannot answer those questions, this court must look to the context in which the legislature used the word "supporting." *See State v. Cloutier*, 351 Or 68, 96, 261 P3d 1234 (2011) (recognizing that "[d]ictionaries, after all, do not

tell us what words mean, only what words *can* mean, depending on their context and the particular manner in which they are used.") (emphasis in original).

ii. A related statute concerning post-conviction evidentiary hearings refutes defendant's construction of the attachment provision and supports an interpretation requiring the attachment of documentary evidence that merely tends to substantiate the allegations.

The most directly relevant context for determining the precise meaning of "supporting" in ORS 138.580 is another provision of the PCHA that was enacted at the same time. ORS 138.620(2), which pertains to evidentiary hearings, allocates the burden of proof.[7] It provides,

> "If 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. *The burden of proof of*

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[7] Historically, the term "burden of proof" expressed two different concepts:

> "One to express the idea that a named litigant must in the end establish a given proposition in order to succeed; the other, to express the idea that at a given stage in a trial it becomes the duty of a certain one of the parties to go forward with the evidence."

Hansen v. Oregon-Wash R & N Co, 97 Or 190, 210, 188 P 963 (1920).

With the adoption of the Oregon Evidence Code in 1981, the legislature abandoned the phrase "burden of proof" in favor of the more accurate terms "burden of persuasion" and "burden of production." *See* OEC 305 (burden of persuasion); OEC 307 (burden of production); *State v. James*, 339 Or 476, 484-88, 123 P3d 251 (2005) (discussing imprecision of phrase "burden of proof" and tracking historical development of more accurate terminology).

> *facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence*."

(Emphasis added)[8].

That related statute casts doubt on defendant's construction of the attachment requirement in several ways. First, it demonstrates that when the legislature wants to require the petitioner to establish facts by a particular quantum of proof, it knows how to do so. In light of ORS 138.620(2)'s explicit requirement that a petitioner prove facts by a preponderance of the evidence, defendant's argument that ORS 138.580 implicitly requires a petitioner to establish a *prima facie* case at the pleading stage is less plausible. It is doubtful that the legislature – a body that is routinely tasked with allocating quantum of proof requirements[9] – intended to require a petitioner to establish a *prima facie* case at the pleading stage but forgot to say so.

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[8] ORS 138.620(2) has not been amended since its adoption in 1959.

[9] *See, e.g.*, ORS 138.692(1)(b) (requiring a person filing a motion to request DNA testing to "present a *prima facie* showing" that DNA testing would establish actual innocence): ORS 31.150(3) (providing that a defendant making a special motion to strike "has the initial burden of making a *prima facie* showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2)[.]"); ORS 192.695 (providing that plaintiff in suit challenging the decision of a public body "shall be required to present *prima facie* evidence of a violation" before the governing body is required to prove its acts complied with the law); ORS 419B.116(5)(b) (requiring a motion for intervention in a juvenile dependency proceeding to "state a *prima facie* case").

ORS 138.620(2) provides a further contextual clue that the legislature did not intend to require the petitioner to establish a *prima facie* case at the pleading stage. It provides that a petitioner is entitled to an evidentiary hearing "[i]f the petition states a ground for relief[.]" Significantly, that statute says nothing about the petitioner having established a *prima facie* case before the evidentiary hearing – the *only* qualification is that the petition has stated a ground for relief. If, as defendant argues, the legislature did not intend for the petitioner to proceed to an evidentiary hearing without having first established a *prima facie* case, ORS 138.620(2) would have been a likely place to articulate that requirement.[10] That is especially true if ORS 138.580 itself contains no explicit requirement that the petitioner's attached documentary evidence establish a *prima facie* case. The absence of any such requirement – by, for example,

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[10] For example, New Jersey's counterpart to ORS 138.620 provides, in relevant part:

> "(b) A defendant shall be entitled to an evidentiary hearing *only upon the establishment of a prima facie case in support of post-conviction relief*, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits."

NJ R Cr R 3:22-10 (emphasis added).

providing that a petitioner is entitled to an evidentiary hearing "if the petition states a ground for relief *and the petitioner has established a prima facie case*" – renders the defendant's construction of ORS 138.580 even less plausible.

In light of ORS 138.620(2), it is apparent that the word "supporting" as used in ORS 138.580 does not mean "establishing a *prima facie* case." Rather, the documentary evidence must merely substantiate the allegations in the petition, or tend to establish the truth of what the petitioner expects to prove.

