IN THE SUPREME COURT OF THE STATE OF OREGON

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| CARVEL GORDON DILLARD,<br>Petitioner-Appellant,<br>Petitioner on Review,<br><br>v.<br><br>JEFF PREMO, Superintendent,<br>Oregon State Penitentiary,<br>Defendant-Respondent,<br>Respondent on Review. | Marion County Circuit Court<br>Case No. 10C22490<br><br>CA A156063<br><br>S064028 |

# BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Appeal from the Judgment of the Circuit Court
for Marion County
Honorable Dale W. Penn, Circuit Court Judge

JED PETERSON #084425
O'Connor Weber LLC
522 SW Fifth Avenue, Suite 1125
Portland, OR 97204
(503) 226-0923
jed@oconnorweber.com
Attorney for Petitioner-Appellant

ELLEN ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
ERIN GALLI #952696
400 Justice Building
1162 Court Street NE
Salem, OR 97301
(503) 378-4402
erin.k.galli@doj.state.or.us
Attorneys for Defendant-Respondent

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522 SW Fifth Avenue, Suite 1125
Portland, OR 97204

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522 SW Fifth Avenue, Suite 1125
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# PETITIONER'S BRIEF ON THE MERITS

## STATEMENT OF THE CASE

This post-conviction case raises the issue of whether a post-conviction judgment is appealable when a trial court has dismissed the petition with prejudice for failure to state a claim, but without holding a hearing.

Petitioner filed a *pro se* petition for post-conviction relief, and, after counsel was appoitned, proceeded on the *pro se* petition. The state moved to dismiss on the basis that the petition failed to state a claim for relief, and petitioner filed a written response to the state's arguments. Without holding a hearing, the court granted the state's motion and dismissed the petition with prejudice.

ORS 138.525, enacted in 1993 as part of Oregon's post-conviction relief statutory scheme, precludes an appeal from a "meritless petition," which is one that fails to state a claim for relief. ORS 138.525(3). The statute also requires that a court dismiss a petition without prejudice when it dismisses the petition as "meritless," unless a hearing was held. ORS 138.525(4). This case presents the issue of whether, and how, those provisions can be reconciled when a court dismisses a meritless petition with prejudice, but without first holding a hearing.



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522 SW Fifth Avenue, Suite 1125
Portland, OR 97204

As argued below, a petition is only "meritless" for purposes of ORS 138.525 if it satisfies two criteria: it was dismissed for failing to state a claim; and, if no hearing was held, it was dismissed without prejudice. If either of those criteria are lacking, the legislature did not intend to preclude appellate jurisdiction under ORS 138.525.

## Question Presented and Proposed Rule of Law

**Question Presented:**

Does ORS 138.525 preclude appellate jurisdiction, where the post-conviction court dismisses the petition for post-conviction relief with prejudice but without holding a hearing, as required by ORS 138.525(4)?

**Proposed Rule of Law:**

ORS 138.525 precludes appellate jurisdiction of a petition that has been dismissed as "meritless." In enacting ORS 138.525, the legislature intended to preclude the appellate review of a petition that (1) was dismissed for failing to state a claim, and (2) if no hearing was held, was dismissed without prejudice. If either of those criteria are not satisfied, then the legislature did not intend for ORS 138.525 to preclude appellate review of the dismissed petition for post-conviction relief.



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522 SW Fifth Avenue, Suite 1125
Portland, OR 97204

## Summary of Argument

ORS 138.525 provides that "a judgment dismissing a meritless petition is not appealable." ORS 138.525(3). The statute also sets forth two provisions describing traits of a "meritless petition." First, a meritless petition is one that "fails to state a claim upon which post-conviction relief may be granted." ORS 138.525(2). Second, a meritless petition that is dismissed "without a hearing" or where the petitioner "was not represented by counsel" is "without prejudice." ORS 138.525(4). Under this court's statutory interpretation methodology, ORS 138.525 should be construed to allow an appeal if a petition is dismissed with prejudice, but without holding a hearing.

This court has previously construed and applied ORS 138.525 in several cases. This court has held that a petition is "meritless" for purposes of ORS 138.525 if the trial court intended to dismiss the petition as meritless. Further, a petition is not meritless if the court dismissed it for a separate reason, such as failing to attach sufficient supporting documents or being successive or untimely.

