IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. JAMES LEWIS GLASPEY, Defendant-Appellant, Petitioner on Review.	Deschutes County Circuit Court No. 00FE0217AB Appellate Court No. A112752 50105 Supreme Court No. S50105

RESPONDENT'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Deschutes County
Honorable ALTA J. BRADY, Judge

Affirmed En Banc: October 9, 2002
Author of Opinion: Brewer, J.
Before: Deits, C.J.
Edmonds, Landau, Haselton, Armstrong, Linder,
Wollheim, Kistler and Brewer, Judges

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RESPONDENT'S BRIEF ON THE MERITS

INTRODUCTION

A. Question presented.

When defendant pleaded no contest to two counts of felony assault in the fourth degree based upon a domestic assault witnessed by two children in the home, was it reversible error for the trial court to enter two convictions[1] and sentence defendant to concurrent terms of probation?

If the trial court properly entered two convictions but erroneously sentenced defendant to concurrent terms of probation and defendant has already fully served those terms, is the case moot?

B. Proposed rule of law.

Defendant's plea of no contest to two counts of fourth degree assault authorized the entry of two convictions. Moreover, each of the two children exposed to the assault is a victim under ORS 161.067(2) for purposes of determining that each count to which defendant pleaded guilty was a separately punishable offense.

When the sole question properly presented for review to this court is whether the trial court may sentence defendant to two concurrent terms of probation for two convictions of ORS 163.160(3) and defendant has fully served the concurrent term, the case is moot.

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[1] As defendant notes, the court exercised its discretion to reduce the felony convictions to misdemeanors under ORS 161.705(1).

C. Factual background.

The indictment charged defendant with two counts of felony assault in the fourth degree, in violation of ORS 163.160(3) based upon a single incident in which defendant assaulted his wife. (Indictment). Fourth degree assault is normally a Class A misdemeanor, ORS 163.160(2). However, if a minor child in the home witnesses the assault, it is a Class C felony. ORS 163.160(3)(c).

The first count charged that the wife's minor child, , witnessed the assault and the second count alleged that , the wife's other minor child, witnessed the assault. Defendant pleaded no contest to each charge and the court accepted his pleas and entered judgments of conviction on each count. At sentencing, the court exercised its discretion under ORS 161.705(1), reduced the felony convictions to misdemeanors, and sentenced defendant to two concurrent 18-month terms of probation.

ARGUMENT

A. Introduction

The trial court properly entered two convictions, one for each count of assault to which defendant pled no contest. Defendant preserved no claim as to the court's authority to enter two convictions; his only preserved issue is the claim of error in imposing separate sentences for the convictions.

No justiciable controversy is presented by this case in its current posture because defendant has fully served the concurrent terms of probation so the only preserved issue – the authority of the court to enter separate punishments – is moot.

The state moved to dismiss the case on that basis prior to briefing and renews the point now in its brief because if the case is moot, this court has no jurisdiction.

The only portion of ORS 161.067 that is involved in this case is subsection 2, the subsection that declares that there are as many separately punishable offenses as there are victims. The plain language of ORS 161.067(2) reveals no ambiguity and the plain meaning of the term "victim" as used in that section includes the children who witness a domestic assault. Nothing in the text, context or enactment history of ORS 161.067(2) reveals legislative intent to exclude children exposed to domestic assaults from the category of "victim."

