IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ANTHONY JAMES LAZARIDES, Defendant-Appellant Petitioner on Review.	Malheur County Circuit Court Case No. 12114997C CA A155380 S063282

BRIEF ON THE MERITS OF DEFENDANT-APPELLANT

Review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court for Malheur County
Honorable Lung S. Hung, Judge

Order Denying Reconsideration Filed: April 30, 2015
By: Rick T. Haselton, Chief Judge, Court of Appeals

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
MARC D. BROWN #030825
Chief Deputy Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Marc.Brown@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General
KARLA FERRALL #992074
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
karla.h.ferrall@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Nature of the Proceeding

Defendant appealed from a criminal judgment convicting him of one count of assaulting a public safety officer, ORS 163.208. After defendant filed his brief, the state moved to dismiss. A copy of the state's motion to dismiss is attached at ER 1-26. In defendant's response to the motion to dismiss, he notified the court that he was back in custody and attached a copy of the Yamhill County Jail Roster as evidence. A copy of the defendant's response to the motion to dismiss is attached at ER 27-31. In its reply, the state presented evidence that defendant had been arrested.[1] A copy of the state's reply is attached at ER 32-38. The Court of Appeals dismissed defendant's appeal pursuant to ORAP 8.05(3). A copy of the order of dismissal is attached at ER 39.

Defendant petitioned for reconsideration, arguing that the Court of Appeals had no authority to dismiss his appeal because he was no longer on escape or abscond status when the court decided the motion to dismiss. A copy

[1] In the motions, the state and defendant relied on an earlier version of ORAP 8.05(3). In its order, the Court of Appeals noted that the parties referred to an older version of the rule.

of defendant's petition for reconsideration is attached at ER 40-42. In its response to defendant's petition for reconsideration, the state presented evidence that defendant was, again, on abscond status. Based on his status at that point, the state asked the court to deny reconsideration. A copy of the state's response to the petition for reconsideration is attached at ER 43-46. In his reply, defendant notified the court that he was no longer on abscond status and attached a copy of the Yamhill County Jail Inmate Roster as evidence that he was in custody. A copy of that reply is attached at ER 47-49. The Court of Appeals denied reconsideration. A copy of the order denying reconsideration is attached at ER 50. This court granted defendant's petition for review from those orders.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented: ORAP 8.05(3) provides that "[i]f the court determines that the appellant is on escape or abscond status at the time the court decides a motion to dismiss, the court may dismiss the appeal or judicial review." Does the Court of Appeals have discretion to dismiss an appeal, notwithstanding the directive in ORAP 8.05(3), when, at the time the court decides the motion, the court is on notice that the appellant has been arrested and returned to custody?

Proposed Rule of Law: No, the court does not have authority to dismiss the appeal. Pursuant to ORAP 8.05(3), the court's authority to dismiss is premised on a finding that the appellant is on escape or abscond status at the time the court decides the motion to dismiss. When an appellant notifies the court that he has been arrested and returned to custody prior to the time the court decides the motion, the court has no discretion to dismiss the appeal.

Statement of Procedural Facts

Defendant timely filed a notice of appeal on October 17, 2013 and filed his opening brief on June 25, 2014.

On January 16, 2015, the state moved to dismiss defendant's appeal on the ground that he "absconded from supervision and is a fugitive from justice."

On January 22, 2015, defendant was arrested and returned to the Yamhill County Jail to serve a sanction. Defendant was scheduled to be released on February 5, 2015. ER 4; ER 34-37.

On February 25, 2015, the court dismissed defendant's appeal. ER 39. On that same date, defendant moved for reconsideration of the order of dismissal. ER 40-42.

On February 26, 2015, defendant's supervising officer requested an arrest warrant for defendant based on his failure to report to the officer three times between his release on February 5, 2015 and February 24, 2015. ER 45. Law

enforcement arrested defendant on March 17, 2015. Defendant received a 26-day sanction with a scheduled release date of April 6, 2015. ER 49.