The plain text of ORS 138.525 provides two criteria to determine whether a petition is meritless such that an appellate court lacks jurisdiction. First, a meritless petition fails to state a claim for relief. Second, a meritless petition is dismissed without prejudice if no hearing were held on the issues in the case.



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The context of ORS 138.525 includes the entire post-conviction relief statutory scheme. The scheme provides for the appointment of counsel, means to investigate post-conviction claims, and additional time for appointed counsel to file an amended petition. Because of the provisions that envision a thorough process for pursuing post-conviction claims after counsel has been appointed, it would be inconsistent with the scheme to allow for a post-conviction court to dismiss a petition with prejudice without first holding a hearing. It would also be inconsistent to preclude that decision from appellate review. Therefore, the context illustrates that an appellate court's jurisdiction should be limited only if the procedural protections of the post-conviction scheme have been followed, that is, that the petitioner has had the opportunity for counsel and an opportunity to make a record of his potential claims.

The legislative history regarding ORS 138.525 is minimal, but supports the proposition that the legislature intended for petitions to be dismissed without prejudice when the court does not hold a hearing. Accordingly, it would be inconsistent with that requirement to allow for violations of the statute to preclude appellate jurisdiction.

The text, context, and legislative history of ORS 138.525 illustrate that a meritless petition is one that is dismissed for failing to state a claim and that is, if



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522 SW Fifth Avenue, Suite 1125
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no hearing is held, dismissed without prejudice. Accordingly, if a court dismisses a petition with prejudice but without holding a hearing, even if the court indicates the petition is "meritless," it is not a "meritless petition" for purposes of ORS 138.525. In this case, because the court dismissed the petition with prejudice but without holding a hearing, ORS 138.525 does not preclude petitioner's appeal.

## Statement of Historical and Procedural Facts[1]

A Josephine County grand jury indicted petitioner with four counts of sexual abuse in the second degree (Counts 1, 3, 5, and 7), ORS 163.425, and four counts of prostitution (Counts 2, 4, 6, and 8), ORS 167.007. Ex 102 (superseding indictment). The indictment alleged crimes against two victims, F and K. Ex 102. Petitioner was not represented by counsel at the trial. App Br at ER-3. A jury found petitioner guilty of Counts 5 and 6, which involved the victim F, and the court dismissed the remaining counts. Ex 112 (judgment).

Petitioner unsuccessfully pursued a direct appeal. *State v. Dillard*, 233 Or App 510, 226 P3d 130, *rev den*, 348 Or 461 (2010).

[1] On review of a motion to dismiss, this court "assume[s] the truth of all well-pleaded facts alleged in the complaint" and gives petitioner "the benefit of all favorable inferences that may be drawn from those facts." *Bradbury v. Teacher Standards and Practices Comm.*, 328 Or 391, 393, 977 P2d 1153 (1999).



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Petitioner timely filed a *pro se* petition for post-conviction relief. In the petition, petitioner alleged that his request for court-appointed counsel was denied and the trial court denied him "resources" that caused petitioner's "*pro se* defense to be inadequate." App Br at ER-16-18. Among other claims, petitioner alleged that the state failed to disclose exculpatory evidence to which petitioner was entitled and that he was "actually innocent" of the charges against him. App Br at ER-5-7, -10-15, -24, -35.

The court appointed counsel to represent petitioner for the post-conviction proceedings.[2] Trial Court File (TCF) 103 (order appointing Cowan). Appointed counsel filed an amended petition for post-conviction relief. TCF 118. Appointed counsel subsequently moved to withdraw at petitioner's request. TCF 137. The court denied the motion. TCF 140. Petitioner filed *pro se* motions to strike the amended petition and replace court-appointed counsel. TCF 705, 715. Appointed counsel moved to withdraw and for the appointment of replacement counsel. TCF 718. The court granted counsel's motion and appointed replacement counsel. TCF 722 (order appointing Grefenson). Appointed counsel filed a second amended petition for post-conviction relief. TCF 742. At petitioner's request,

[2] Petitioner simultaneously sought post-conviction relief in a separate case. That case has already been appealed through Oregon courts. *Dillard v. Brown*, 272 Or App 181, 356 P3d 1171, *rev den*, 358 Or 248 (2015).