When the legislature enacted ORS 163.160, making it a Class C felony to commit fourth degree assault in the presence of certain children, it did not intend to narrow the plain meaning of "victim" as used in ORS 161.067(2). Indeed, the purpose of ORS 163.160 was to recognize the harm to children from witnessing domestic assaults[2]. The use of the term "victim" in ORS 163.160 to refer to the person directly assaulted and the term "child" to refer to the person witnessing the assault does not dictate the result defendant seeks. Both persons are victims of the crime of assault. If a defendant were convicted of one count of assault four naming

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[2] Defendant argues the legislature was protecting children from the "risk" of harm rather than from a completed harm, so that children covered by ORS 163.160 are no more "victims" than bystanders to an act of reckless driving. (Br on Mer 13). That argument misses the point. The legislature, as a matter of public policy, has deemed a child who is in the "immediate presence of" or who has "witnessed" the assault to have suffered harm. ORS 163.160(4), for example, defines witnessing of the assault for purposes of this statute as "seen or directly perceived in any other manner by the child." Thus, a child who hears the screams of a parent through a bedroom wall may not be at risk of direct physical injury, but has been subjected to a psychological harm.

the person directly assaulted as the victim and one count of assault four naming the child-witness as the victim, the first count would merge into the second count as a true lesser-included crime. In the present case, however, defendant pleaded no contest to two counts involving two different child victims and was not charged with a count naming the wife as a victim. Thus, the entry of two convictions and imposition of two sentences was authorized.

B. Defendant preserved only the question of separate sentences, not the entry of separate convictions.

The state argued in the Court of Appeals that defendant did not preserve any claim of error predicated on the entry of separate convictions; his only argument in the trial court was that his convictions "merged for sentencing purposes." *State v. Glaspey,* 184 Or App 170, 172-73, 55 P3d 562 (2002). The Court of Appeals agreed with the state that defendant failed to preserve any claim that he could be convicted of only one offense, but noted that it could not properly analyze the claim that *was* preserved – the potential for multiple sentences in these circumstances – unless it first decided that the entry of multiple convictions was proper. *Id.*

On review to this court, defendant again repeats his unpreserved challenge to the entry of more than one conviction. (Br on Merits 11-12). Because that issue was not preserved, this court should decline to reach it. *State v. Farmer,* 317 Or 220, 856 P2d 623 (1993) (when claim not made in trial court but raised in court of appeals, Supreme Court will not review it unless it qualifies as plain error, even if court of appeals did so). Moreover, as in *State v. Barnum,* 333 Or 297, 301, 39 P3d 178 (2002), defendant here did not challenge the validity of the indictment charging him

with two counts of fourth degree assault, so regardless of whether those two charges could be separately punishable, the entry of the multiple convictions was proper. *See also State v. Barrett,* 331 Or 27, 36-37, 10 P3d 901 (2000) (("If the trial court were to enter a conviction on only one count [of aggravated murder], and dismiss the other * * *, it always would be possible that an appeal would result in a reversal, for insufficient evidence, of the count that was selected to serve as the basis for conviction. With the other [count] dismissed, defendant would be able to argue that he was entitled to a judgment of acquittal on the [remaining charge]."). Therefore, in the posture of this case, the propriety of entering two convictions is not properly before this court.

C. The trial court correctly entered two convictions, defendant's claim to the contrary is unpreserved, and the remainder of the case is moot.

Assuming this court agrees that the trial court correctly entered two convictions, the appeal should be dismissed as moot. The state raised this issue in a motion to dismiss the appeal and that motion was denied. Because mootness necessarily implicates the court's jurisdiction, the state raises it again at this time pursuant to ORAP 7.15(3) (permitting resubmission of motion without leave of the court if basis for motion is a challenge to the court's jurisdiction).

Two concurrent terms of probation commenced upon entry of the judgment on November 20, 2000, and at this point, the 18-month period of probation on each count has expired. Thus, even if defendant were correct that the court erred in imposing separate sentences for each count, this court can offer no practical relief and the case is moot. *See Brumnett v. PSRB,* 315 Or 402, 405, 848 P2d 1194 (1993) ("[one]

requirement for a justiciable controversy is that the court's decision in the matter will have some practical effect on the rights of the parties to the controversy.").

Because the trial court correctly entered two judgments of conviction, even if the court should have imposed sentence on only one of the convictions, defendant was not prejudiced in any way this court can now remedy. Defendant received misdemeanor treatment on both convictions and the court imposed *concurrent terms of probation.* Thus, even if defendant prevailed on his claim of error based on the imposition of punishment for both offenses, this court can offer no practical relief by vacating one sentence.

