IN THE SUPREME COURT OF THE STATE OF OREGON

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

Appeal from the Judgment of the Circuit Court
for Malheur County
Honorable J. BURDETTE PRATT, Judge

REPLY BRIEF OF PETITIONER ON REVIEW, MARK NOOTH

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

Attorney for Petitioner-Appellant/
Respondent on Review

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

Attorneys for Defendant-Respondent/
Petitioner on Review

10/13

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

PETITIONER ON REVIEW'S REPLY BRIEF

INTRODUCTION

In defendant's opening brief, he argued that the text, context, and legislative history of ORS 138.580 show that the "attachment" provision in that statute requires the post-conviction petitioner to attach "reliable and trustworthy evidence that, if credited and not controverted, would permit the court to rule in his or her favor." In response, the *amicus curiae* parties who are aligned with petitioner (in particular, the Office of Public Defense Services (OPDS) and the American Civil Liberties Union (ACLU)) argue that defendant's rule of law is stricter than what the text, context, and legislative history of ORS 138.580 establish. They also argue that defendant's proffered construction of the statute would raise constitutional questions, meaning that this court should construe it more leniently. As explained below, those arguments fail.

ARGUMENT

A. Defendant's proposed rule of law is not as demanding as *amici* believe it to be.

An overriding theme of *amici's* arguments is that defendant's proffered construction of the attachment requirement puts too high a burden on petitioners. According to *amici*, defendant's rule would require the attached evidence to actually "prove" or "establish" the petitioner's claim to the post-conviction court, at the pleading stage of the case. (*E.g.,* ACLU Br 16; OPDS

Br 23, 24, 27). Their arguments in that respect appear to be based on two concepts of defendant's rule of law: (1) the requirement that the petitioner attach "trustworthy and reliable" evidence to the petition, and (2) the reference to "*prima facie*" evidence. As explained below, *amici* misunderstand both of those aspects of the rule of law.

First, OPDS believes that the requirement that the attached evidence be "trustworthy and reliable" puts the post-conviction court in the position—at the pleading stage—of weighing the attached evidence, and evaluating its ultimate credibility, to determine if the evidence satisfies ORS 138.580. (OPDS Br 19 n 6). That is not correct. As defendant's rule of law makes clear, the inquiry under ORS 138.580 requires the post-conviction court to view the attached evidence as if it were "credited and not controverted[.]" The requirement that the evidence be "trustworthy and reliable" refers not to the *substantive* weight or strength of the evidence, but rather, to the *objective indicia* of the evidence's reliability. Stated another way, the attached evidence must be of a type that, viewed objectively, has guarantees of trustworthiness and reliability such that a further evidentiary hearing is warranted.[1]

---

[1] In this case, for example, petitioner could have attached "trustworthy and reliable" evidence by submitting affidavits or declarations from the witnesses whom he believes his counsel should have questioned differently. Alternatively, he might have satisfied the requirement by submitting unsworn documents from those witnesses, as long as the documents

Footnote continued…

Amici's second misconception about defendant's proposed rule of law appears to hinge on defendant's use of the phrase "*prima facie*." *Amici* appear to view that standard as a sort of independent burden that, if intended by the legislature, would have been included in the statute explicitly. (*E.g.,* OPDS Br 22-24, 27, 31). Defendant acknowledges that the legislature did not use the term "*prima facie*" in ORS 138.580. But that term is still helpful in understanding what evidence the petitioner must attach to satisfy the statute. ORS 138.580 requires the petitioner to attach evidence that supports each of the "allegations in the petition." As OPDS acknowledges, the "allegations in the petition" are the allegations that are necessary to state a successful claim for relief. (OPDS Br 18). Thus, if a petitioner provides evidentiary support for each allegation, the petitioner has necessarily provided *prima facie* evidence—or evidence that, if believed, would enable the factfinder to ultimately rule in his or her favor.

(…continued)
contained sufficient indicia of trustworthiness and reliability (for example, a formal report, such as a police report or medical report).

For those reasons, *amici*'s argument about defendant's proposed rule of law misunderstands key aspects of that rule. Those arguments are not a basis for determining that the statute should be construed differently.[2]

B. The general maxim providing that courts will construe a statute to avoid constitutional concerns does not apply in this case.

