

# Appendix-C (pg 1 of 2)

## IN THE COURT OF APPEALS OF THE STATE OF OREGON

SANTOS CUEVAS,  
Petitioner-Appellant,

v.

BRANDON KELLY, Superintendent, Oregon State Penitentiary,  
Defendant-Respondent.

Umatilla County Circuit Court No. CV160512

Court of Appeals No. A164833

### **ORDER DETERMINING JURISDICTION; ORDER OF DISMISSAL**

Petitioner moves to determine whether the court lacks jurisdiction of this appeal on the ground that the judgment is not appealable under ORS 138.525(3) because the trial court dismissed petitioner's petition for post-conviction relief for failure to state a claim.

The material facts are these: Petitioner filed a *pro se* petition for post-conviction relief. The PCR court appointed counsel pursuant to ORS 138.590(4), and counsel filed an affidavit pursuant to ORS 138.590(5) stating that the original petition could not be construed to state a ground for relief and could not be amended to do so. Petitioner then filed notice of dissatisfaction with court-appointed counsel and the PCR court held a *Church* hearing.<sup>1</sup> Following the hearing, the trial court gave petitioner's attorney 30 days to file either an amended petition or an updated affidavit under ORS 138.590(5). The PCR judge further stated: "If nothing is filed by the deadline, the case will be dismissed with prejudice due to insufficiency." Petitioner filed a second *Church* notice, and counsel filed an updated affidavit stating that his analysis of the original petition had not changed. The trial court then issued an order and, thereafter, a judgment, dismissing the case "pursuant to ORS 138.590(5)."

Petitioner argues that dismissal pursuant to ORS 138.590(5) does not constitute dismissal as meritless because a court cannot rely solely on court-appointed counsel's representations when making a decision on the merits. Petitioner further claims that his argument that the court did not examine the merits of the case is augmented by his contention that court-appointed counsel incorrectly interpreted ORS 138.550(1).

Respondent initially conceded that the basis for the circuit court's dismissal was unclear, and requested that the court defer a determination of whether the judgment is

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<sup>1</sup> Refers to a hearing consistent with the Supreme Court's decision in *Church v. Gladden*, 244 Or 308, 417 P2d 993 (1966).

### **ORDER DETERMINING JURISDICTION; ORDER OF DISMISSAL**

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Page 1 of 2

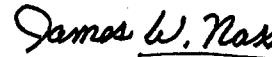
appealable until after the trial court record, including the transcript, was filed. Thereafter, the transcript was filed, which included the trial judge's comment quoted above.

ORS 138.590(5) states that the affidavit submitted by court-appointed counsel:

*[D]oes not constitute a ground for denying the petition *prior to a hearing on its sufficiency*, but the circuit court may consider the affidavit in *deciding upon the sufficiency* of the petition at the hearing.<sup>2</sup>*

Given that ORS 138.590(5) describes an affidavit submitted by court-appointed counsel stating counsel's belief that the original petition cannot be construed to state a ground for relief and cannot be amended to state one, it is a reasonable interpretation of the trial judge's determination that the petition was insufficient under ORS 138.590(5) in that the petition failed to state a claim on which relief could be granted. There is sufficient evidence in the record to determine that the PCR court dismissed the action for lack of merit pursuant to ORS 138.525(3). Therefore, the court determines that it lacks jurisdiction of the appeal and, on its own motion, dismisses the appeal on that ground.

Appeal dismissed.

  
07/13/2017  
7:41 AM  
JAMES W. NASS  
APPELLATE COMMISSIONER

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondent      Costs: No costs allowed

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c: Jason L Weber  
Erin Galli  
Jeannine K Manny, Transcriber

ej

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<sup>2</sup> (emphasis added).

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**ORDER DETERMINING JURISDICTION; ORDER OF DISMISSAL**

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Page 2 of 2

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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v.

BRANDON KELLY, Superintendent, Oregon State Penitentiary,  
Defendant-Respondent.

Umatilla County Circuit Court No. CV160512

Court of Appeals No. A164833

**ORDER DENYING RECONSIDERATION**

Appellant petitions for reconsideration of the Appellate Commissioner's order dated July 13, 2017, determining that the judgment from which this appeal is taken is not appealable under ORS 138.525(3) and dismissing the appeal on that basis. The petition is denied.<sup>1</sup>

 12/06/2017  
2:09 PM  
ERIKA L. HADLOCK  
CHIEF JUDGE, COURT OF APPEALS

c: Jason L Weber  
Erin Galli

ej

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<sup>1</sup> The Appellate Commissioner's order contains this statement: "The trial court then issued an order and, thereafter, a judgment dismissing the case 'pursuant to ORS 138.590(5).'" The trial court's *order of dismissal* contains that wording, but the judgment does not. That does not affect the court's ultimate conclusion that the trial court dismissed the action based on the trial court's determination that the petition was "insufficient"; that is, the petition failed to state a claim for relief. The court expresses no opinion regarding whether the trial judge correctly determined that the petition did not state a claim for relief.

**ORDER DENYING RECONSIDERATION**

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# Appendix-B

## IN THE SUPREME COURT OF THE STATE OF OREGON

SANTOS CUEVAS,  
Petitioner-Appellant,  
Petitioner on Review,

v.

BRANDON KELLY, Superintendent, Oregon State Penitentiary,  
Defendant-Respondent,  
Respondent on Review.

Court of Appeals  
A164833

S065669

### ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and the supplemental *pro se* petition for review and orders that they both be denied.

*Thom A. Balmer*

THOMAS A. BALMER  
CHIEF JUSTICE, SUPREME COURT  
4/19/2018 1:35 PM

c: Jason L Weber  
Erin Galli

lk

### ORDER DENYING REVIEW

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Page 1 of 1

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