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appointed counsel moved to strike the second amended petition and proceed on the original *pro se* petition. TCF 782. The court granted the motion. TCF 786.

The first appointed counsel appeared at hearings held on July 9, 2012, and September 10, 2012. Tr 1, 4. The second appointed counsel appeared at hearings held on April 8, 2013, and June 10, 2013. Tr 5, 8. At all the hearings, the parties discussed scheduling issues. The record does not indicate that petitioner was present at any of the hearings.

On October 22, 2013, the state moved to dismiss the petition under ORCP 21(A)(8)[3], "on the grounds that petitioner fails to state ultimate facts sufficient to constitute post-conviction claims." TCF 787 (Motion to Dismiss Pro Se Petition for Post-Conviction Relief). The motion specifically argued that (1) "[p]etitioner makes no cognizable claims," (2) "[p]etitioner's complaints of prosecutorial misconduct fail to state a claim for post-conviction relief," (3) "[p]etitioner's complaints of trial court error fail to state a claim for post-conviction relief," (4) "[p]etitioner's complaints about appellate counsel do not state a claim for post-

[3] ORCP 21 A provides, in part,

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: * * * (8) failure to state ultimate facts sufficient to constitute a claim[.]"



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conviction relief," and (5) "[a]ctual innocence is not a claim for relief under Oregon law." TCF 787-89.

Petitioner responded to the defendant's motion on November 6, 2013. TCF 792 (Petitioner's Response to Defendant's Motion to Dismiss). In the response, petitioner disputed each of defendant's claims regarding the petition. TCF 794-802.

On December 9, 2013, the court wrote an opinion letter, which noted, "Neither party requested oral arguments in the two cases." TCF 804. The court agreed with the state's arguments, granted the state's motion to dismiss, and adopted the state's arguments "as the basis for ruling." TCF 804.

On January 3, 2014, the court issued an order that dismissed the *pro se* petition for post-conviction relief "with prejudice." TCF 805-06. The court also issued a judgment that indicated the petition for post-conviction relief was denied and the case was "dismissed with prejudice." TCF 807.

Petitioner appealed and assigned error to (1) the post-conviction trial court's dismissal of the petition on the basis that it failed to state ultimate facts sufficient to constitute post-conviction claims, and (2) the court's dismissal of the petition with prejudice without holding a hearing.



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In a written opinion, the Court of Appeals concluded that the court lacked jurisdiction over petitioner's appeal:

> "In determining whether we have jurisdiction of this appeal, we reconcile ORS 138.525(3), which expressly provides that a judgment dismissing a post-conviction petition as meritless is not appealable, and the Supreme Court's decision in *Ware*[ *v. Hall*, 342 Or 444, 154 P3d 118 (2007)], which outlines the strict statutory requirements governing a post-conviction court's dismissal of a meritless petition under ORS 138.525(4). We note that, in *Ware*, the Supreme Court focused on the statutory requirements of ORS 138.525(4) in the context of determining whether ORS 138.525 authorized a post-conviction court to depart from the procedures in ORS 138.620 and ORS 138.550 and dismiss a successive petition without a hearing if the petition was meritless. 342 Or at 451-52. Ultimately, having concluded that the post-conviction court had such authority, the court remanded the case to the post-conviction court 'to determine whether to dismiss without prejudice under ORS 138.525 or to hold a hearing on petitioner's claim under ORS 138.620.' *Id.* at 453. Thus, the court in *Ware* did not have occasion to address ORS 138.525(3). However, in *Young v. Hill*, 347 Or 165, 173, 218 P3d 125 (2009), the Supreme Court addressed the effect of that statute, reasoning that ORS 138.525(3) 'is unambiguous: petitions that fail to state a claim are meritless, and a judgment dismissing a petition as meritless is not appealable.'
>
> "Here, the post-conviction court's order did not expressly state that it was dismissing the petition as meritless; however, it need not do so explicitly. In *Young*, the court stated:
>
> > "'Neither ORS 138.525 nor any other source of law requires the judgment expressly to designate a petition as meritless. Nor must the judgment expressly recite that the dismissal is for failure to state a claim. The only question is whether, in fact, that is the ground on which the trial court dismissed the petition.'