D. The proper interpretation of ORS 161.067(2) leads to the result reached by the Court of Appeals.

The proper focus for the inquiry in this case must be on ORS 161.067, the statute that determines how many separately punishable offenses exist for each episode of criminal conduct. ORS 161.067 has three subparts. Subsection (1) directs separate convictions when the same conduct violates two or more statutory provisions, as long as each requires proof of a different statutory element. As in *State v. Crotsley*, 308 Or 272, 779 P2d 600 (1989), a single sexual act can support separate first-degree and third-degree rape convictions because these crimes have separate elements and are directed at preventing different types of harm. That subsection is not at issue in this case. Subsection (3) permits separate convictions for repeated violations of the same statutory provision against the same victim, but only when each violation is separated by a pause that affords an opportunity to renounce further criminal intent. Neither subsection (1) nor subsection (3) is at issue here.

Subsection (2), the section that is critical to the present case, directs imposition of separate convictions when the same conduct or criminal episode violates only one statutory provision but involves more than one victim. Subsection (2) provides in pertinent part:

> (2) When the same conduct or criminal episode, though violating only one statutory provision involves two or more victims, there are as many separately punishable offenses as there are victims.[3]

Defendant focuses upon the wrong statute in his analysis. Defendant seeks to escape the provisions of ORS 161.067(2) by arguing that the children who witnessed him assault his wife were not "victims" as that term is used in ORS 161.067(2). He argues that the assault had only one "victim" – the wife – and therefore, he committed only one punishable offense. To reach this conclusion, defendant purports to apply the template announced in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P2d 1143 (1993), but focuses only upon the language of ORS 163.160, the statute defining the substantive criminal offense itself. He ignores ORS 161.067(2), the statute that speaks directly to the court's authority to impose multiple punishments when a crime has more than one victim. The primary question is whether the children are "victims" within the provisions of ORS 161.067(2) that authorizes separately punishable offenses when the same conduct "involves two or more victims." Because these children are victims under the plain meaning of the term, the only statutory interpretation question presented by ORS 163.160 is the subsidiary question of

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[3] The remainder of subsection (2) pertains to certain property crimes where there may be multiple victims due to joint interests in the property. Only the portion of subsection (2) quoted above in the text is at issue in this case.

whether the legislature intended to carve out a special exception to ORS 161.067(2) when it enacted ORS 163.160. If a statutory analysis of ORS 163.160 does not reveal such intent, then the plain language of ORS 161.067(2) controls and the court was authorized to impose two sentences, one for each conviction.

E. Plain language of ORS 161.067(2) reveals no ambiguity and authorizes separate sentences for each conviction.

With respect to the first step in the *PGE* analysis, this court explained the role of "plain language":

> In interpreting a statute, the court's task is to discern the intent of the legislature. ORS 174.020; *State v. Person*, 316 Or 585, 590, 853 P 2d 813 (1993); *Teeny v. Haertl Constructors, Inc.*, 314 Or 688, 694, 842 P2d 788 (1992). To do that, the court examines both the text and context of the statute. *State v. Person, supra*, 316 Or at 590, 853 P2d 813; *Southern Pacific Trans. Co. v. Dept. of Rev.*, 316 Or 495, 498, 852 P2d 197 (1993). That is the first level of our analysis.
>
> In this first level of analysis, *the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. State v. Person, supra,* 316 Or at 590, 853 P2d 813; *State ex rel. Juv. Dept. v. Ashley*, 312 Or 169, 174, 818 P2d 1270 (1991). In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. Some of those rules are mandated by statute, including, for example, the statutory enjoinder "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. Others are found in the case law, including, for example, the rule that words of common usage typically should be given their plain, natural, and ordinary meaning. *See State v. Langley,* 314 Or 247, 256, 839 P2d 692 (1992) (illustrating rule); *Perez v. State Farm Mutual Ins. Co.*, 289 Or 295, 299, 613 P2d 32 (1980) (same).

