"WHO'S" ON FIRST, AND "WHAT'S" ON SECOND, BUT THE OREGON COURT OF APPEALS DOESN'T KNOW THE MEANING OF "THIRD" BASE

By Evan Gutman CPA, JD (2013)

Dick Smothers - Now did you hear me say "Take It" or not?

Tommy Smothers - I only heard you say it, Once.

Dick Smothers - Which time?

Tommy Smothers - Third time.

Dick Smothers - How do you know it was the Third time, if you only heard it Once.

Tommy Smothers - I started counting backwards from the first two times I didn't hear it.

The Smothers Brothers Comedy Act, singing "Boil that Cabbage Down" [17]

The Smothers Brothers are an incredibly funny comedy act. Tommy Smothers is one of the funniest men ever and Dick Smothers is a great straight man. That said, I would be reluctant to support Tommy Smothers to be a State Appellate Court Justice. However, apparently, his type of approach to logical reasoning has been adopted by the Oregon Court of Appeals.

This chapter can fairly be considered as an addendum to the prior essay, which addressed the Judiciary's "I'm My Own Grandpa" logic and the movie in which the song was sung called "The Stupids." I present herein a prime textbook example of Judicial "I'm My Own Grandpa" logic.

The case is Oregon v Rodriguez, Appellate Case No. A126339 (12/19/07). Frankly speaking, this appellate opinion is so absolutely freaking hilarious, it's unbelievable. While I sometimes have difficulty in ascertaining which appellate judicial opinion is more stupid than the next, and definitely find it almost impossible to ascertain the dumbest appellate opinion of all, this case is positively a prime candidate. I assert with forthright honesty, and not the least bit facetiously, that an elementary school student who got at least a "B" in basic

Arithmetic could do a better job than the majority opinion of the Oregon Court of Appeals in this case. So here it is. "I'm My Own Grandpa" logic at its "best."

The Defendant was convicted of Driving Under the Influence of Intoxicants in August, 2004. It was his **Fourth** DUII conviction. Oregon Law ORS 809.235(1)(b) provided that a court must revoke a person's driving privileges if (emphasis added):

> "the person is convicted of misdemeanor driving while under the influence of intoxicants under ORS 813.010 **for a third time**." [18]

It is obvious from just a basic reading of the above statute, that the Oregon Legislature screwed up big league when they enacted it. What the legislators should have done was written the statute to read:

"for a third or subsequent time" [19]

But, they didn't. The Banana-Brained Oregon Legislators stupidly limited the mandatory license revocation provision to only a "Third" conviction. So, the Defendant's attorney quite properly argued that the statute did not apply to the Defendant because its express language clearly indicates it applies only when a person has been convicted "for a third time." In this case, the DUII was the Defendant's "Fourth" conviction, not his "Third."

The Majority does not want to see the defendant get off simply because there is no enacted law addressing his situation. Rather, they choose to do their job as Judges incompetently, in order to supplement the legislative incompetence that gave rise to this ironic situation. This consists of the Majority utilizing "I'm My Own Grandpa" logic to assert the position that the term "Fourth" is actually incorporated within the term "Third."

The manner in which the Majority does this is by asserting that it could be construed that the sequence of convictions does not begin to count until after the first conviction. Their concept is that if you start counting after the number "One," then the "Fourth" is really the "Third." And no, I am not kidding. That is really what they did. The Majority opinion states as follows, quoted at length (emphasis added):

"On appeal, defendant renews his contention that the statute does not apply because this is his fourth -- and not his third -- conviction for misdeamnor DUII. According to defendant, the plain meaning of the reference to a "third" means that there must be two, and only two, prior convictions.

. . .

. . . we turn to the wording of the statute. . . .

. . .

In this case, the question is what the legislature intended by the reference to a person having been convicted of misdemeanor DUII "for a third time." More precisely, the question is -- at least initially -- whether there is more than one construction of that provision that is not "wholly implausible." . . . .

The answer to that question is straightforward. The statute is at least ambiguous. In ordinary speech, references to numeric sequences can mean a variety of things. According to the usual source of ordinary meaning . . .for example, **the adjective "third" may refer to** "**being number three in a countable series**," or "being next to the second in place or time," or "**being the last in each group of three in a series**," among other things. One of those definitions -- the middle one -- is consistent with defendant's proposed construction. But the other two are consistent with the state's.

That is not surprising, as the ambiguity of numeric references is a common feature of ordinary speech. To pick a silly example, when you tell your child, "if you do that one more time, you are grounded" -- that admonition does not necessarily mean that grounding will follow one -- and only one -- offense. . . . The precise meaning of the numeric reference depends on the context in which it is employed.

. . .

So, to return to the wording of ORS 809.235(1)(b), **there is nothing in the phrasing of the provision** referring to a defendant having been convicted of a misdemeanor DUII "for a third time" **that necessarily means that the statute applied to a third -- and only a third -- conviction.** Reading the statute to apply to a third and subsequent convictions is, in other words, not wholly implausible." [20]

A Dissenting opinion is written in the case by Justices, Sercombe and Wollheim. Apparently, unlike the Majority Justices Sercombe and Wollheim had not lost their minds. Their Dissent states as follows (emphasis added):

"**The majority's construction . . . robs the statute of its plain meaning through the guise of creating ambiguity from wordplay**. The license revocation sanction only applies to a person "whose third <DUII misdemeanor> conviction . . . occurs on or after" January 1, 2004. . . . The majority reads this limitation to include the exact opposite -- that the sanction applies to a person whose third DUII misdemeanor conviction occurs before January 1, 2004. That result is reached through a misapplication of the statutory principles set out in PGE v Bureau of Labor and Industries. . . .