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> "347 Or at 171. In this case, the allegations in the motion to dismiss and the trial court's judgment indicate that the trial court indeed dismissed the petition for failure to state a claim.
>
> "Accordingly, we dismiss petitioner's appeal for lack of jurisdiction."

*Dillard v. Premo*, 276 Or App 65, 66-67, 366 P3d 797, *rev allowed*, 360 Or 400, __ P3d __ (2016).

## Argument

This case presents an issue of statutory interpretation regarding the interplay of two provisions of ORS 138.525. One provision appears to preclude the appeal of any "meritless petition" for post-conviction relief. A separate provision appears to require that a "meritless petition" be dismissed without prejudice if the petitioner did not have counsel or a hearing.

In this case, the court dismissed the "meritless petition" with prejudice, without first holding a hearing on the state's motion to dismiss. As argued below, in those circumstances the petition should not be considered "meritless" for purposes of ORS 138.525, and petitioner should be allowed to appeal the dismissal.

### I. The text, context, and legislative history of ORS 138.525 indicate that a petition is "meritless" for purposes of the statute (1) if it is dismissed for failing to state a claim, and (2) if no hearing is held, it is dismissed without prejudice.

ORS 138.525 provides:



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> "(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."

The statute was enacted in 1993 as part of a series of amendments to Oregon's Post-Conviction Hearing Act (PCHA). Or Laws 1993, ch 517, §3.

To construe a statute, this court ascertains the legislature's intent by viewing the text of the statute in context, and giving any legislative history the weight that this court deems appropriate. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). If the legislature's intent remains unclear, this court "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.* at 172.

**A. The plain text**

The text of ORS 138.525 provides that a "meritless petition" is "one that, when liberally construed, fails to state a claim upon which post-conviction relief may be granted." ORS 138.525(2).



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The statute also sets forth a key trait of a meritless petition: a dismissal of such a petition is "without prejudice" if the dismissal was "without a hearing and the petitioner was not represented by counsel." ORS 138.525(4).

The plain text of ORS 138.525 thus points to two criteria to determine whether a petition is meritless. First, whether the petition was dismissed for failure to state a claim. Second, if no hearing was held, whether the petition was dismissed without prejudice. The plain text suggests that if either of those two traits is not satisfied, the petition is not "meritless," and does not preclude appellate jurisdiction under ORS 138.525(3).

**B. Context**

"A statute's context includes other provisions of the same or related statutes, the pre-existing statutory framework within which the statute was enacted, and prior opinions of this court interpreting the relevant statutory wording." *Ogle v. Nooth*, 355 Or 570, 584, 330 P3d 572 (2014). In this case, the proper context includes several of this court's opinions construing ORS 138.525, as well as the PCHA statutory scheme as a whole.[4]

[4] The wording at issue in ORS 138.525(1) and (2) was "drawn from the habeas statutes, ORS 34.370(6) and (7), which similarly address 'meritless petitions.'" *Young v. Hill*, 347 Or 165, 170-71, 218 P3d 125 (2009). However, because the habeas corpus scheme does not include similar analogues to ORS 138.525(3) and (4), the habeas scheme is not helpful context to resolve the issue in this case.



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### i. Prior opinions

#### a. *Ware v. Hall*

In *Ware v. Hall*, 342 Or 444, 154 P3d 118 (2007), this court addressed the subsection (4) requirement that a dismissal be without prejudice in certain circumstances. The post-conviction trial court dismissed the petitioner's successive petition with prejudice the same day it was filed, without prior notice to the petitioner. *Id.* at 446-47.

This court construed ORS 138.525 in light of the post-conviction relief statutory scheme and noted that "[s]ubsection (4) necessarily assumes that courts may dismiss a meritless petition without following each of the procedural steps set out in the 1959 act," and therefore no hearing was required under ORS 138.550(3). *Id.* at 452. The state argued that a court could dismiss the petition with prejudice if the petitioner had counsel but no hearing, but this court rejected the argument in light of the requirement in ORS 138.620[5] that a petitioner have a hearing and counsel before dismissing with prejudice:

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[5] ORS 138.620(1) provides, in relevant part,

> "After the response of the defendant to the petition, the court shall proceed to a hearing on the issues raised. If the defendant's response is by demurrer or motion raising solely issues of law, the circuit court need not order that petitioner be present at such hearing, as long as petitioner is represented at the hearing by counsel. At the hearing upon issues raised by any other response, the circuit court shall order that petitioner be present."