(Emphasis added) *PGE,* 317 Or at 610-11.

Under the *PGE* template, if the text and context of the term make the meaning clear and unambiguous, then the inquiry into legislative intent is complete. Here, an

examination of both text and context shows that the term "victims" in ORS 161.067(2) is unambiguous:

> 2) When the same conduct or criminal episode, though violating only one statutory provision involves two or more victims, there are as many separately punishable offenses as there are victims.

The term "victims" means individuals who are directly harmed by criminal conduct. The dictionary definition of "victim" includes a person "subjected to oppression, deprivation, or suffering." *Webster's Third International Dictionary* at 2550 (unabridged ed 1993). In the plain text of ORS 161.067(2), the legislature has authorized the imposition of as many punishments as there are persons directly harmed by the criminal conduct. The legislature has authorized, through subsection 2, punishment that is more severe if more persons are harmed. If a person engages in an episode of criminal conduct that injures one hundred people, the legislature has clearly stated that there are one hundred separately punishable offenses. If the same person engages in the same criminal conduct but harms only one person, that person will be subject to punishment for only one offense. This legislative recognition of the role of the scope of harm that may be caused by a single criminal act is apparent and the legislature has clearly expressed in the plain language of ORS 161.067(2) that the reach of the crime should affect the number of offenses for which a person may be punished.

The context of the provision leads to the same result—that there are as many punishable offenses arising from a single incident of criminal conduct as there are persons directly harmed. *PGE*, 317 Or at 611. ORS 161.067(2) was part of Ballot

Measure 10, the "Victim's Rights Initiative," passed by the voters in 1986. *State v. Crotsley*, 308 Or 272, 276 n 3, 779 P2d 600 (1989) (tracing history of provision). In that same initiative, the term "victim" was defined for purposes of some already existing statutes:

> As used in ORS 40.385, 135.230, 135.406, 135.970, 147.417, 147.419 and 147.421 and in ORS chapters 136, 137 and 144, except as otherwise specifically provided or unless the context requires otherwise, "victim," means the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime and includes, in the case of a homicide or abuse of corpse in any degree, a member of the immediate family of the decedent and guardian of the minor. In no event shall the criminal defendant be considered a victim.

ORS 131.007.

Of note is that voters adopted this provision that applied the statutory definition of "victim" to Chapter 137, the chapter that contained the then-existing provision authorizing consecutive sentences for crimes involving more than one victim, *former* ORS 137.122. Not coincidentally, the same Ballot Measure 10 impliedly repealed ORS 137.122 and replaced it with ORS 137.123. ORS 137.123 as enacted by voters in this same initiative authorized consecutive sentences when:

> The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or *created a risk of causing loss, injury, or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.*

(Emphasis added).

In other words, as this court noted in *Crotsley*, the initiative was a clear rejection of the judicially-constructed practice of "merging" convictions and punishments. The purpose was to have the punishment fit the scope of the crime, including the provision of multiple convictions and sentences if more than one victim was harmed by a single incident of criminal conduct. The provision for consecutive sentences for offenses that caused or created a risk of harm to more than one victim would have little meaning unless it is applied to situations where the defendant's criminal conduct harmed more than one victim. And, as provided in ORS 161.067(2), there are as many separately punishable offenses as there are victims harmed by the conduct. Although the voters did not explicitly direct that the definition of "victim" set forth in ORS 131.007 in Ballot Measure 10 apply to the provisions of ORS 161.067(2), they did direct that provision to apply to Chapter 137, the chapter providing for consecutive sentences. The application of the ORS 131.007 definition to ORS 137.123 makes it likely that the voters also intended the term "victims" in ORS 161.067(2) to mean persons who have suffered harm as the result of a crime.