For example, when a petitioner raises a claim of ineffective assistance of counsel, he will be required to prove that his counsel took (or failed to take) some particular action, that his counsel's performance fell below an objective standard of reasonableness, and that as a result, his case was prejudiced. *See Strickland*, 466 US at 688, 694 (standard under Sixth Amendment). In his post-conviction petition, the petitioner will be required to plead ultimate facts establishing each element of that claim. ORCP 18A (pleading must include "plain and concise statement of the ultimate facts constitution a claim for relief"); *see also Young v. Hill*, 347 Or 165, 171, 218 P3d 125 (2009) (ORCPs apply to post-conviction relief unless otherwise inconsistent with PCHA). Contrary to the state's assertion, a petitioner need not present documentary evidence to prove each and every necessary factual underpinning of each and every claim raised in the petition. *See* Pet BOM at 27-28 (arguing that petitioner needed to attach to his pleading documentary evidence supporting

every element of ineffective assistance of counsel claim). The attached documentary evidence need only tend to substantiate the claim itself, not *every* element of the claim. To require a petitioner to attach documentary evidence substantiating every element of a claim is not materially different than requiring a petitioner to establish a *prima facie* case, which, as discussed throughout this brief, is not a burden the legislature chose to impose at the pleading stage.

In a petition alleging claims of ineffective assistance of counsel, documentary evidence tending to establish the truth of the claim could include any of the following: the transcript showing that counsel did or did not take certain action at trial or sentencing; an affidavit describing investigation that should have been conducted; or an affidavit that counsel did or did not take particular action during plea negotiations. In other words, the petitioner simply needs to provide evidence tending to support, or substantiate, what he expects to prove – that his counsel was ineffective in a particular way.[11] Attached

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[11] In practice, there exists a sizeable variety of claims raised in post-conviction relief. *See* ORS 138.530(1) (listing grounds upon which post-conviction relief may be granted). They include, for example, claims that trial counsel was ineffective for failing to provide competent representation during plea negotiations, for failing to conduct investigation, for errors occurring during trial, for errors occurring at sentencing; claims that appellate counsel was ineffective for failing to raise an issue on appeal; and claims that a guilty plea was not entered knowingly and voluntarily The kind of documentary evidence that will tend to substantiate a claim will, of course, vary depending on both the type of claim raised and the specific claim itself.

documentary evidence would not substantiate the allegations in the petition if, for example, it contradicted the allegations or was not relevant to the allegations.

When properly viewed in context, the attachment requirement *must* serve a different purpose than the subsequent evidentiary hearing. At the hearing, the petitioner has the burden of coming forward with admissible evidence that proves *all of the* facts underlying his claims by a preponderance of the evidence. At the time he files his pleading, however, he must merely attach documentary evidence demonstrating that the facts are *capable of* corroboration. In other words, the purpose of the attachment requirement is to substantiate that the petitioner may be able to carry the burden of production and persuasion at an evidentiary hearing. Defendant's interpretation of the attachment requirement prematurely places the burden of production on the petitioner.

C. The final portion of the attachment requirement makes it mandatory.

The final portion of the attachment requirement provides that the supporting documentary evidence "shall be attached to the petition." *Amicus* agrees with defendant that in light of the legislative history, "shall" is used in its mandatory sense. *See Doyle v. City of Medford*, 347 Or 564, 571, 227 P3d 683 (2010) (noting that although there are instances in which "shall" is used

permissively, an examination of the legislative history of the statute at issue demonstrated that it was used mandatorily). The statute therefore requires the attachment of documentary evidence tending to substantiate the allegations in the petition in any way.

III. Other statutory context supports construing the attachment requirement as a minimal burden on petitioners.

Additional context supports interpreting ORS 138.580 to require the petitioner to attach documentary evidence that tends to substantiate the allegations, rather than requiring the petitioner to attach evidence establishing a *prima facie* case. As discussed earlier, a petitioner must initially file the petition without the assistance of counsel if he cannot afford an attorney. ORS 138.590(2) (providing that petitioner must file request for appointment of counsel at the time he files the petition). If the trial court appoints counsel, counsel has 15 days to amend the petitioner as a matter of right. ORS 138.590(5). It is unjust to expect a petitioner who is typically untrained the in the law *and* incarcerated to attach evidence sufficient to actually prove the allegations at the time the pleading is filed. Moreover, to require counsel to satisfy that burden within 15 days of being appointed is similarly unreasonable. The fact that a trial court *may* (but is not required to) extend the time in which counsel's amended petition has to be filed does not alter the analysis. The legislature thought that a 15-day period would generally provide counsel with

sufficient time to remedy any defects in the petition, which reveals that the attachment provision was intended to be a minimal requirement, and not the equivalent of requiring a petitioner to establish a *prima facie* case at the pleading stage.

