

**IN THE SUPREME COURT OF THE STATE OF OREGON**

STATE OF OREGON,	)	Umatilla County Circuit
	)	Court No. CRH090155
Plaintiff-Appellant,	)	
Respondent on Review,	)	
	)	Court of Appeals
v.	)	No. A145386
	)	
ARNOLD WELDON NIX,	)	Supreme Court No.
	)	S060875
Defendant-Respondent,	)	
Petitioner on Review.	)	

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**BRIEF ON THE MERITS OF  
PETITIONER ON REVIEW, ARNOLD WELDON NIX**

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Review of the Decision of the Court of Appeals  
on Appeal from a Judgment  
of the Circuit Court for Umatilla County  
Honorable JEFFREY M. WALLACE, Judge

Opinion Filed: August 1, 2012  
Author of Opinion: Brewer, Presiding Judge  
Before: Brewer, Presiding Judge, and Haselton, Chief Judge, *vice*  
Gillette, Senior Judge

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DAVID J. CELUCH #952291  
1318 SW 12<sup>th</sup> Ave.  
Portland, Oregon 97201  
(503) 224-4045  
E-Mail: davidjceluch@mac.com  
Attorney for Petitioner on Review

ELLEN ROSENBLUM #753239  
Attorney General  
ANNA JOYCE #013112  
Solicitor General  
JAMIE K. CONTRERAS #  
Assistant Attorney General  
1162 Court Street NE  
Salem, Oregon 97310  
E-Mail: Jamie.k.contreras@doj.state.or.us  
(503) 378-4402  
Attorneys for Respondent on Review

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## **OPENING BRIEF FOR PETITIONER ON REVIEW**

### **STATEMENT OF THE CASE**

#### **Introduction**

Petitioner seeks review reversal of the decision of the Court of Appeals in *State v. Arnold Weldon Nix*, 251 Or. App. 449, 283 P.3d 442 (2012). A copy of the decision is attached at ER-1.

#### **Questions Presented**

Are animals “victims” pursuant to ORS 161.067 when a criminal defendant has violated ORS 167.325?

#### **Proposed Rules of Law**

Animals are defined as property under Oregon law. ORS 167.310(2). There is no statute that allows property to be seen as a victim. ORS 161.067 does not define “victim” but the ordinary definition of the word does not include non-persons. All of the relevant case law indicates that in a case involving damage to property either the owner of the property or the people of the state of Oregon are the “victim” of the offense. The text, context and legislative history of ORS 167.325 does not create a statutory scheme

whereby animals are victims. *State v. Glaspey*, 337 Or 558, 100 P3d 730 (2004) only requires that the court examines the substantive statute to determine which person or persons are victims.

### **Procedural History**

The state charged the defendant in Umatilla County Circuit Court Case No. CRH090155 with 93 counts of animal neglect – 23 of first-degree neglect, ORS 167.330, and 70 of second-degree, ORS 167.325. His trial was held on March 16-18, 2010. The defendant was ultimately found guilty of 20 counts of animal abuse in the second degree. The defendant was sentenced on March 31, 2010. The trial courts merged the defendant's 20 counts into a single conviction. The judgment was entered the same day.

The state filed a notice of appeal on April 27, 2010. The state argued to the Oregon Court of Appeals that the convictions should not have merged. The Court of Appeals reversed the trial court's ruling in an opinion dated August 1, 2012. Petitioner filed his petition for review on November 28, 2012. This Court allowed review on March 7, 2013.

### **Summary of Facts**

The following facts are taken from the Court of Appeals opinion:

The relevant facts are undisputed. Acting on a tip, police officers entered defendant's farm and found dozens of emaciated animals, mostly horses and goats, and several animal carcasses in various states of decay. Defendant owned those animals. Defendant was indicted on 23 counts of first-degree animal neglect, ORS 167.330, and 70 counts of second-degree animal neglect, ORS 167.325. Each separate count identified a different animal and charged conduct by defendant toward that animal. All of the separate counts were alleged to have occurred within the same span of time. A jury convicted defendant of 20 counts of second-degree animal abuse.