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> "ORS 138.525(4) assumes that a court may dismiss a meritless petition without counsel and without a hearing but only if the dismissal is without prejudice. Nothing in the text or context of ORS 138.525(4) suggests that the legislature intended to craft a broader exception to the requirements in ORS 138.620 than ORS 138.525 provides; that is, nothing suggests that a court may dismiss a meritless post-conviction petition with prejudice if the petitioner has counsel but not some kind of a hearing. We cannot add an exception to the requirements of ORS 138.620 that the legislature omitted."

*Id.* at 452-53. In light of the citation to ORS 138.620, "some kind of a hearing" most likely means a "hearing on the issues raised" in the defendant's response to the petitioner's petition.

*Ware* has significance to this case for two reasons. First, under this court's construction of ORS 138.525(4), the court in the present case violated the statute by dismissing with prejudice, without first providing a hearing. Second, in construing the statute, this court looked to the post-conviction statutory scheme as a whole as the relevant context, and construed the statute in light of the purposes of the post-conviction scheme.

**b. *Young v. Hill***

Two years later, in *Young v. Hill*, 347 Or 165, 218 P3d 125 (2009), this court addressed the subsection (3) provision that meritless judgments are not appealable. In *Young*, the post-conviction trial court dismissed a petition for failing to state a claim, but did not cite ORS 138.525 in its judgment. The state's only argument



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had been that the petition failed to state a claim, and the trial court indicated it was dismissing the petition for the reasons argued by the state. *Id.* at 171-72.

This court noted that the judgment did not have to "expressly recite that the dismissal is for failure to state a claim." *Id.* at 171. Instead, the "only question is whether, in fact, that is the ground on which the trial court dismissed the petition." *Id.* In the circumstances of *Young*, this court held that "the dismissal of the petition clearly was for failure to state a claim." *Id.* at 172. This court concluded the judgment was not appealable:

> "The trial court's oral ruling and judgment were unambiguous: the trial court granted the state's motion to dismiss for failure to state a claim. In turn, the statute is unambiguous: petitions that fail to state a claim are meritless, and a judgment dismissing a petition as meritless is not appealable. ORS 138.525(2) and (3)."

*Id.* at 173-74. This court held that it did not matter whether the petition actually was meritless, but only whether that was the reason the court dismissed it. *Id.*

This court recognized the "unqualified" legislative policy behind ORS 138.525: "no appeal lies from any judgment dismissing a petition for post-conviction relief for failure to state a claim." *Id.* at 174 (footnote omitted). Importantly, this court noted that it had consulted the legislative history and concluded that "the legislature meant exactly what it said – that a meritless post-conviction petition was one that failed to state a claim, and that there would be no



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right to appeal the dismissal of such a petition, *when the petitioner was represented by counsel*." *Id.* at 174 n 8 (emphasis added).

In other words, the limitation on appeals in subsection (3) was meant to be read in conjunction with the rest of the statute, such as the requirement in subsection (4) that an attorney be provided. That is, the non-appealability provision only applied if the remainder of the statute had been complied with, *e.g.*, counsel had been appointed to represent the petitioner.

*Young* demonstrates that the analysis for whether a trial court dismissed a meritless petition turns on the trial court's intent, as opposed to whether the petition actually was meritless. That analysis, in turn, requires looking at the whole record, not just whether specific wording was used in the judgment.

