IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SEAN MICHAEL MCNALLY, Defendant-Appellant, Petitioner on Review.	Multnomah County Circuit Court No. 111152528 CA A150977 SC S063644

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Multnomah County
Honorable ALICIA FUCHS, Judge

Opinion Filed: July 8, 2015
Before: Before Armstrong, Presiding Judge, Nakamoto, Judge, and De Muniz, Senior Judge.

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
ANDREW ROBINSON #064861
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
andrew.robinson@opds.state.or.us

Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
JAMIE K. CONTRERAS #022780
Assistant Attorney-in-Charge,
Criminal Appeals
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
jamie.k.contreras@doj.state.or.us

Attorneys for Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Other Authorities

BRIEF ON THE MERITS OF
RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION

Defendant was charged with, among other crimes, interfering with a peace officer, ORS 162.247(1)(b), for refusing to comply with a police officer's lawful order to leave a Greyhound bus terminal.[1] When he refused to comply with that order, he was not under arrest. He testified at trial that he told the officers that he would not leave because he believed he had a right to be there, and characterized the officer's order as a "huge injustice." At the close of the evidence, he asked the court to instruct the jury that his conduct constituted "passive resistance" and therefore fell within an exception to the crime of interfering with a peace officer. *See* ORS 162.247(3)(b).[2]

At issue is what the legislature meant by "passive resistance." Although it did not define that term, the context in which the exception was enacted—specifically, a previous version of ORS 162.247, and the related crime of resisting arrest, ORS 162.315—as well as legislative history indicate that the

---

[1] Defendant was also charged with second-degree criminal trespass and resisting arrest (for different conduct than formed the basis for the interfering with a peace officer charge at issue on review), and was convicted on those counts. (App Br ER 6-7). The Court of Appeals reversed defendant's conviction for resisting arrest, and the state does not challenge that ruling on review. Defendant has not appealed his conviction for criminal trespass.

[2] The complete text of ORS 162.247 is appended to this brief at App-1.

legislature intended for "passive resistance" in ORS 162.247 to have the same meaning that it has in the resisting arrest statute. That is, the legislature intended that the scope of the exception would be limited only to passive resistance *to an arrest*. It did not intend for the exception to apply in situations when a person "passively" refuses to obey a lawful order that does not involve an arrest. So construed, defendant was not entitled to assert the defense, and the trial court did not err by refusing to give defendant's requested jury instruction.[3]

But if this court disagrees and concludes that the passive-resistance exception applies outside the arrest context, it should construe the phrase "passive resistance" to mean something other than the mere non-physical—or "passive"—refusal to comply with a lawful order. Otherwise, the exception would all but eliminate the crime of refusal to comply with a lawful order, and

---

[3] As defendant correctly notes, in the Court of Appeals the state conceded that the trial court erred by failing to give defendant's requested jury instruction—a concession that the court declined to accept. *See State v. McNally*, 272 Or App 201, 207, 353 P3d 1255, *rev allowed*, 358 Or 529 (2015). After the Court of Appeals' issued its decision interpreting ORS 162.247(2)(b) in *State v. Patnesky*, 265 Or App 356, 335 P3d 331 (2014)—which was published after the state submitted its respondent's brief in this case—and after reviewing the legislative history of the statute in depth, however, the state recognizes that its concession was erroneous. Because this court is obligated to construe the statute correctly, regardless of the arguments of the parties, the state offers what it now believes to be the analysis that best comports with the legislature's intent. *See Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) ("In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties.").

therefore could not have been what the legislature intended. Instead, the legislature understood the phrase "passive resistance" to refer to passive acts of civil disobedience—that is, acts of refusal that are deliberate, open, and motivated by conscience or principle.

FIRST QUESTION PRESENTED

A person commits the crime of interfering with a peace officer, ORS 162.247(1)(b), if he or she refuses to obey a peace officer's lawful order. That provision "does not apply in situations in which the person is engaging in * * * * passive resistance." ORS 162.247(3). Does a person who refuses to comply with a lawful order unrelated to an arrest without engaging with the officer physically "engage in passive resistance"?

FIRST PROPOSED RULE OF LAW

No. The legislature did not intend for the "passive resistance" exception to the crime of interfering with a peace officer to apply whenever a person refuses to comply with an officer's lawful order by non-physical means. Instead, the legislature intended for the exception to apply only to persons who passively resist *an arrest* and thus are exempted from prosecution for the related crime of resisting arrest, ORS 162.315. The exception does not apply when a person refuses to comply with an order in a non-arrest situation.