At defendant's sentencing hearing, the state asked the trial court to impose 20 separate convictions because the jury had found defendant guilty of neglecting 20 different animals. Accordingly, the state argued, the convictions “do not merge based on [ORS 161.067](1), (2) and (3).” The trial court disagreed and merged the guilty verdicts into a single conviction, explaining that

“[ORS 161.067(2) ] talks about—although violating only one statutory provision, it involves two or more victims. In this case, I agree with the defendant's position that the animals are not victims, as defined by the statute; by the ORS 161.067(2).

“ \* \* \* I don't think that [ORS 161.067(3) ] applies because the animals are not victims under the definition of the statute requiring that to be persons.”

Defendant was sentenced to 90 days in jail and three years of bench probation; the trial court suspended imposition of the jail sentence, and the state appealed. ORS 138.222(4)(a).

*State v. Arnold Weldon Nix*, 251 Or. App. 449, 451, 283 P.3d 442 (2012)

The Court of Appeals found that the trial court had erred in merging the convictions and remanded the case to the trial court for re-sentencing.

### **Summary of Argument**

The trial court correctly ruled that the defendant's convictions should merge pursuant to ORS 161.067. The state proceeded on the theory that each individual animal in each count against the defendant constituted a separate "victim" and that provided a basis for separate offenses.

Animals do not meet the ordinary definition of victims. The legislature did not create a new category of victims by re-defining the term in ORS 167.325. Existing case law indicates that persons, not animals, are victims. Therefore, pursuant to ORS 161.067 (2) there is no bar to merger of the offenses in this case.

### **Argument**

The trial court properly merged the convictions for 20 counts of animal neglect in the second degree into one offense. Animals do not meet the ordinary definition of victims. An examination of ORS 167.325 in light of *State v. Glaspey*, 337 Or 558, 100 P3d 730 (2004) reveals that animals are not victims even though the legislature sought to protect them. Therefore, pursuant to ORS 161.067 (2) there is no bar to merger.

#### **A. "Victims" under ORS 161.067 are persons.**

ORS 161.067 (2) states 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.

In *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993), this Court explicitly discussed the methodology for interpreting a statute. The Court held that the first level of statutory construction is to examine the text and context of the statute. *Id.* at 610. The Court further explained that the text of the statutory provision is the starting point for analysis and “is the best evidence of the legislature’s intent.” *Id.* at 610. When a court reads a statute it must consider “rules of construction of the statutory text that bears directly on how to read the text.” *Id.* at 611. One of the rules that must be considered is that words of common usage typically should be given their plain, natural, and ordinary meaning. *Id.*; *see also State v. Langley*, 314 Or. 247, 256, 839 P.2d 692 (1992).<sup>1</sup>

A substantive statute defining a criminal offense may only provide a category of persons who are victims because the ordinary meaning of the word “victim” means a “person.” *See, e.g., Webster’s Third New International Dictionary* 2550 (unabridged ed 2002); *Black’s Law Dictionary* 1598 (8<sup>th</sup> ed 2004). The use of the word victim in ORS 161.067

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<sup>1</sup> The defendant acknowledges that *State v. Gaines*, 346 Or. 160, 171-73, 206 P.3d 1042 (2009) also allows the court to consider relevant legislative history. However, that does not obviate the need to apply ordinary meaning to the words in a statute if they are not otherwise defined.



is therefore meant to include the class of persons who are injured by the violation of a criminal statute. In order to classify a non-person as a “victim”, the legislature would have to specifically identify a non-person as a victim in the criminal statute.