On April 30, 2015, the Court of Appeals denied defendant's petition for reconsideration of the order of dismissal. ER 50.

Defendant provides the following chart to better illustrate the timeline explained above:

DATE	**EVENT**
January 16, 2015	State filed a motion to dismiss pursuant to ORAP 8.05(3).
January 22, 2015	Defendant arrested and returned to custody.
February 5, 2015	Defendant released from custody.
February 25, 2015	**Court of Appeals orders defendant's appeal dismissed.**
February 25, 2015	Defendant petitions for reconsideration of the order.
February 26, 2015	Supervising officer requests an arrest warrant.
March 17, 2015	Defendant arrested and returned to custody.
April 6, 2015	Defendant scheduled to be released.
April 30, 2015	Court of Appeals denies reconsideration.

Summary of Argument

The Court of Appeals is authorized to dismiss a criminal appeal if the defendant is on abscond or escape status at the time the court decides a motion to dismiss. Conversely, if the court has been informed that the defendant has

returned to custody prior to deciding the motion to dismiss, the court has no authority to dismiss the appeal. The state, as the moving party, has the burden of showing that the defendant has absconded or escaped after returning to custody for the Court of Appeals to regain its authority to dismiss the appeal.

Here, at the time the Court of Appeals decided the motion to dismiss defendant's appeal, defendant was no longer on abscond status. Defendant acknowledges that the day after the court decided the motion to dismiss, his supervising officer requested an arrest warrant for defendant. However, that occurred after the court decided the motion. Additionally, the state failed to inform the court that defendant was on abscond status until after defendant filed his petition for reconsideration. Finally, the fact that defendant had missed three appointments prior to the date the court decided the motion did not provide the authority for the court to dismiss. That is so because the state failed to inform the court that defendant missed the appointment and, more importantly, for two of those appointments, defendant contacted his supervising officer and explained why he would not be at the appointment. And as this court previously noted, missing an appointment does not constitute absconding from supervision.

ARGUMENT

I. The Court of Appeals has no authority to dismiss an appeal pursuant to ORAP 8.05(3) if the defendant is not on abscond status when it decides the motion.

Pursuant to ORAP 8.05(3):

> "If a defendant in a criminal case, * * * escapes or absconds from custody or supervision, the respondent on appeal may move for dismissal of the appeal. *If the court determines that the appellant is on escape or abscond status at the time the court decides the motion, the court may dismiss the appeal or judicial review*. If the court has not been advised otherwise, the court may infer that the appellant remains on escape or abscond status when the court considers and decides the motion."

(Emphasis added.)

In two recent cases, this court interpreted the parameters of a former version of ORAP 8.05(3).[2]

In *State v. Robbins*, the issue was whether missing a single appointment with a probation officer constituted absconding from supervision for purposes of ORAP 8.05(3). 345 Or 28, 31-32,188 P3d 262 (2008). This court focused

---

[2] That version of ORAP 8.05(3) provided:

> "If a defendant in a criminal case * * * on appeal of an adverse decision, escapes or absconds from custody or supervision, the respondent on appeal may move for dismissal of the appeal. *If the appellant has not surrendered at the time the motion is decided by the court, the court may dismiss the appeal or judicial review.* If the court has not been advised otherwise, the court may assume that the appellant has not surrendered when the court considers and decides the motion."

ORAP 8.05(3)(2011) (emphasis added).

its analysis on the meaning of the word "abscond," and held that "abscond," as used in the rule, "requires a showing of some kind of conscious intent to evade or avoid legal process." *Id*. at 34. Because this court held that missing one probation appointment did not constitute absconding from supervision, it did not decide whether the Court of Appeals had authority to dismiss the defendant's appeal because she had "surrendered." *Id*. at 38.