The Court of Appeals' opinion recognized the role of context in the proper interpretation of ORS 161.067(2). The court noted that ORS 131.007, providing the broad definition of victim for purposes of chapter 137, means that a court would be authorized to impose *consecutive* sentences under ORS 137.123(5)(b)[4] for this

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[4] ORS 137.123(5)(b) provides the court has discretion to impose consecutive sentences for convictions arising out of a continuous and uninterrupted course of conduct only if the court finds: (b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury

Footnote continued...

incident because the children witnessing this assault qualify as victims under ORS 131.007. However, the sentencing court would be precluded from imposing consecutive sentences under defendant's interpretation of ORS 161.067(2) because the court could enter only one conviction. *Glaspey,* 184 Or App at 179.

Factually, defendant was convicted of two counts of assault four, based on the same assault against his wife. As pleaded and proven, defendant was guilty of one count of assaulting his wife in the presence of one child and one count of assaulting his wife in the presence of another child. The state does not argue that defendant's wife was not harmed by the assault or that she was not a victim. However, the way the pleading was drafted, there were only two crimes for which defendant could be punished, each predicated on the witnessing of the assault by a child.[5] The person who is on the receiving end of a physical assault is surely a "victim" within the meaning of the term as used in ORS 161.067(2), but that does not preclude others who are harmed by the same conduct from also being "victims" for purposes of ORS 161.067(2). Certainly, a child watching or hearing his mother being beaten by her husband or boyfriend is subjected to "oppression, deprivation, or suffering," the dictionary definition of what makes a person a "victim."

(...continued)
or harm to a *different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.* (Emphasis added).

[5] In theory, the state might have charged defendant with three counts of assault, with the additional count naming only the wife as the victim and omitting reference to the presence of the children. If it had done so, the count naming the wife as a victim would be treated as a lesser-included offense and "true merger" would result in only two convictions (one for each child victim).

In the present case, defendant's plea establishes that both children actually witnessed the assault. Thus, at sentencing, the court could reasonably find that the child named in each of the two counts was a "victim" who suffered direct harm from witnessing the assault and properly impose two sentences.

Defendant claims that to characterize a child who witnesses an assault as a "victim" for purposes of ORS 161.067, the court would have to "add" language by inserting a reference to ORS 161.067 into the statutory definition of "victim" in ORS 131.007. That argument ignores the fact that the legislature may choose to define a particular term for some specific statutory purposes but may leave the interpretation of the same term, in other contexts, to common sense. Here, the fact that the term "victim" is statutorily defined for some other contexts does not mean that the court would have to "add" one or more of those other definitions to ORS 161.067(2) to discern what the legislature meant when it used the term "victim" in subsection 2.

The definitions of the term "victim" in ORS 131.007[6] or 137.103,[7] for example, might enlighten the meaning of the same term as used in ORS 161.067(2). Indeed, because all of these provisions were part of the "Victim's Rights" initiative, Ballot Measure 10, those definitions could be considered part of the context of the statute, but the existence of these other definitions does not preclude the consideration of these two children as "victims" for purposes of determining whether there were two separately punishable offenses. The term "victim," as used in ORS 161.067(2), by its plain meaning, includes the persons whom the statute seeks to protect from the assault – in this case, children exposed to domestic violence.

F. No evidence of legislative intent to narrow the plain meaning of "victim" in ORS 161.067(2) when the crime charged is a violation of ORS 163.160.

The pivotal question in this case is whether defendant can be separately punished for two convictions of ORS 163.160 based on the characterization of each child witnessing the assault as a "victim" under ORS 161.067(2). As just discussed,

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[6] ORS 137.007 provides in pertinent part:

> As used in ORS 40.385, 135.230, 135.406, 135.970, 147.417, 147.419 and 147.421 and in ORS chapters 136, 137 and 144, except as otherwise specifically provided or unless the context requires otherwise, "victim" means the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime and includes, in the case of a homicide or abuse of corpse in any degree, a member of the immediate family of the decedent and, in the case of a minor victim, the legal guardian of the minor. In no event shall the criminal defendant be considered a victim.