**c. *Delzell v. Coursey***

The petitioner in *Delzell* appealed the dismissal of his petition for post-conviction relief and argued that the court erred in dismissing his petition before appointing counsel. *Delzell v. Coursey*, 258 Or App 674, 675, 310 P3d 1202 (2013) (*per curiam*). The Court of Appeals dismissed the appeal, relying on ORS 138.525. *Id.* The court concluded that the petition was meritless, and therefore not appealable, because "the court checked a box on the judgment that provided" it was dismissed as meritless. *Id.*



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The petitioner sought review with this court, and in an order this court allowed review and vacated and remanded for further proceedings:

> "The trial court's general judgment of dismissal is ambiguous regarding the reason or reasons why the court dismissed. It is not clear whether the trial court dismissed the petition because it was 'time-barred and/or successive,' or because it was meritless (failed to state a claim), or for both those reasons. The reasons for the dismissal may affect whether the judgment is appealable, see ORS 138.525(3), and whether the trial court could dismiss with prejudice, see ORS 138.525(4). Accordingly, the petition for review is allowed. The decision of the Court of Appeals dismissing the appeal for lack of jurisdiction is vacated, and the general judgment of the trial court is vacated. The matter is remanded to the trial court for that court to clarify its ruling by appropriate order or judgment."

*Delzell v. Coursey*, 354 Or 597, 318 P3d 749 (2013).

This court's order in *Delzell* illustrates two points. First, a judgment can state that it is being dismissed as meritless, and that still might not be enough to qualify as meritless under ORS 138.525 such that an appellate court lacks jurisdiction. Second, it underscores that the trial court's intent in dismissing is important to the analysis. In other words, the order in *Delzell* is premised on two interpretations of ORS 138.525: (1) dismissing a petition as untimely or successive does not count as meritless, and (2) a trial court can label something as meritless, even when it is not "meritless" for purposes of ORS 138.525.

**d. *Ogle v. Nooth***



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In *Ogle v. Nooth*, 355 Or 570, this court construed the "attachment" provision of the PCHA, codified at ORS 138.580. The statute was amended in 1993 as part of the same bill that created the "meritless petition" provisions of ORS 138.525. *Id.* at 588. This court noted that, "in contrast to the sanction provided in ORS 138.525 for 'meritless' petitions, the PCHA does not expressly provide for any particular sanction or remedy for failure to meet the attachment requirement in ORS 138.580." *Id.* at 577. *Ogle* illustrates, like *Delzell*, that a dismissal for failure to satisfy the attachment provision is not a dismissal for failure to state a claim.

**e. Summary**

This court's cases involving ORS 138.525 illustrate that the statute does not allow an appeal from a judgment that the trial court intended to dismiss as meritless, that is, for failing to state a claim. A reviewing court can look to the record as a whole to determine the trial court's intent. If the court dismissed the case for a reason other than failure to state a claim, such as it was untimely or successive or failed to satisfy the attachment requirement, that is not a bar to an appeal. A court can also explicitly state that an appeal is dismissed as meritless, and that is not always sufficient to fall within ORS 138.525.

**ii. PCHA**

ORS 138.525 is part of the PCHA, and should be viewed in light of the purposes of the post-conviction statutory scheme as a whole. *See Verduzco v. State*, 357 Or 533, 565, 355 P3d 902 (2015) (noting that "the texts of ORS 138.550(2) and (3) express a complete thought").

The PCHA was created to provide a means of presenting federal issues to Oregon state courts. *Young v. Ragen*, 337 US 235, 239, 69 S Ct 1073, 93 L Ed 1333 (1949) (holding that the United States Constitution requires states to provide people convicted of crimes "some clearly defined method by which they may raise claims of denial of federal rights"); Jack G. Collins and Carl R. Neil, *The Oregon Postconviction-Hearing Act*, 39 Or L Rev 337, 337 n 2 (1960) (same). "The PCHA was adopted in 1959 to provide a detailed, unitary procedure to persons seeking post-conviction relief." *Bartz v. State*, 314 Or 353, 361-62, 839 P2d 217 (1992).

The post-conviction statutory scheme allows for, after the filing of a petition, the appointment of counsel and additional time to investigate. ORS 138.590(1), (5). If a petition does not state a claim for relief, appointed counsel "shall be permitted as of right" to file an amended petition. ORS 138.590(5). A petitioner can issue subpoenas to gather evidence. ORCP 55; *Young*, 347 Or at 171 ("unless otherwise provided for in the post-conviction statutes, Oregon Rules of Civil



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Procedure apply in post-conviction proceedings"). In other words, the post-conviction scheme envisions a process whereby a petitioner can obtain counsel, investigate his case, and amend the petition that has already been filed. In light of the procedural protections for counsel, investigation, and amended pleadings, it would be inconsistent with the scheme to allow a trial court to have plenary authority to shut the process off permanently – with prejudice, with no appeal – before any of that occurs. Thus, the context of the PCHA suggests that ORS 138.525 should only limit appellate jurisdiction when a petitioner can re-file for post-conviction relief (the initial petition was dismissed without prejudice) or the petitioner had the opportunity to make a record of his arguments before the trial court (the petitioner was provided a hearing and counsel).