Moreover, as the Court of Appeals recognized, requiring the petitioner to establish a *prima facie* case at the time the petition is filed is not consonant with the process of discovery, which is the method by which a petitioner can acquire the evidence necessary to carry the burdens of production and persuasion. *See Ogle*, 254 Or App at 675 ("It 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."). ORCP 36 provides for discovery by, among other ways, depositions, production of documents, physical and mental examinations, and requests for admission. A party is not entitled to discovery until after the action commences. *See* ORCP 39 (providing for depositions upon oral testimony); ORCP 40 (providing for depositions upon written questions); ORCP 43 (providing for production of documents); *see also Young*, 347 Or at 171 (ORCPs apply unless PCHA provides otherwise). Under defendant's interpretation of the attachment requirement, counsel appointed in post-conviction proceedings would have, as a matter of right, no more than 15 days to utilize discovery methods to establish a *prima facie* case.

Defendant argues that there is no need to interpret ORS 138.580 consistently with the discovery process as outlined in the ORCPs because the ORCPs were not in effect in 1959 when the legislature enacted the PCHA. Pet BOM at 31. That argument assumes that there were was *no* discovery methods available in 1959. But that is incorrect. The same legislature that enacted the PCHA also passed ORS 41.615. Or Laws 1959, ch. 353, § 2, *repealed by* Or Laws 1977, ch. 358, § 1**.** That statute provided that, in a pending proceeding, the trial court could order the production of documents for examination. Further, in 1959, depositions were governed by ORS 45.151, which allowed the taking of depositions after the commencement of the proceeding. Or Laws 1955, ch. 611, § 1, *repealed by* Or Laws 1979, ch. 284, § 199. It is through the use of discovery tools that a petitioner may secure admissible evidence to prove his claim, and it therefore makes little sense to require the establishment of a *prima facie* case within 15 days of the appointment of counsel.

As one last piece of contextual background helpful in construing the attachment requirement, a statute in effect in 1959 provided that pleadings should be liberally construed:

> "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties."

ORS 16.120, *repealed by* Or Laws 1979, ch. 284, § 199; *see also* ORCP 12 (providing that pleadings "shall be liberally construed"). ORS 16.120 lends

additional support to a more moderate construction of the attachment requirement. *See Mueller v. Benning*, 314 Or 615, 621, 841 P2d 640 (1992) (citing ORCP 12 for the proposition that pleadings should be liberally construed in a post-conviction proceeding).[12]

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[12] ORS 138.580 contains a "certification" requirement, which is an assertion by the petitioner that the petition is being filed in good faith and supported by the evidence and law. *See* ORCP 17C (certification requirement for pleadings). ORS 138.580 also requires a petitioner to swear to the authenticity of all documents and exhibits, as well as the truth of facts within his personal knowledge, presumably to discourage untrue allegations. A petitioner therefore subjects himself to penalties for both false certification and false swearing. *See* ORCP 17D (providing sanctions for false certification); ORS 162.075 (defining crime of false swearing).

Defendant contends that by specifically requiring a petitioner to swear to the truth of facts within his personal knowledge, the subsequent attachment requirement must exclude documentary evidence that relies on the petitioner's personal knowledge. *See* Pet BOM at 15 ("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."). *footnote continued……*

IV. The legislative history confirms that the attachment requirement was intended to help a petitioner clarify his claims, which would aid courts in resolving those claims on the merits; it was not intended to "weed out" cases for dismissal as early as possible.

As a preliminary matter, it bears emphasizing that, although defendant contends that the legislative history confirms his argument that "supporting" means "establishing a *prima facie* case," he does not cite a single instance in which the Oregon legislature, or any other relevant body promulgating a post-conviction procedures act, used the term "*prima facie*." That is because the purpose of the PCHA was to simplify post-conviction procedure and provide more protection for prisoners, not, as defendant suggests, impose a significant hurdle at the pleading stage in an effort to avoid an adjudication of the claims on the merits.