SECOND QUESTION PRESENTED

If the passive-resistance exception applies in non-arrest situations, is a person's refusal to comply with an officer's lawful order "passive resistance" simply because the person does not engage with the officer physically?

SECOND PROPOSED RULE OF LAW

No. Passive resistance does not mean the mere non-physical—or "passive"—refusal to comply with a lawful order. Rather, it is the refusal to comply with a lawful order as an act of civil disobedience—that is, deliberately, openly, and for reasons of principle or conscience. A person charged with refusing to obey a lawful order is therefore entitled to a jury instruction on passive resistance only if the evidence would permit the jury to conclude that his or her passive refusal to comply was an act of civil disobedience.

SUMMARY OF ARGUMENT

At issue in this case is what the legislature intended when it exempted acts of "passive resistance" from the crime of interfering with a peace officer. The text of the exception, read in context—namely, against the backdrop of the related crime of resisting arrest and in light of earlier versions of ORS 162.247—indicates that the legislature intended for "resistance" to mean resistance *to an arrest*. That is, the passive-resistance exception applies only when a person passively resists an arrest and, therefore, falls within the exception to liability for resisting arrest in ORS 162.315. By enacting the same

exception in ORS 162.247, the legislature sought to ensure that a person engaged in passive resistance also could not be convicted of the crime of interfering with a peace officer based on the same conduct. It did not intend for the passive-resistance exception to apply when a person refuses to comply with an officer's order in a non-arrest situation. Legislative history confirms that intent. Under that construction of the statute, the trial court did not err when it refused to give defendant's requested jury instruction.

Alternatively, if the passive-resistance exception applies in non-arrest situations, this court should construe the phrase "passive resistance" to mean something other than simply the non-physical refusal to comply with a lawful order. Rather, the legislative history indicates that the legislature understood the phrase "passive resistance" to have the meaning it has in the civil-rights context: a passive act of civil disobedience. Thus, "passive resistance" refers to a refusal to comply that is deliberate, open, and motivated by conscience or principle. So construed, the trial court erred by refusing to give defendant's requested instruction because there was some evidence in the record that defendant was refusing to comply because the officer's order was an "injustice."

ARGUMENT

A. Under ORS 162.247(3)(b), a person is not guilty of interfering with a peace officer if he or she is "engaging in passive resistance."

ORS 162.247 codifies the crime of interfering with a peace officer. A person commits that crime if, "knowing that the person is a peace officer or a parole and probation officer," he or she

> (a) Intentionally acts in a manner that prevents, or attempts to prevent, a peace officer or parole and probation officer from performing the lawful duties of the officer with regards to another person; or
>
> (b) Refuses to obey a lawful order by the peace officer or parole and probation officer.

ORS 162.247(1). The person does not commit that crime, however, when he or she "is engaging in: (a) Activity that would constitute resisting arrest under ORS 162.315; or (b) Passive resistance." ORS 162.247(3). Here, defendant does not dispute that he intentionally refused to comply with the lawful order of a peace officer. He argues only that his refusal constituted "passive resistance." This case therefore hinges the meaning of that term.

B. The legislature intended for "passive resistance" in ORS 162.247 to be constrained to resistance *to an arrest*, and thus to mirror the exception for passive resistance in the resisting-arrest statute, ORS 162.315.

The legislature did not define the term "passive resistance," so this court must determine what the legislature intended the term to mean by examining the text of ORS 162.247 in context, along with pertinent legislative history. *See*

State v. Gaines, 346 Or 160, 171-72, 206 P3d 1042 (2009). In so doing, this court first considers the "plain and ordinary" meaning of the term, generally by consulting the dictionary. But dictionaries "do not tell us what words mean, only what words *can* mean, depending on their context and the particular manner in which they are used." *State v. Cloutier*, 351 Or 68, 95, 261 P3d 1234 (2011) (emphasis in original).

Here, the dictionary definition is relevant, but not dispositive. *Webster's* defines the phrase "passive resistance" as "resistance (as to a government or an occupying power) that does not resort to violence or active measures of opposition but depends mainly on techniques and acts of noncooperation." *Webster's Third New Int'l Dictionary* 1651 (unabridged ed 2002). But the context in which the legislature adopted the exception indicates that the legislature intended for the term "passive resistance" to have a more specific meaning than the dictionary provides. Instead, the legislature meant for the term to have the meaning that it has for the related crime of resisting arrest, ORS 162.315.[4] *See State v. Klein*, 352 Or 302, 309, 283 P3d 350 (2012) (a statute's context includes related statutes); *State v. Bailey*, 346 Or 551, 561 n 4, 213 P3d 1240 (2009) (relying on closely related statute as context).