**C. Legislative history**

As noted above, ORS 138.525 was enacted in 1993 as part of a bill that amended separate parts of the post-conviction relief statutory scheme. In 1989, the legislature had "eliminated the provision stating that no statute of limitations applied and inserted a statute of limitations of 120 days." *Ogle*, 355 Or at 588 (citing Or Laws 1989, ch 1053, § 18). The 1993 legislature changed three aspects of the PCR scheme. It

> "(1) lengthened the statute of limitations from 120 days to two years; (2) gave post-conviction courts authority to dismiss 'meritless' post-conviction petitions; and (3) eliminated the exception to the



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> attachment requirement that allowed petitioners to explain why they were unable to attach materials to support their claims."

*Id.* (citing Or Law 1993, ch 517, §§ 1, 3, 4).

The non-appealability provision of ORS 138.525 was offered as an amendment by the Oregon Criminal Defense Lawyers Association (OCDLA). Exhibit B, House Judiciary Subcommittee on Crime and Corrections, HB 2352, April 7, 1993 (proposed amendments). In testimony before the House Subcommittee on Crime and Corrections that same day, Ross Shepard on behalf of OCDLA said that the wording was taken from the habeas corpus statutory scheme to allow for a dismissal of a meritless petition at any time, and that it was the intention that if a court summarily dismisses a petition before counsel is appointed, the dismissal would be without prejudice. Tape Recording, House Subcommittee on Crime and Corrections, HB 2352, April 7, 1993, Tape 70, Side A (statement of Ross Shepard). Subsection (4) was added to clarify the intent of the legislature that a dismissal would be without prejudice if no attorney had been appointed and there had been no hearing. Tape Recording, House Subcommittee on Crime and Corrections, HB 2352, April 7, 1993, Tape 71, Side A (statements of Holly Robinson, Committee Counsel; Shepard; and Rep. Mannix).

The legislative history indicates that even though the bill prohibited appeals of meritless petitions, the legislature intended to allow for a possible subsequent



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case that might state a claim for relief. That is, the non-appealability provision was part and parcel of a statutory scheme that required petitions to be dismissed without prejudice if no hearing were held. As noted above, this court in *Young* found the provision of counsel significant: "The legislative history reveals the legislature meant exactly what it said – that a meritless post-conviction petition was one that failed to state a claim, and that there would be no right to appeal the dismissal of such a petition, *when the petitioner was represented by counsel*." 347 Or at 174 n 8 (emphasis added). In other words, subsections (3) and (4) of ORS 138.525 express a "complete thought" regarding the circumstances in which a trial court's dismissal of a meritless petition precludes appellate review. The complete thought of the legislature was that no appeal would lie from a meritless petition, so long as (1) the petition was dismissed without prejudice, or (2) the petitioner was provided counsel and a hearing.

**D. Maxims of construction**

If the meaning is still unclear after considering text, context, and legislative history, this court can resort to maxims of construction. *Gaines*, 346 Or at 164-65. Several maxims suggest that an appeal should lie from a dismissed petition, if the dismissal violates ORS 138.525(4).

To preclude appellate review of a petition dismissed with prejudice, without a hearing and counsel, would lead to absurd results. *See McKean-Coffman v.*



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*Employment Div.*, 312 Or 543, 549, 824 P2d 410 (1992) ("in construing a statute, courts must refuse to give literal application to language when to do so would produce an absurd result"). Similarly, ORS 138.525 should be construed to give effect to all of its provisions. *See* ORS 174.010 ("[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."). If trial courts could dismiss post-conviction cases as meritless with prejudice, without holding a hearing, then the legislature's enactment of ORS 138.525(4) would be rendered advisory. Courts could – as the court did in this case – routinely violate the law and enter an unlawful judgment, but the case would be immune from appellate review. Those maxims counsel in favor of an interpretation of ORS 138.525 that gives effect to all of its provisions.