A few years later, in *State v. Moss*, this court interpreted the meaning of the term "surrender" as used on ORAP 8.05(3). 352 Or 46, 47, 279 P3d 200 (2012). In *Moss*, the state moved to dismiss pursuant to ORAP 8.05(3). Before the Court of Appeals ruled on that motion, the defendant was arrested and returned to custody. The defendant opposed the motion, arguing that the defendant had "surrendered." The state responded that defendant had not "surrendered" because the police had arrested her. *Id*. After an extensive review of the history of the abscond rule, this court determined that "it is most likely that those who adopted ORAP 8.05(3) intended the reference to 'surrender' after absconding to require more than a return to custody following arrest." *Id*. at 57. As explained below, because ORAP 8.05(3) no longer contains the term "surrender," *Moss* is of limited utility. However, *Moss* contains two points that directly relate to the issue before this court.

First, this court observed that the Court of Appeals had authority to dismiss the appeal pursuant to ORAP 8.05(3) so long as the court had not been

advised that the defendant had "surrendered." *Id*. at 58. Along those lines, if, at the time the Court of Appeals decided the motion to dismiss, it had been informed that the defendant had surrendered, then the court had no authority to dismiss the appeal. The dissent in *Moss* agreed with that observation:

> "The second sentence of the rule provides that, '[i]f the [defendant] has not surrendered at the time the motion is decided by the court, the court may dismiss the appeal.' The prefatory clause of the second sentence makes it plain that an appellate court obtains legal authority to grant the state's motion for dismissal only in the event that a negative fact exists, *i.e.*, that 'the [defendant] has not surrendered' at the time that the court decides the state's motion."

Id. at 64 (Durham, J., dissenting). The dissent further explained that once the court is advised that the defendant has surrendered, "the rule requires the state, as the moving party, to show that appellant 'has not surrendered,' which is the condition that must exist before the court has the authority to dismiss the appeal." *Id*. at 74 (Durham, J., dissenting).

The second applicable point from *Moss* is less a legal principle and more an insight into the subsequent amendment to ORAP 8.05(3). At the conclusion of his dissent, Justice Durham noted the following:

> "Oregon's rule, as it stands after today's opinion, authorizes the dismissal of the appeal of a criminal defendant who escapes or absconds, or even a probationer who violates probation, and is later arrested, even if the defendant fully cooperates with and submits to the arrest, *if* the police possess and serve an arrest warrant on the defendant. Where the defendant's whereabouts are fully known to the court and the state, and the defendant figuratively is sitting in court awaiting the outcome of his or her appeal, there seems to me to be little or no justification to authorize dismissal of the appeal and, thus,

> to nullify the defendant's statutory right to appeal. If Oregon's rule now purports to authorize an appellate court to dismiss an appeal even though the defendant has submitted to the state's authority and is in custody, then the rule undermines the statutory right of appeal. To remedy the problem identified above, the Chief Justice and the Chief Judge should amend ORAP 8.05(3) to focus the rule on whether the defendant has returned to custody following an escape, not on whether the defendant surrendered to the police purely voluntarily, or simply has been recaptured. If the Chief Justice and Chief Judge decline to do so, the legislature should step in to protect the opportunity of every citizen to appeal a criminal judgment."

Id. at 75 (Durham, J., dissenting) (emphasis in original).

The import of that last point is that 83 days after the publication of *Moss*, the Chief Justice of the Oregon Supreme Court and the Chief Judge of the Oregon Court of Appeals issued an order temporarily adopting amendments to ORAP 8.05(3). A copy of that order is attached at APP 1. The temporary order amended ORAP 8.05(3) in two ways. First, it changed the sentence "If the appellant has not surrendered at the time the motion is decided by the court, the court may dismiss the appeal or judicial review" to "If the appellant is not in custody or under supervision at the time the motion is decided by the court, the court may dismiss the appeal or judicial review." Second, the order struck the last sentence: "If the court has not been advised otherwise, the court may assume that the appellant has not surrendered when the court considers and decides the motion."[3] APP 1.