First, if the legislature had intended to limit the attached documentary evidence to sources *other* than the petitioner's own knowledge, *amicus* can discern no reason why the legislature would not have said so. Moreover, as defendant himself recognizes, the only documentary evidence reasonably available to support certain post-conviction claims will be the petitioner's own assertions of fact. Pet BOM at 16. If, for example, a petitioner claims that his trial attorney lied and coerced him into pleading guilty, it is unlikely that the petitioner will acquire an affidavit from his trial counsel affirming that fact within 15 days of the appointment of counsel. The only evidence a petitioner could realistically be expected to attach would be a document containing his own assertions of fact. Of course, it may be that under circumstances such as those, the attached documentary evidence will simply repeat the assertions of fact contained in the petition itself. Alternatively, it could be argued that in such a situation, the assertions of fact contained in the petition, which are sworn to as affirmatively true and correct, constitute a *de facto* affidavit that satisfies the attachment requirement.

A. The 1959 legislature enacted the PCHA to simplify post-conviction procedure and provide greater protection for petitioners.

As discussed earlier, prior to Oregon's enactment of the PCHA in 1959, there were at least four post-conviction remedies in the state. Collins and Neil, 39 Or L Rev at 337-38. "Any casual study of the Oregon Supreme Court's opinions in cases involving th[o]se remedies [demonstrated] the increasing difficulty of the court in drawing the lines between the various remedies, defining their scope, and selecting the proper one for a given situation." *Id.* The PCHA originated as House Bill 590, introduced to the 1959 legislature by Supreme Court Justice O'Connell. Minutes, HB 590, April 9, 1959. Justice O'Connell stated that the bill "would bring together under one procedure the various procedures after appeal." *Id.* Assistant Attorney General Peter Herman testified in support of the bill, noting that his office was faced with the "double burden" of trying to first unravel the claims of an uncounseled petitioner, and then giving that petitioner a "suitable hearing on the merits." *Id.*

At the time it was enacted, the relevant portion 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, § 8.

The only legislative history that specifically addresses ORS 138.580 demonstrates that the drafters did not intend the attachment requirement to be a significant departure from the current practice in post-conviction cases:

> "[ORS 138.580] spells out the form and content of the petition. It is quite similar to sections 3 and 4 of the Uniform Post-Conviction Procedure Act. There is probably little change in existing post[-]conviction practice, although the detailed provisions of this section should tend to clarify petitions for relief."

Collins and Neil, 39 Or L Rev at 350 (internal footnote omitted). And, significantly, *amicus* is unable to find any contemporaneous post-conviction case law (addressing the four post-conviction remedies available at that time) that required a petitioner to establish a *prima facie* case on the pleadings.

HB 590 did not "parallel precisely any of the existing or proposed post-conviction statutes[,]" but the drafters of what was to become the PCHA relied, in part, on the Illinois Post-Conviction Hearing Act and the Uniform Post-Conviction Procedure Act. *Id.* at 340.

The Uniform Post-Conviction Procedure Act was proposed by the Commissioners on Uniform State Laws and approved by the American Bar Association in 1955. Note, 69 Harv L Rev at 1289; 9B ULA at 542. The prefatory comments to the uniform act declare that its goal,

> "is to clarify and simplify present procedures through consolidating them into a single action and so to eliminate the confusion of cases that now burden the courts, and at the same

> time provide for the petitioner a more complete protection that he now has in his assertion of valid claims."

9B ULA at 549.

The 1955 uniform act contained a similar attachment requirement as the 1959 version of ORS 138.580. *See* 9B ULA at 557 ("Affidavits, records, or other evidence supporting its allegations shall be attached to the petition or the petition shall state why they are not attached."). Although the commissioners provided lengthy explanatory notes after many of the provisions of the uniform act, following the section on which ORS 138.580 was based, the commissioners only noted, "This section describes what the petition should contain." *Id*. If the commissioners had intended the phrase "supporting its allegations" to mean "establishing a *prima facie*" case, it is unlikely that they would have both failed to use that phrase in the act itself *and* neglected to mention that substantial standard in the commentary. "Supporting its allegations" simply meant to substantiate the allegation in the petition in any way.