If the statutory scheme were construed to preclude appellate review of petitioner's claims based on seemingly arbitrary decisions by a trial court, the scheme would also violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Wolff v. McDonnell*, 418 US 539, 558, 41 L Ed 2d 935, 94 S Ct 2963 ("[T]he touchstone of due process is protection of the individual against arbitrary action of government[.]"); *United States v. Jin Fuey Moy*, 241 US 394, 401, 36 S Ct 658, 60 L Ed 1061 (1916) ("A statute must be



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Portland, OR 97204

construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.").

**E. Petitioner's proposed construction**

ORS 138.525 precludes appellate jurisdiction if two criteria are met: first, the petition was dismissed for failure to state a claim; and second, the petition was dismissed without prejudice if the dismissal was without a hearing and counsel. For instance, if the petition is dismissed for a reason other than that it failed to state a claim – such as failing to satisfy the attachment requirement or being successive or untimely – then ORS 138.525 does not preclude appellate review. Similarly, if the petition is dismissed with prejudice, but without a hearing and counsel, then ORS 138.525 does not preclude appellate review. The legislature intended for subsection (3) of ORS 138.525 only to apply to a judgment that was dismissed consistently with the procedural protections in subsection (4).

## II. In this case, the petition is appealable because the post-conviction court did not comply with ORS 138.525(4) when it dismissed the petition.

In this case, the post-conviction trial court dismissed the *pro se* petition after granting the state's motion to dismiss, which had relied on ORCP 21(A)(8). Though petitioner had counsel at the time, no hearing occurred regarding the state's motion.



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The only reasons cited by the state to dismiss the petition relied on the argument that petitioner failed to state a claim for relief. Thus, the first part of petitioner's proposed test is satisfied: the trial court's intent was to dismiss the petition for failure to state a claim. However, the trial court violated ORS 138.525(4) by dismissing the case with prejudice without first holding a hearing on the state's motion to dismiss. This court held in *Ware* that ORS 138.525(4) requires both counsel *and* a hearing on the issues before a court can dismiss a case with prejudice. 342 Or at 452-53. In its letter opinion, the trial court in this case noted that neither party had requested oral arguments. However, under ORS 138.525(4), the only way to dismiss a petition with prejudice is to hold a hearing. The plain text of the statute requires a hearing, not just the possibility of a hearing. Therefore, the trial court's observation is beside the point and does not bring the court's actions within the requirements of ORS 138.525(4).

The court's dismissal of the petition with prejudice violated ORS 138.525(4), and therefore it should not be considered the dismissal of a "meritless petition" for purposes of ORS 138.525. Accordingly, ORS 138.525(3) does not preclude appellate review in this case. This court should reverse the Court of Appeals and remand for consideration of petitioner's arguments on appeal regarding whether the *pro se* petition stated valid claims for post-conviction relief.



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522 SW Fifth Avenue, Suite 1125
Portland, OR 97204

## CONCLUSION

For the foregoing reasons, this court should reverse the decision of the Court of Appeals and remand to the Court of Appeals for further proceedings regarding petitioner's petition for post-conviction relief.

DATED November 23, 2016.

Respectfully Submitted,

/s/ Jed Peterson

Jed Peterson
OSB No. 084425
O'Connor Weber LLC
522 SW Fifth Avenue, Suite 1125
Portland, OR 97204
(503) 226-0923
jed@oconnorweber.com
Attorney for Petitioner-Appellant
Carvel Gordon Dillard

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

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) that the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,882 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point font for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).



O'Connor Weber LLC
522 SW Fifth Avenue, Suite 1125
Portland, OR 97204

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I certify that I directed the original Brief on the Merits of Petitioner on Review to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Brief on the Merits of Petitioner on Review will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Erin Galli, #952696, attorney for Defendant-Respondent.

DATED November 23, 2016.

Respectfully Submitted,

/s/ Jed Peterson

Jed Peterson
OSB No. 084425
O'Connor Weber LLC
522 SW Fifth Avenue, Suite 1125
Portland, OR 97204
(503) 226-0923
jed@oconnorweber.com
Attorney for Petitioner-Appellant
Carvel Gordon Dillard