---

[3] ORAP 8.05(3)(2013), provided:

Although there appears to be no documentation regarding the intent of the Chief Justice and Chief Judge in changing the rule, based on the timing and substance of that change, it is likely that the change was made in response to the concluding statement of the dissent quoted above.

The 2014 ORAP Committee debated whether to adopt or modify the temporary rule. That item was on the February 28, 2014 ORAP Committee Agenda. A copy of that agenda is attached at APP 2-3. The proposed text of ORAP 8.05(3) was the text of the temporary rule. The April 3, 2014 ORAP Committee Agenda also contained the same agenda item. That agenda explained the issue, as follows:

> "Whether to modify the permanent rule permitting the dismissal of appeals or other proceedings brought by escaped or absconded criminal defendants to eliminate ambiguity about whether the prisoner has 'surrendered.'"

A copy of the April 3, 2014 agenda is attached at APP 7-8. On that agenda, the committee explained that:

> "Prior to the temporary amendment, the rule provided that the appellate court could dismiss criminal appeals (as well as other related matters involving criminal convictions and sentences) if the appellant was a criminal defendant who had escaped or absconded from custody or supervision and the defendant had not 'surrendered' before the

---

> "If a defendant in a criminal case * * * on appeal of an adverse decision, escapes or absconds from custody or supervision, the respondent on appeal may move for dismissal of the appeal. If the appellant is not in custody or under supervision at the time the motion is decided by the court, the court may dismiss the appeal."

> court ruled. The term 'surrendered' could be ambiguous (if a defendant is arrested at gunpoint, has he surrendered?). It also raises questions about why the appellate courts are dismissing the matter (whether it is because the appellate court cannot enforce a judgment against a fleeing defendant, or whether the defendant's escape waives the right to pursue an appeal). The temporary amendment removed the term 'surrender' and now allows dismissal if the escaped appellant 'is not in custody or under supervision.'"

APP 7-8.

Ultimately, the agenda explained the revisions to ORAP 8.05(3) for that meeting:

> "At the February 28 meeting, the committee generally supported the 'narrow' policy reason for the rule (the inability of the appellate court to enforce a judgment against a fleeing defendant). Concern was expressed, however, about the temporary rule's use of the term 'under supervision.' Solicitor General Joyce and Chief Deputy Defender Lannet conferred and suggested the revision shown."

APP 7.

Between the February 28, 2014 meeting and the April 3, 2014 meeting, Solicitor General Joyce and Chief Deputy Defender Lannet exchanged emails regarding ORAP 8.05(3). A copy of that email exchange is attached at APP 4-5. On March 7, 2014, Solicitor General Joyce emailed Chief Deputy Defender Lannet the following:

> "Looks like we're tasked figuring out how to best frame the language in ORAP 8.05.
>
> "If we're going with the narrower meaning of the rule, it seems like the rule could say, consistent with *St v. Moss*, that 'If the appellant has not voluntarily returned to custody or come into

compliance with the terms of his or her supervision at the time the motion is decided by the court, the court may dismiss the appeal or judicial review.'"

"Thoughts?"

Chief Deputy Defender Lannet replied with the following comments:

"The problem with following *Moss* is that the chiefs changed the rule to reflect the policy espoused by the dissent. *State v. Moss*, 352 Or 46, [7]5, (2012) ('To remedy the problem identified above, the Chief Justice and Chief Judge should amend ORAP 8.05(3) to focus the rule on whether the defendant has *returned to custody* following an escape, not on whether the defendant surrendered to the police voluntarily, or simply has been recaptured.' (emphasis in original)).

"The sticking point I thought was that the phrase 'under supervision' could be read too broadly, *e.g.*, I could argue that a probationer who was not reporting in with his PO was still legally 'under supervision.'