Amici also argue that, in construing ORS 138.580's attachment requirement, this court should employ the "avoidance" maxim—the maxim of construction providing that, as between two interpretations of a statute, the court should choose the one that avoids constitutional problems. *E.g., State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (1996). According to *amici*, defendant's proposed rule of law raises constitutional concerns (in particular, concerns about suspending the writ of *habeas corpus* and about due process) because it requires petitioners to locate and obtain documents without having access to formal discovery methods. (ACLU Br 11-20; *see also* OCDLA Br 27, 43). *Amici* contend that post-conviction petitioners (especially petitioners who are incarcerated) cannot be expected to comply with that requirement. (*See* ACLU Br 13, 16-18; OCDLA Br 6, 10-11). That argument fails for the following reasons.

---

[2] *Amici*'s misunderstanding also colors their constitutional argument, by suggesting that the bar is higher than it really is. Defendant addresses the constitutional issues next.

1. Because the meaning of ORS 138.580 is clear from the text, context, and legislative history of the statute, this court may not resort to general maxims of construction.

As noted above, the "avoidance" maxim is a general maxim of statutory construction. Courts may resort to those maxims only if the statute at issue remains ambiguous after considering its text, context, and legislative history. *State v. Gaines*, 346 Or 160, 172, 206 P3d 1042 (2009). For reasons explained in defendant's opening brief on the merits, ORS 138.580 is not ambiguous after considering its text, context, and legislative history. Thus, the avoidance maxim is inapplicable here.

2. *Amici*'s constitutional argument depends on an assumption about the abilities of petitioners that is not necessarily founded.

Even if this court considers the avoidance maxim, it is not dispositive with respect to ORS 138.580. As noted above, the crux of *amici*'s argument is that post-conviction litigants cannot realistically be expected to locate and obtain documentary evidence to support their claims without some sort of formal discovery process. (*See, e.g.,* ACLU Br 17; "the petitioner has very few realistic ways to obtain competent evidence" to establish facts; OPDS Br 27-28; "It is unjust to expect a petitioner who is typically untrained in the law *and* incarcerated to attach evidence sufficient to actually prove the allegation at the time the pleading is filed"; emphasis in original). The lack of discovery

methods, *amici* argue, would render the statute unconstitutional. (ACLU Br 16-17).

The primary flaw in *amici*'s argument is that it rests on the assumption that petitioners are generally not able to obtain evidence to support their claims without formal discovery. That assumption is merely hypothetical, and underestimates the various ways in which petitioners *are* able to obtain documentary evidence without formal discovery.

A petitioner can obtain evidence to comply with ORS 138.580 by hiring an attorney or an investigator to track down and obtain documents to support his or her claims. Indigent petitioners—even those who are incarcerated—also have various means to obtain documentary evidence. Most notably, all petitioners are entitled to a copy of their trial and appellate counsel's files.[3] Those files will often contain documents to support a post-conviction petition, such as trial transcripts, notes, police reports, and investigator's reports, all of which may provide information about counsel's performance, thought processes, investigations, and decisions. Incarcerated petitioners also have access to telephones and mail services, through which they can contact potential witnesses (including their former lawyers), and obtain declarations or other

[3] *See* ORPC 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as * * * surrendering papers and property to which the client is entitled").

reliable statements. In addition, petitioners may use the public-records law to obtain documents or records to support their allegations.

Other aspects of the Post-Conviction Hearing Act bolster a petitioner's means to obtain documents. For example, the PCHA provides a statute of limitations of two years, ample time to determine which documents are needed and obtain them.[4] And if, on occasion, a petitioner has trouble obtaining a necessary document in that time, the statutes contain other methods through which he or she can actually engage in formal discovery in order to find and attach evidence to an *amended* petition. If the petitioner is indigent, he or she is entitled to file an amended petition as a matter of right. ORS 138.590(5). And if he or she is not indigent, the court *still* has the discretion to allow additional time after the filing of the initial petition within which to file an amended petition. ORS 138.610.[5]

For the foregoing reasons, defendant's proposed rule of law, particularly when viewed in the context of the other post-conviction statutes, does not create

---

[4] As discussed in defendant's opening brief, the legislature increased the statute of limitations from 120 days to two years when it eliminated the exception to the attachment requirement.