In its opinion below, the Court of Appeals acknowledged:

[W]here the legislature has defined or used the term victim throughout the criminal code, whether for purposes of substantive or procedural pronouncements, it typically has expressly or implicitly adopted the ordinary meaning of victim. In addition, to date, most of our decisions under ORS 161.067(2) have concluded that crimes have a human victim for the purpose of merger under that statute. *See, e.g., Mullen*, 245 Or.App. at 677, 263 P.3d 1146 (“[T]he victims of identity theft include persons who suffer a risk of loss from the exposure of their identification.”); *State v. Williams*, 229 Or.App. 79, 84, 209 P.3d 842, *rev. den.*, 347 Or. 44, 217 P.3d 690 (2009) (the “victim” of robbery is the person against whom force is used or threatened); *Sanchez-Alfonso*, 224 Or.App. at 562, 198 P.3d 946 (for purposes of ORS 161.067(2), the “victim” of a burglary is the person who possesses the property right in the building the defendant entered); *State v. Luers*, 211 Or.App. 34, 65, 153 P.3d 688, *adh'd to as modified on recons.*, 213 Or.App. 389, 160 P.3d 1013 (2007) (noting that “ordinarily a victim is a person”); *State v. Graves*, 92 Or.App. 642, 646, 759 P.2d 1121 (1988) (concluding, pre- *Glaspey* that “the intended victims of a conspiracy to commit particular crimes are included within the meaning of ‘victims’ in ORS 161.067(2)”).

*State v. Nix*, 251 Or. App. 449, 455, 283 P.3d 442 (2012).

In spite of this, the Court of Appeals determined that animals are victims for purposes of ORS 167.325. The Court of Appeals was incorrect.

As amplified below, nothing in ORS 167.325 changed the definition of the term “victim” in ORS 161.067.

In front of the Court of Appeals the state argued that a victim need not be a person if the context of a statute requires otherwise. App Br at 15. The state cited ORS 131.007 in support of this proposition, which states:

As used in ORS 40.385, 135.230, 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.

This definition does not aid the state in this case. This definition does not apply to chapters 161 or 167. This is evidence that the legislature made the affirmative choice *not* to have the *definition* of the term victim be dependent on context for purposes of ORS 161.067. As noted above the term victim should be given its plain, natural and ordinary meaning.

**B. An examination of ORS 167.325 in light of this Court’s holding in *State v. Glaspey*, 337 Or 558, 100 P3d 730 (2004) reveals that animals are not victims for purposes of ORS 161.067.**

ORS 167.325(1) provides in pertinent part:

A person commits the crime of animal neglect in the second degree if, except as otherwise authorized by law, the person

intentionally, knowingly, recklessly or with criminal negligence fails to provide minimum care for an animal in such person's custody or control.

The Court of appeals looked at this language and concluded that the legislature intended to protect animals by creating the crime of second-degree animal abuse. *State v. Nix*, 251 Or. App. at 456.

In *State v. Glaspey*, 337 Or 558, 100 P3d 730 (2004), this Court considered the question of who the legislature intended to be a victim in any given offense. The court was trying to determine if child witnesses to an assault in the fourth degree were victims. After considering the plain language of ORS 161.067 the court concluded, “that ORS 161.067(2) uses the term ‘victims’ to describe the category of *persons* who are victims within the meaning of the specific substantive statute defining the relevant offense.” *Id.* at 563 (emphasis added). The court went on to note, “Ordinarily, when the term ‘victim’ is used in a statute that defines a criminal offense, it is used in the precise sense of a *person* who suffers harm that is an element of the offense.” *Id.* at 565 (emphasis added).

Ultimately, the court concluded that the child witnesses in a felony assault in the fourth degree are not victims of the offense. The court reached that conclusion even after recognizing that the legislature was concerned

about the psychological harm that witnessing a domestic assault could cause a child. *Id.* at 567.

There are two lessons to be drawn from the *Glaspey* case. The first is that this Court has previously recognized that victims are people. In order to determine who the victim of a crime is for purposes of ORS 161.067, this Court should determine which *people* suffer injury as a result of the substantive offense.

The second is that just because some harm is suffered in a criminal offense doesn't mean the party suffering the harm is automatically a victim for purposes of Oregon law. That the legislature recognized a need to protect animals from neglect by their owners doesn't mean that the animals become victims for purposes of ORS 161.067. In spite of the fact that the legislature showed concern for the well-being of animals by passing the second-degree animal neglect statute, the legislature did not indicate in the animal neglect statute that it was creating a new type of victim. There is nothing in the statute to indicate that the legislature's concern for the animals was causing it to re-define the word victim as it is used in ORS 161.067.