Defendant cites portions of the legislative history discussing the "overburdened court dockets" created by the various post-conviction remedies, and contends that the drafters of the PCHA intended to require a petitioner to establish a *prima facie* case on the pleadings in order to reduce the number of evidentiary hearings and, therefore, decrease court congestion. *See* Pet BOM at 21. *Amicus* does not dispute that, before the enactment of the PCHA, courts

were spending a significant amount of time teasing apart the various post-conviction remedies and attempting to clarify *pro se* claims. However, nothing in the legislative history supports the proposition that the solution to that problem was requiring the petitioner to establish a *prima facie* case on the pleadings. Rather, it is apparent that the 1959 legislature sought to reduce overworked courts by three other methods: (1) eliminating the multiplicity of post-conviction remedies, (2) providing for the appointment of counsel, and (3) prohibiting successive filings. *See, e.g.,* Collins and Neil, 39 Or L Rev at 351 (noting that section providing for appointment of counsel "is intended to use the burden of circuit court judges" because "the often illiterate and unintelligible legal papers filed by prisoners may be turned into pleadings upon which issues can be clearly drawn."); *Id.* at 356 (asserting that section which generally prohibits the filing of successive petitions "is one of the most important in the act[,]" and "attempts to provide a clear and workable basis for reducing the tide of post[-]conviction litigation to manageable proportions[.]").

In support of his construction of the attachment requirement, defendant relies most heavily on the legislative history of the 1949 Illinois Post-Conviction Hearing Act. However, the Illinois act and the statutory framework from which it originated contained significant differences from Oregon's PCHA.

Like the uniform act, the Illinois act contained an attachment requirement that was similar, but not identical, to ORS 138.580. Albert E. Jenner, *The Illinois Post-Conviction Hearing Act*, 9 Fed R Dec 347, 347 (1949). It provided,

> "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations, or shall state why the same are not attached."

Jenner, 9 Fed R Dec at 365. The chairperson of the committee that drafted the Illinois act wrote that, "[t]he provision respecting the attachment of affidavits, etc. is not only an attempt to paraphrase existing requirements as to statutory *coram nobis* (*People v. Touhy*, 397 Ill 19, 72 NE2d 827 (1947)) but to discourage indiscriminate and unfounded petitions." *Id.* at 360.

In *Touhy*, the petitioner had been convicted of several criminal offenses and eventually filed a petition for a writ of error coram nobis in which he claimed that key witnesses had testified falsely. 397 Ill at 21-22. The petitioner did not attach any affidavits to his petition, but simply included his own allegations that the witnesses had lied. *Id.* at 832. In Illinois at that time, a petition for a writ of error coram nobis was filed in the same trial court that imposed judgment and was intended to bring before that court matters of fact which, if known at the time, would have prevented entry of judgment. *Id.* at 24-25. Significantly, it was the practice to present evidence to the court through the use of affidavits:

> "In this state the issue of fact may be made, and is generally made, by affidavits in support of the motion and by counter affidavits denying the facts set up in the motion and affidavits in support therefore, in which case the burden of proof is upon the party making the motion to prove his facts alleged by a preponderance of the evidence."

Id. at 26. It was against that backdrop, then, that the Illinois Supreme Court held that the trial court had properly dismissed the petition because, "[t]he allegations, so far as the alleged false testimony of [the witness] is concerned, are hearsay statements of the highest degree." *Id.* It is evident that the particular procedure used in coram nobis cases in Illinois at that time actually *required* the petitioner to prove, by a preponderance of the evidence, the facts alleged in the petition through the use of affidavits. That is not the procedure used in the PCHA. *Touhy* and commentary to the Illinois act do not provide support for defendant's construction of the attachment requirement.[13]

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[13] One other difference between the Illinois act, the uniform act, and the PCHA should be noted. Both the Illinois and the uniform acts use the phrase "affidavits, records, or other evidence" as opposed to "other documentary evidence." *See* 9B ULA at 557 (uniform act); Jenner, 9 Fed R Dec at 365 (Illinois act). And further, both the Illinois and uniform acts provide that, at the evidentiary hearing, the trial court "may receive proof by affidavits, depositions, oral testimony, or other evidence" as opposed to "other competent evidence." 9B ULA at 559; Jenner, 9 Fed R Dec at 366.

footnote continued….

Though nothing in the legislative history of the PCHA directly addresses the question at issue in this case, it is clear that the impetus for the act was the desire to simplify the procedure for petitioners and the courts and to provide petitioners with greater protection. It was not, as defendant asserts, to "weed[] out" as many petitions at the pleading stage for failure to comply with an early burden of production. The construction of ORS 138.580 proposed by *amicus* – requiring a petitioner to attach documentary evidence tending to substantiate the allegations in the petition – serves to clarify the claims, discourage frivolous allegations, and is faithful to the legislative history of the PCHA.