[5] OPDS argues that a petitioner's appointed counsel has only 15 days within which to file the amended petition as a matter of right. (OPDS Br 19, 27, 28, 29). That is incorrect. The petitioner's counsel must only file his *motion* to file an amended petition within 15 days. From that point, the actual timing of the amended petition would be up to the court.

significant constitutional concerns about ORS 138.580. Viewed correctly, the attachment requirement is merely a reasonable procedural prerequisite for post-conviction relief. *See, e.g., Bartz v. State of Oregon*, 314 Or 353, 839 P2d 217 (1992) (the former 120-day statute of limitations did not unconstitutionally suspend the writ of *habeas corpus* because it was a reasonable time limit; the statute of limitations did not violate due process because it was reasonable in scope).[6]

3. The "absurd results" maxim weighs against petitioner's and *amici*'s rule of law.

If this court considers the general maxim on which *amici* rely, it should also consider other pertinent maxims. One that has particular force is the maxim that, when construing a statute, the court should presume that the legislature did not intend an absurd result that is inconsistent with the legislature's policy. *See State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996) (discussing maxim). Here, if this court adopts the Court of Appeals'

---

[6] *Amicus* party Oregon Criminal Defense Lawyers' Association contends that defendant's rule of law may also violate equal protection based on its treatment of indigent, versus non-indigent, petitioners. (OCDLA Br at 8, 10, 11). That argument fails because the attachment requirement does not, by its terms, discriminate between those groups of people. And even assuming (without conceding) that the statute had that actual effect, nothing shows that the legislature had a discriminatory purpose in causing it. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 US 252, 264, 97 S Ct 555, 50 LEd 2d 450 (1977).

construction of the statute, it would prompt an absurd result that conflicts with the legislature's purpose in adopting the attachment requirement.

As explained in defendant's opening brief, the purpose of the attachment requirement was to discourage unfounded post-convictions petitions by requiring evidentiary support for the claims at the pleading stage. The legislature strengthened that purpose in 1993 by eliminating the exception to the attachment requirement, effectively making it mandatory. The Court of Appeals' construction of the statute, which permits a petitioner to satisfy the requirement by submitting his own affidavit containing hypothetical assertions of fact for which he or she had no personal knowledge, undermines the legislature's purpose in adopting the statute. This court should construe the statute to avoid that absurd result.

CONCLUSION

The attachment provision in ORS 138.580 requires the petitioner to attach to his petition evidence with sufficient guarantees of trustworthiness and reliability that, if credited, would permit a finding in the petitioner's favor on the allegations in the petition. Because that is clear from the text, context, and legislative history, this court should not consider the general statutory maxim on which *amici* rely. But in any event, the maxim does not apply because *amici*'s contention that the rule of law would be unconstitutional is based on an assumption about petitioners' abilities that is not necessarily founded.

Respectfully submitted,

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

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

Attorneys for Defendant-Respondent
Mark Nooth

RPK:blt/4667123

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 10, 2013, I directed the original Reply Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon James N. Varner, attorney for appellant/respondent on review; Kendra M. Matthews and Megan E. McVicar, attorneys for amicus curiae American Civil Liberties Union of Oregon, Inc.; Kristin A. Carveth, attorney for amicus curiae Office of Public Defense Services; and upon Ryan T. O'Connor, attorney for amicus curiae Oregon Criminal Defense Lawyer's Association, by using the court's electronic filing system.

I further certify that on October 10, 2013, I directed Reply Brief to be served upon Kevin Diaz, attorney for amicus party American Civil Liberty Union of Oregon, Inc., by mailing a copy, with postage prepaid, in an envelope addressed to:

Kevin Diaz
ACLU of Oregon
P.O. Box 40585
Portland, Oregon 97240

Continued…

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,046 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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

Attorney for Defendant-Respondent/
Petitioner on Review
Mark Nooth