As the state pointed out to the Court of Appeals, the animal neglect statutes were overhauled in 1985 in recognition of the fact that "[p]ublic attitudes have changed [since cruelty laws were adopted in the 1920s and

1930s] and many people feel that animals should be given greater protection from cruel treatment and neglect.” Staff Measure Analysis, Senate Judiciary Committee, SB 508, Mar 14, 1985. The legislature seemed to be changing the statutes to reflect the interest of the public at large in protecting animals.

Generally, the people in the public at large will be the victim in an animal neglect case. The Court of Appeals noted that one witness who testified in support of the changes to the animal neglect statutes concluded by saying, “I ask for your support of S.B. 508 on behalf of *all responsible pet owners*, and the animals as well.” Testimony, House Judiciary Committee, H.B. 508, June 12, 1985 Ex. E (statement of David Hemphill) (Emphasis added). The speaker was obviously recognizing the interest of the public at large in providing protection to animals.

It is also possible for the owner of the neglected animal to be a victim under certain circumstances. For instance, if the owner of an animal were to temporarily entrust the care of a pet to another person for a period of time and the other person failed to provide “minimum care” to the animal, the person may cause the owner of the animal to incur veterinary expenses. The financial loss suffered by the owner could cause that person to be a victim of the offense, as well. The legislature expressed this intent in ORS 167.350, which provides, in part:

“(1) In addition to and not in lieu of any other sentence it may impose, a court may require a defendant convicted under ORS 167.315 to 167.333, 167.340, 167.355 or 167.365 to forfeit any rights of the defendant in the animal subjected to the violation, and to repay the reasonable costs incurred by any person or agency prior to judgment in caring for each animal subjected to the violation.”

\* \* \*

“(3) In addition to and not in lieu of any other sentence it may impose, a court may order the owner or person having custody of an animal to repay the reasonable costs incurred by any person or agency in providing minimum care to the animal.”

The animal neglect statute protects the public at large from irresponsible pet ownership and protects pet owners from the irresponsible actions of another person charged with taking care of their animals. *Glaspey* requires that these people are the victims for purposes of ORS 161.067.

The legislature undoubtedly has the power to make animals suffering neglect victims for purposes of ORS 161.067. The legislature has simply not taken that step at this point in time.

Animals cannot be victims as that term is used in ORS 161.067. The defendant's convictions merge into one offense.

## CONCLUSION

This Court should hold that the defendant's convictions for animal abuse in the second degree merge into one offense. ORS 161.067 would only prevent merger if there were multiple victims of the offenses. The word victim as used in the statute only allows people to be victims. The legislature did not specifically provide in ORS 167.325 that animals could be victims for purposes of ORS 161.067. That sort of statutory definition would have been needed in order to change the meaning of the term victim.

Respectfully Submitted,

/s/ David J. Celuch

David J. Celuch, OSB No. 95229,  
Attorney for Petitioner on Review,  
Arnold Weldon Nix

## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on April 18, I directed the original Brief on the Merits of Petitioner on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system. I further certify that on April 18, 2013 I directed the Brief on the Merits of Respondent on Review to be served upon Jamie K. Contreras attorney for petitioner on review, by using the court's electronic filing system and sending two copies to:

Jamie K. Contreras  
Assistant Attorney General  
1162 Court St. NE  
Salem, OR 97301  
E-mail: [jamie.k.contreras@doj.state.or.us](mailto:jamie.k.contreras@doj.state.or.us)

/s/ David J. Celuch  
David J. Celuch  
OSB #952291  
Attorney for Petitioner on Review

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

I certify (1) that this brief complies with the word count limitation in ORAP 5.05 (2)(b) and (2) the word count of this brief is 2677 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(4)(f).

/s/ David J. Celuch  
David J. Celuch #95229