B. Subsequent amendment to ORS 138.580 made the attachment requirement mandatory, but did nothing to change its meaning.

ORS 138.580 was amended in 1993 to delete the portion of the provision that permitted a petitioner to either attach documentary evidence "or * * * state

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It is significant that the Illinois and uniforms acts use the same word – "evidence" – for purposes of the attachment requirement and what is to be presented at the subsequent evidentiary hearing. That implies that because "evidence" as it is used in the evidentiary hearing provision refers to admissible evidence, it necessarily refers to admissible evidence in the attachment provision as well.

The PCHA departed from the Illinois and uniform acts by clearly differentiating between evidence used to fulfill the attachment requirement, which need not be admissible, and evidence required at the evidentiary hearing, which must be competent, or admissible. That demonstrates that the Oregon legislature intended to minimize the attachment requirement compared to the post-conviction acts on which it was based.

why they are not attached." Or Laws 1959, ch 636, § 8, *repealed by* Or Laws 1993, ch. 517, § 4. That amendment was one of three amendments to the PCHA proposed jointly by the Oregon Department of Justice and the Oregon Criminal Defense Lawyers Association. *See* Tape Recording, House Committee on Judiciary, Subcommittee on Crime and Corrections, HB 2352, April 7, 1993, Tape 70, side A. The other two amendments extended the statute of limitations from 120 days to two years, and added a provision allowing trial courts to dismiss meritless petitions and prohibiting an appeal from that dismissal. Or Laws 1993, ch. 517, §§ 1, 3[14]. While there was lengthy debate and discussion about those latter two amendments, the entirety of the discussion before the legislature about deleting the phrase "or * * * state why they are not

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[14] That provision was codified at ORS 138.525, which currently provides,

> "(1) The court may, on its own motion or on the motion of the defendant, enter a judgment denying a meritless petition brought under ORS 138.510 to 138.680.
>
> "(2) As used in this section, 'meritless petition' means one that, when liberally construed, fails to state a claim upon which post-conviction relief may be granted."
>
> "(3) Notwithstanding ORS 138.650, a judgment dismissing a meritless petition is not appealable.
>
> "(4) A dismissal is without prejudice if a meritless petition is dismissed without a hearing and the petitioner was not represented by counsel."

attached" was testimony from Assistant Attorney General Brenda Peterson, in which she stated that the amendment would provide 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, April 7, 1993, Tape 70, Side A.

Nothing in the text or legislative history of that amendment to ORS 138.580 altered the meaning of the attachment requirement, it simply made it mandatory. *Amicus* does not disagree with defendant's contention that the 1993 amendments "strengthened the attachment requirement." Pet BOM at 26. No longer could a petitioner assert a claim for relief and then neglect to include *any* documentary evidence tending to substantiate that claim. The legislature's decision to require strict compliance with the attachment requirement only reinforces a more moderate construction of ORS 138.580. The practical reality is that at least some of the evidence a petitioner may need to prove his claim is in the hands of other people – his trial attorney or the district attorney, for example. To obtain that evidence, the petitioner will need to utilize discovery. Defendant's construction of ORS 138.580 would require a petitioner to obtain necessary evidence within 15 days of the appointment of counsel. If a petitioner is unable to acquire the evidence quickly, he cannot get around the

attachment requirement by asserting that he is trying to secure the documentary evidence through discovery. According to defendant, the allegation would be subject to dismissal. That outcome is entirely inconsistent with the purpose of the PCHA – to discourage groundless claims while providing the petitioner with more complete protection in the assertion of valid claims.

In sum, both the 1959 legislative history and 1993 legislative history confirm that when the legislature used the phrase "supporting the allegations of the petition," it did not mean "establishing a *prima facie* case." It was not a tool for eliminating on procedural grounds what could be meritorious claims. Rather, it was a minimal requirement intended to discourage frivolous claims by aiding the petitioner in clarifying his allegations which would, in turn, assist courts in resolving those claims on the merits. *See Case v. Nebraska*, 381 US 336, 345, 85 S Ct 1486, 14 L Ed 2d 422 (1965) (Brennan J., concurring) (adequate state post-conviction relief "would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that non-meritorious claims would be full ventilated, making easier the task of the federal judge if the state prisoners pursued his cause further.").