"How about this:

"If the court determines that the appellant is on escape or abscond status at the time the court decides the motion, the court may dismiss the appeal or judicial review. If the court has not been advised otherwise, the court may assume that the appellant remains on escape or abscond status when the court considers and decides the motion.

"That phrasing would reflect the text of the preceding sentence ('If a defendant * * * escapes or absconds from custody or supervision, the respondent * * *.'). It would also keep the presumption that Jim wants, *i.e.*, the state's motion (with some evidence of escape or abscond) sets the *status quo* unless and until defendant comes forward with evidence to the contrary."

On March 10, 2014, Solicitor General Joyce approved the proposed text:

"My notes don't help me much here, in terms of what the chiefs meant when they said they were opting for the 'narrow' version of the rule. But I'll take your word for it. I like the language you suggested.

OK to forward to Steven/Lora."

Solicitor General Joyce sent an email to Lora Keenan, Stephen Armitage, Chief Deputy Lannet, and Justice Kistler on March 10, 2014, with the proposed text for ORAP 8.05(3):

> "Ernie and I have conferred, and here's what we've come up with in terms of reflecting what we think is the chiefs' decision to have the rule reflect the 'narrower' rationale and to fix the broadness around use of the term 'on supervision':
>
> "If the court determines that the appellant is on escape or abscond status at the time the court decides the motion, the court may dismiss the appeal or judicial review. If the court has not been advised otherwise, the court may assume that the appellant remains on escape or abscond status when the court considers and decides the motion"

A copy of that email is attached at APP 6.

The ORAP committee adopted that proposed text. As noted above, the current version provides:

> "If a defendant in a criminal case, * * * escapes or absconds from custody or supervision, the respondent on appeal may move for dismissal of the appeal. If the court determines that the appellant is on escape or abscond status at the time the court decides the motion, the court may dismiss the appeal or judicial review. If the court has not been advised otherwise, the court may infer that the appellant remains on escape or abscond status when the court considers and decides the motion."

Those documents provide three important clues into the committee's intent. First, it intended to follow the suggestions presented by the dissent in *Moss*. Second, the ORAP Committee "supported the 'narrow' policy reason for

the rule (the inability of the appellate court to enforce a judgment against a fleeing defendant)," as opposed to the broader waiver of appeal policy rationale. Third, the committee resurrected the presumption that the defendant is on escape or abscond status "unless and until the defendant comes forward with evidence to the contrary."

Under the current version of ORAP 8.05(3), the Court of Appeals may exercise its discretion to dismiss the appeal if the defendant is on escape or abscond status at the time the court decides the motion. Conversely, if the defendant is not on escape or abscond status at the time the court decides the motion, the court has no authority to dismiss the appeal. Once the state presents evidence that defendant is on escape or abscond status, the defendant has the burden of presenting evidence that he is no longer on escape or abscond status.

II. Defendant was not on abscond status at the time the Court of Appeals decided the motion to dismiss.

The evidence before the Court of Appeals, at the time the court decided the state's motion to dismiss, was that defendant had been arrested and sanctioned and release had been scheduled for February 5, 2015.

The court dismissed defendant's appeal on February 25, 2015. Defendant's supervising officer filed for an arrest warrant on February 26, 2015. As a result, when the court decided the motion, the evidence before it was that defendant was no longer on abscond status. The court did not have the

authority to dismiss defendant's appeal pursuant to ORAP 8.05(3).[4]

The state may argue that on the date the court decided the motion, defendant was, in fact, on abscond status because he had failed to report to his supervising officer on February 9, 2015, February 12, 2015, and February 24, 2015. That argument fails for two reasons.

Most importantly, the state, as the moving party, had the burden of informing the court that defendant had absconded from supervision after his release from custody. The state failed to satisfy its burden. When the court decided the motion, the information before it was that defendant had been arrested, sanctioned, and released on February 5, 2015. Without any additional information, the court could not infer that defendant had failed to report as required after his release.