[7] ORS 137.103 provides another definition, for purposes of restitution:

> "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities; "victim" shall not include any coparticipant in the defendant's criminal activities.

the plain text and context of ORS 161.067(2) would authorize such separate punishments. The only way that defendant's argument can succeed is if he can demonstrate that the legislature intended to apply some different rule to convictions under ORS 163.160. That intent would have to be apparent from either the text and context of ORS 163.160 or, if that inquiry does not provide the answer, from the legislative history. As it turns out, nothing in the text or context of ORS 163.160 suggests legislative intent to apply a different sentencing rule to convictions under ORS 163.160 and the legislative history of ORS 163.160 suggests the opposite – that the legislature adopted the provision to protect children from the harms caused by being a witness to domestic violence.

Defendant argues in his brief on the merits that the legislature's use of separate terms "the person," "the victim" and "the victim's minor child" in ORS 163.160 evidences a clear legislative intent that only the recipient of the physical blows should be considered the only true "victim" in cases where the question is how many separately punishable offenses have been committed. (Br on Mer 6). The Court of Appeals correctly held that this argument was not persuasive. At a purely textual level, the use of different terms in ORS 163.160 was simply a way of distinguishing the actors in the criminal incident from one another. The labeling of persons by their roles in the definition of the crime in a way that singles out the physically assaulted person as the "victim" does nothing to demonstrate the legislature's intention to consider only the person actually assaulted as the "victim." The denomination of only the recipient of the physical blows as the "victim" in the statute does not demonstrate

an intent to exclude the children from being considered victims for purposes of ORS 161.067(2). Instead, the wording simply seeks to avoid the confusion of using the word "victim" to refer to both the person being hit and the children witnessing the event.

Assault in the fourth degree is elevated in seriousness to felony status only when the assault is committed in the presence of *certain children*. If an assault is witnessed by a neighbor's child who is temporarily visiting the home, for example, the assault remains a misdemeanor. Thus, the references to "the person's" or "the victim's" minor child or stepchild or "a minor child residing within the household of the person or victim" serve not to direct who may, or may not, by a "victim" for purposes of ORS 161.067. Rather, those categories function to limit the scope of liability to assaults taking place in the presence of or witnessed by children who have an on-going legal relationship or residential relationship with the person doing the assaulting or the person being assaulted. The use of the term "victim" in ORS 163.160(3)(c) to refer to the person physically injured does not play the pivotal role defendant would urge and was not meant to exclude the children who witness an assault from the status of victims for purposes of ORS 161.067(2).

Defendant also argues that subsection (3) of ORS 163.160 is the functional equivalent of the separate theories underlying aggravated murder, discussed in *Barrett*. (App Br 9). *Barrett*, however, was decided under subsection (1) of ORS 161.067 (dealing with whether conduct violated two or more statutory provisions), not subsection (2) (multiple victims) or subsection (3) (same victim,

repeated violations of the same offense). Nothing in *Barrett* should affect the court's analysis of the reach of ORS 163.160(3)[8]; the aggravated murder statutes describe a single offense that may be committed in a number of ways. ORS 163.160(3) describes how a fourth degree assault conviction may be treated as a felony when children are present to witness the assault.