V. Petitioner attached documentary evidence supporting the allegations of the petition.

Petitioner satisfied the attachment requirement in this case. He attached documentary evidence tending to substantiate the allegations in his petition.

Petitioner first alleged that his trial counsel had been ineffective for failing to meet with witness before trial to refresh her memory with the police report. In support of that claim, petitioner attached his own affidavit in which he asserted that his trial attorney did not meet with Petitioner's affidavit qualified as a written declaration or assertion of fact or an event offered as proof. And that documentary evidence tended to substantiate that his trial attorney did not, in fact, meet with a fact necessary to prove that particular allegation. That alone satisfied the attachment requirement.

Petitioner's second claim was that his trial attorney had failed to adequately investigate the victim's medical records before trial. Petitioner attached an affidavit in which he asserted that the medical records would have demonstrated that the victim had an abscessed tooth rather than a fracture. That is documentary evidence substantiating the second claim of ineffective assistance of trial counsel. Defendant contends that petitioner should have attached an affidavit from his trial attorney attesting to the fact that he did not investigate the victim's medical records. Pet BOM at 29. Defendant further argues that petitioner should have attached the medical records themselves to

the petition. *Id.* *Amicus* agrees that petitioner will need to produce that documentary evidence *at the evidentiary hearing*. It is patently unfair to expect a petitioner to acquire that evidence at the pleading stage and before a meaningful period for discovery. Defendant's suggestion that petitioner can easily acquire hospital records in his trial attorney's possession, as well as an affidavit from his trial attorney attesting to his own inadequacy, ignores the reality that a post-conviction petitioner and his former trial attorney may no longer have interests that are aligned.

Petitioner likewise supported his third and fourth claims for relief with documentary evidence – the trial transcript. His third claim was that his trial attorney had failed to present the victim's medical records during trial. The attached trial transcript substantiated that assertion – his trial attorney did not, in fact, present the victim's medical records during trial. *See* Petitioner's Exhibit List, Trial Transcript at iv (exhibit list), Trial Court File. Petitioner's fourth claim was that his trial attorney had failed to cross-examine Dr. Pederson about the victim's abscessed tooth. That claim too was supported by the trial transcript. *See* Petitioner's Exhibit List, Trial Transcript at 103-06 (cross-examination of Dr. Pederson), Trial Court File.

Petitioner did all that he was required to do move his case forward – through discovery and to an evidentiary hearing where he will be required to produce admissible evidence that proves his claims by a preponderance of the

evidence. Defendant is not incorrect insofar as he points out evidence that petitioner will need to prove his claims; he is incorrect, though, in contending that petitioner needs to do so at the time he files his petition.

Post-conviction relief is this state's last opportunity to ensure that a criminal conviction was obtained consistently with constitutional guarantees. The role of state courts has become increasingly important in recent years as federal habeas review has been substantially undercut:

> "Under [the Antiterrorism and Effective Death Penalty Act[15]], the primary and often final arbiters of federal constitutional law are state post-conviction courts, and federal review of state convictions is substantively *de minimis* for the first time since 1867, when federal habeas review of state convictions became statutorily recognized and roundly accepted."

Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 Wash & L Law Rev 85, 125 (2012) (internal footnotes omitted); *see also id.* at 89 (describing federal habeas review of state convictions as "futile, illusory, and so improbable as to be microscopic") (footnote omitted). This court should decline defendant's invitation to create a considerable impediment to an adjudication of a petitioner's claims on the merits in state court as well.

ORS 138.580 does not require a petitioner to establish a *prima facie* case. It simply requires the attachment of evidencie tending to substantiate the

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[15] 28 USC § 2254 (1996).

allegations. Petitioner did so in this case. He is entitled to fully utilize the discovery process and attempt to prove his case by a preponderance of the evidence at an evidentiary hearing. The trial court prematurely dismissed his case and its ruling should be reversed.

CONCLUSION

For the reasons discussed above, petitioner satisfied the attachment requirement of ORS 138.580. 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)

Petition length

I certify that (1) this petition complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10, 909 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 I directed the *Amicus* Brief on the Merits for Respondent Review to be served upon Anna Joyce attorney for Plaintiff-Respondent, on September 26, 2013, by having the document personally delivered to:

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Respectfully submitted,

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