---

[4] The order of dismissal appears to focus on the fact that the evidence showed that defendant was arrested and had not surrendered. As explained above, and as noted in the order of dismissal, the current rule does not include the word "surrender." The basis for the court's order denying reconsideration is likewise unclear. The court appears to have misread the evidence and concluded that defendant was arrested after the court dismissed his appeal ("Appellant alleges that, after the court rendered its decision, law enforcement officials executed a warrant for appellant's arrest and, when appellant filed his petition for reconsideration, he was in custody."). ER 50. That is not correct. Defendant argued that the evidence showed that, at the time the court dismissed his appeal, he had been arrested and was no longer on abscond status. ER 40-42. Additionally, the order denying reconsideration appears to consider the fact that defendant was arrested and returned to custody ("Appellant does not dispute that, when the court decided the motion to dismiss, he had absconded from supervision, nor does he contend that he voluntarily surrendered."). ER 50.

The state presented evidence that defendant failed to report to his supervising officer; however, it presented that evidence to the court on March 3, 2015, in its response to defendant's petition for reconsideration. The rule requires a reviewing court to look at the information before the court at the time it decided the motion to dismiss. At that time, the court had no information beyond the fact that defendant was scheduled to be released on February 5, 2015. Accordingly, "at the time the court decide[d] the motion," defendant was not on abscond status.

Second, even if ORAP 8.05(3) allows a reviewing court to look at evidence that was not before the court when it decided the motion, defendant still prevails. That is so, because the record shows that defendant only failed to report once. On February 9, 2015, defendant called his supervising officer to report that his vehicle was not functioning and, as a result, he could not make his appointment. On February 12, 2015, defendant contacted his supervising officer to inform him that a doctor had ordered ten days of bed rest due to a medical problem, and his supervising officer directed him to report on February 24, 2015. Defendant failed to report or contact his officer on that date. Thus, defendant failed to report to his supervising officer one time without contacting his officer to explain the reason for his absence. Proof that defendant missed one meeting is insufficient to prove the necessary intent to evade the legal process required for dismissal. *Robbins*, 345 Or at 36 (quoting *Webster's Third*

New Int'l Dictionary 6) ("In determining whether a defendant has absconded from supervision, appellate courts must consider whether the defendant's acts show the intent that inheres in the definition of 'abscond'—not simply that the defendant failed to attend one meeting with a probation officer or could not be located for a brief period of time, but that the defendant sought to 'evade the legal process of a court by hiding within or secretly leaving its jurisdiction.'").

Therefore, even if this court determines that it may look at evidence not before the Court of Appeals when it decided the motion to determine whether the court had the authority to dismiss the appeal, that evidence does not support a finding that defendant absconded for purposes of ORAP 8.05(3).

Ultimately, the question for this court is whether, at the time the court decided the motion to dismiss, the evidence before the court showed that defendant was on escape of abscond status. The evidence before the court when it decided the motion to dismiss was that defendant had been arrested, sanctioned, and released. Without more, the Court of Appeals had no authority to dismiss defendant's appeal.

CONCLUSION

For the foregoing reasons, defendant respectfully asks that this court reverse the February 25, 2015, order of the Court of Appeals and remand for further proceedings.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____
MARC D. BROWN OSB #030825
CHIEF DEPUTY DEFENDER
Marc.Brown@opds.state.or.us

Attorneys for Defendant-Appellant
Anthony James Lazarides

EXCERPT OF RECORD INDEX

APPENDICES INDEX

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. ANTHONY JAMES LAZARIDES, Defendant-Appellant.	Malheur County Circuit Court No. 12114997C Appellate Court No. A155380 RESPONDENT'S MOTION — DISMISS — NON-APPELLANT/NON-PETITIONER

Respondent, State of Oregon, moves this court to dismiss the appeal in this case under ORAP 8.05(3) because defendant has absconded from supervision and is a fugitive from justice. In particular, defendant has failed to appear for office visits, to keep in contact with his parole officer, and to notify his parole officer of his current address. The Board of Parole and Post-Prison Supervision has issued a warrant for his arrest.