> **The substantive questions presented are what "for a third time" means**. . . .
> . . .
>
> The majority construes the phrase "convicted. . . for a third time" . . . as ambiguous, in that it could refer to more than one occasion of conviction. **In the majority's view, a "third time" conviction could occur any number of times, when a person is convicted "for a third time," "for a fourth time," "for a fifth time," and so on**. According to the majority, the phrase refers to any one of several convictions. . . .
>
> I differ with the majority because I do not believe that the phrase can reasonably be construed to refer to more than one particular conviction. **In my view, a person can only be "convicted . . . for a third time" once**. . . . **To read the statute differently** -- i.e., to cover any number of convictions -- **distorts its plain meaning**.
> . . .
> . . . The statutory interpretation issue, however, is not the abstract meaning of "third." It is the meaning of "third time." **The obvious meaning of "third time" is "being next to the second in place or time."** In that context, "third time" does not mean "being number three in a countable series" or "ranking next to the second of a grade or degree" . . . .
>
> The ordinary meaning of "third time" as it refers here to the "third conviction," is the third conviction in time. **A person's fourth marriage** to a different person **would not qualify that person as being married for "a third time." "Third base" is the base that must be touched by a runner in baseball. No one would call home plate the "third base" because you could begin counting at first base. . . ."** [21]

Overall, it's a pretty good Dissent. As for the Majority opinion, which was signed on by eight Justices, it truly boggles my mind that people who write such ludicrous, irrational Crap could be paid out of public funds for their literal Trash.

Obviously, there was a serious problem with the statute. The crux of the problem was that the Legislators who wrote the statute were Imbeciles. Undoubtedly, if you're going to penalize a Third Conviction, you should similarly penalize a Fourth or subsequent Conviction. But, the bottom line is that's not what the Legislative Imbeciles wrote. They limited the law to a conviction for a "third time." For the Majority to include the Fourth conviction within the term "Third" even though they knew full well that there was no basis in the words of the enacted statute for doing so had the effect of the Court of Appeals enacting its own statute. They became Legislators and Judges simultaneously. And that is what this case was really about.

The power play made by the Oregon Court of Appeals Majority to assume Legislative responsibilities and authority was the reason the case involved all

Ten appellate Justices on the Oregon Court of Appeals. Typically, only three Justices decide a case on appeal. The Court of Appeals was making a transparent, amateurish and quite foolish attempt at a Judicial power-grab.

The Defendant was nothing more than a mere, irrelevant pawn in the power play taking place between the Judiciary and the Legislature. Everyone knows the Legislators were Imbeciles for the wording they enacted in the statute. That is incontestable. So, what the Justices were trying to do was send a "telegraph" message to the Legislature, so to speak, that their branch of government needs the Judiciary to engage in legislating to save poorly written statutes. The concept is basically that, "we of the Oregon Judiciary will save you Legislators from being exposed as morons to the general public." However, in order for us to help you, it is necessary for you to allow us to be Legislators as well as Judges."

Undoubtedly, the express language of the statute gives rise to an "Absurd" result. It penalizes a "Third" conviction, but not a "Fourth" conviction. But, to include the term "Fourth" within the meaning of "Third" is more "Absurd."

Here is what should have happened in the case. The Court of Appeals should have done the following. They should have bravely and aggressively pointed out how totally Imbecilic the express language of the Legislative enactment was. Then, based on the Imbecilic statute, they should have Reversed the trial court and indicated precisely why they were doing so. The effect of such a ruling would be as follows. The Legislature would be totally embarrassed in the eyes of the general public for writing a stupid statute that gave rise to a totally Absurd result. This embarrassment would have caused the Legislators to be a lot more careful when writing statutes. It would have provided a sufficient degree of encouragement for them to start competently reviewing the way they write laws. By slamming the State Legislators hard for their incompetence, the Appellate Justices would have been totally absolved of participation in any Absurd result, because the fault would lie squarely on Legislative shoulders. In contrast, the Justices would have simply followed the law as written. The Absurd result would have been totally the fault of the Legislators because they were the morons who enacted the statute.

Instead, the Judiciary ran interference on behalf of the Legislators. They felt they could take advantage of the situation by using it as an opportunity to seize a share of Legislative authority. But, the real impact of their ill-conceived strategy was that it resulted in the Justices substituting themselves as the guilty culprits giving rise to the Absurd result. This occurred because they included the term "Fourth" within the meaning of the term "Third."

In all likelihood, the Justices figured nobody would read the opinion and as a result, they'd quietly get away with their power play. Certainly, any

Legislators who read the opinion wouldn't make a fuss about it. Quite to the contrary. The Legislature would have no choice other than to be appreciative to the Judiciary for saving them from being exposed to the general public as Imbeciles. Thus, the Justices concluded it was a virtual certainty that this case would provide them with an enhanced ability to Legislate from the bench.

From the perspective of the Majority, the whole manipulative ploy probably seemed like a "Sure Thing." That's the reason why Ten Justices on the Court got involved in the case. At first glance, the case would seem to be fairly non-controversial. It certainly wasn't a high profile case. But, it did in fact involve very major issues pertaining to the allocation of governmental power between the branches. This case demonstrates how shifts in governmental power often occur totally and quietly behind the scenes.

The Majority of the Oregon Court of Appeals figured there was no political risk involved by writing an opinion using "I'm My Own Grandpa" logic. They did precisely that in order to justify a ridiculous and "Absurd" conclusion that the term "Fourth" is included within the term "Third."

But, the simple fact is that the eight Appellate Justices who signed the Majority opinion are each now exposed as having a greater probability of rendering a significant contribution to society by starring in a sequel to "The Stupids," rather than by being Appellate Justices. They could call the sequel "The Stupids II." Naturally, that means it's the "Third" in the series.