If this court disagrees that the interpretation is resolved at this first level of analysis, the legislative history supports the state's position. For example, in the Senate Crime and Corrections Committee, the discussion of SB 553, the bill that became ORS 163.160, focused primarily upon the detrimental effects upon children of witnessing domestic abuse. (App-1-6). The goal of this portion of SB 553 was to recognize and address the added harms that result from assaults that are witnessed by children in the home. The sponsor of the legislation, Senator Kate Brown, introduced the bill to the committee with comments that domestic violence affects children both physically and psychologically. (App-1-6). Specifically, children who witness

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[8] *Barrett*, as previously noted, and *State v. Barnum*, 333 Or 297, 39 P3d 178 (2002) are instructive on the question of how many *convictions* should be entered to accurately reflect the defendant's conduct. This court in *Barrett* held that the alternative methods of committing aggravated murder did not amount to separate statutory provisions for purposes of determining the number of punishable offenses under ORS 161.067(1). In *Barnum*, the defendant was properly convicted of two counts of burglary but under ORS 161.067(3), could only be sentenced for one offense. The argument that *Barrett* or *Barnum* somehow dictates an interpretation of ORS 161.067(2) that would result in only one *sentence* is the point of disagreement between the state and defendant here.

Defendant also argues "the legislature was aware of * * * *Barrett* and would have expected that the similarity in structure between the felony in the fourth degree statute and the aggravated murder statute would result in a similar interpretation." (Br on Mer 18). That argument fails because this court decided *Barrett* in 2000 and the legislature enacted ORS 163.160(3) in 1997.

violence learn that it is a way to control other people. (App-2). Deputy District Attorney Walt Beglau from Marion County testified in support of the bill, noting that children who witness domestic violence are traumatized and learn to use violence themselves. (App-3). The same sentiments were echoed by Detective Jeffrey Green of the Clackamas County Sheriff's Office who testified about the effects of such violence, even on infants. (App-3). Chris Gardner, the Chair of the Children's Justice Act Task Force, also testified in support of the bill and noted "when children are present, [there is] more than one victim to the crime." (App-3).

Thus, the legislative history illustrates that the legislature intended to prevent harm to the children who witness domestic assaults. When a person assaults a family member in front of two children, there is more than one "victim" of that assaultive conduct. The recipient of the physical blows is a "victim," and so, too, is each of the children who witness the assault. Nothing in the legislative history even hints at the intent to treat offenses involving children who witness a domestic assault different from other crimes with multiple victims under ORS 161.067(2).

Finally, defendant argues that adopting the state's interpretation of the term "victim" would lead to absurd results. (Br on Mer 17). Specifically, he postulates that a violation of ORS 163.160(3) would always produce two separately punishable offenses if one child witnesses a domestic assault because there will always be two victims – the person actually assaulted and the child. Therefore, he argues, the state could charge two counts, identically worded for the same conduct and create two separately punishable offenses for purposes of ORS 161.067(2). As noted previously,

the state disagrees. The count involving the direct assault on the spouse would merge into the conviction for the assault involving the child. As a lesser-included offense, the spouse-based count would merge into the child-based count, even for purposes of entry of the conviction and no question of separate punishments would arise.

In any event, deciding cases of statutory interpretation based upon the "absurd results" doctrine is inappropriate unless the statutory language is ambiguous after examining text and context. Here, nothing in ORS 161.067(2) is ambiguous and nothing in ORS 163.160 suggests a legislative intent to apply a different rule to cases under that statute. This court should never reach the final step in the *PGE* analysis in this case and that final step is the time the "absurd results" doctrine may come into play. *See State v. Vasquez-Rubio,* 323 Or 275, 282-83, 917 P2d 494 (1996) ("When the legislative intent is clear from an inquiry into text and context, or from resort to legislative history, however, it would be inappropriate to apply the absurd-result maxim.").

In the present case, the imposition of separate sentences was consistent with the people's intent in the initiative pertaining to multiple sentences, codified as ORS 161.067(2) and consistent as well with the legislature's intent in the substantive offense defined in ORS 163.160. The Court of Appeals decision was correct.

CONCLUSION

This court should affirm the Court of Appeals' opinion or, in the alternative, dismiss the case as moot.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on May 24, 2004.

I further certify that I directed the Respondent's Brief on the Merits to be served upon Peter A. Ozanne and Rankin Johnson IV, attorneys for petitioner on review, on May 24, 2004, by mailing two copies, with postage prepaid, in an envelope addressed to:

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