ORAP 8.05(3) provides, in part:

> (3) If a defendant in a criminal case * * * on appeal of an adverse decision, escapes or absconds from custody or supervision, the respondent on appeal may move for dismissal of the appeal. If the appellant has not surrendered at the time the motion is decided by the court, the court may dismiss the appeal or judicial review. If the court has not been advised otherwise, the court may assume that the appellant has not surrendered when the court considers and decides the motion.

The term "abscond," as used in ORAP 8.05(3), requires "some kind of conscious intent to evade or avoid legal process." *State v. Robbins*, 345 Or 28, 39, 188 P3d 262 (2008). In other words, for a person to "abscond" within the meaning of the rule, the person must engage in some course of action (or

Department of Justice
1515 SW 5th Ave, Ste 410
Portland, OR 97201
(971) 673-1880

inaction) with the conscious intent to evade or avoid legal process. *Id.* at 36. "The 'legal process' sought to be evaded may include compliance with the terms of one's sentence, including the defendant's conduct in 'mak[ing] himself available for probation.'" *Id.* at 36 (quoting *State v. Smith*, 312 Or 561, 564, 822 P2d 1193 (1992)).

Defendant was convicted of assaulting a public officer—the conviction at issue in this appeal—on September 16, 2013. (Att 1-2, Judgment; Att 3-9, OJIN Register Printout, Malheur. Co. Case No. 12114997C). The court sentenced him to 12 months in the Oregon Department of Corrections and 24 months of post-prison supervision. (Att 1-2; Att 3-9). On October 15, 2014, defendant was released on post-prison supervision. (Att 10-12).

Defendant reported to his parole officer, Jason Deforest, on December 9, 2014, at which time he notified Officer Deforest that he had no place to reside. (Att 19). Officer Deforest found defendant available housing at Helping Hands, an emergency shelter in Yamhill County, and defendant was directed to report to the housing center on December 10, 2014, and to return on December 23, 2014, for an office visit. But defendant failed to report to Helping Hands and failed to report for the office visit. (Att 19-20). Officer Deforest called defendant and directed him to report on December 26, 2014. Defendant failed

Department of Justice
1515 SW 5th Ave, Ste 410
Portland, OR 97201
(971) 673-1880

to report for that office visit as well. (Att 13). On December 30, 2014, Officer Deforest requested a warrant from the Board, and it issued a warrant for his arrest on the same day. (Att 13: Att 14). That warrant remains outstanding and defendant's whereabouts are unknown.

As the outstanding warrant reflects, defendant has absconded from supervision and made himself unavailable to the court. For that reason, this court should dismiss her appeal.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General

/s/ Karla H. Ferrall
KARLA H. FERRALL #992074
Senior Assistant Attorney General
karla.h.ferrall@doj.state.or.us

Attorneys for Plaintiff-Respondent,
State of Oregon

Department of Justice
1515 SW 5th Ave, Ste 410
Portland, OR 97201
(971) 673-1880

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 9.17(2)(c) and (2) the word-count of this brief (as described in ORAP 5.05(2)(b)(i)(A)) is 4, 392 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner on Review's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 27, 2015.

I further certify that I directed the Petitioner on Review's Brief on the Merits to be served upon Paul Smith attorney for Respondent on Review, on August 27, 2015, by having the document personally delivered to:

Paul L. Smith, #001870
Deputy Solicitor General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
Phone: (503) 378-4402
Attorney for Respondent on Review

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

MARC D. BROWN OSB #030825
CHIEF DEPUTY DEFENDER
Marc.Brown@opds.state.or.us

Attorneys for Petitioner on Review
Anthony James Lazarides