---

[4] The crime of resisting arrest was part of the 1971 Criminal Code Revision. Or Laws 1971, ch 743, § 206. The "passive resistance" part of that statute was added in 1989. Or Laws 1989, ch 877, § 1.

The resisting arrest statute, ORS 162.315, provides that "[a] person commits the crime of resisting arrest if the person intentionally resists a person known by the person to be a peace officer or parole and probation officer in making an arrest." ORS 162.315(1). It goes on to define "resists," and in doing so, excepts from its definition acts of "passive resistance":

> "*Resists" means the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury to any person and includes, but is not limited to, behavior clearly intended to prevent being taken into custody by overcoming the actions of the arresting officer*. The behavior does not have to result in actual physical injury to an officer. *Passive resistance does not constitute behavior intended to prevent being taken into custody.*

ORS 162.315(2)(c) (emphasis added). Thus, under that definition, a person "resists" arrest when he or she intentionally engages in any activity during the course of an arrest that creates a substantial risk of injury to any person, but not if the person is engaging in "passive resistance." *See State v. Hutchinson*, 94 Or App 441, 443, 765 P2d 248 (1988) (ORS 162.315 "prohibits resistance if it 'creates a substantial risk of physical injury to any person.' Passive resistance and nonviolent flight are not prohibited.").

That definition of resisting arrest was in effect in 1997, when the legislature originally enacted the crime of interfering with a peace officer.

Or Laws 1997, ch 719, § 1.[5] Representative Prozanski, who introduced the legislation, explained that its purpose was to ensure that peace officers could "perform their lawful duty and not be interfered with to the point of where it keeps them performing that duty[.]" Tape Recording, Senate Committee on Judiciary, Subcommittee on Crime and Corrections, SB 423, Feb 19, 1997 (statement of Rep. Floyd Prozanski). But the bill included

> a caveat that *this statute would not be applicable in the making of an arrest*, and the reason I think that is important to distinguish is because we already have in the books resisting arrest which applies not only to the individual who is in fact being arrested but a third person who may be interfering in the arrest of the person being arrested. So, it's not my intent to create a new statute that's going to give another, let's say another means of citing someone for that same conduct that is already regulated by state law under the resisting arrest [statute].

Id., Tape 13, Side A (emphasis added). To ensure that the new statute would not be used for that purpose, it specifically provided that the crime "does not apply in situations in which a peace officer is making an arrest." Or Laws 1997, ch 719, § 1.

Apparently that provision was difficult to apply, because two years later a bill was introduced to "clarify" it—the bill that ultimately enacted the "passive resistance" language now at issue, as well as the exception

---

[5] For ease of reference and comparison, the state has attached the current and previous versions of ORS 162.247 and the text of ORS 162.315 (resisting arrest) in an appendix to this brief. *See* App 1-3.

for "activity that would constitute resisting arrest." Counsel for the House Judiciary Committee explained the purpose of the bill, HB 3374 (1999), was to prevent defendants from being doubly charged with resisting arrest and interfering with a peace officer:

> This has to do with two crimes. One is resisting arrest * * * and the other is interfering with a peace officer * * *. And what this does is really a clarification of the language. The language that is being deleted is language that says: "this section does not apply in situations in which" and then the deleted portion is "a peace officer is making an arrest." What that has led to is some situations—the original intent as I understand of that subsection (3) was to say that if you're charging a person with resisting arrest they were trying to prevent the offender from being doubled up with two charges, both resisting arrest and interfering with a police [*sic*] officer. In practice what has happened is that the language "a peace officer is making an arrest" has been construed a bit too broadly. And so what this would do is simply provide that if the activity constitutes resisting arrest under that statute then the person cannot be charged with interfering with a peace officer. But if the activity did not constitute an offense under the other statute then they could be charged under this crime of interfering with a peace officer. My understanding is it does go back to the original intent of that language.

Tape Recording, House Committee on Judiciary, Subcommittee on Criminal Law, HB 3374, May 4, 1999, Tape 178, Side B at 326 (statement of counsel John Horton). When Counsel Horton gave that summary, the bill contained no reference to "passive resistance"; it provided only that the statute did not apply "in situations in which the person is engaging in activity that would constitute

resisting arrest under ORS 162.315." Minutes, House Committee on Judiciary, Subcommittee on Criminal Law, HB 3374, May 4, 1999, Ex P.

The "passive resistance" language was added later, in a subsequent amendment to the bill, the "-9 amendments." Minutes, House Committee on Judiciary, Subcommittee on Criminal Law, HB 3374, May 6, 1999, Ex G. The bill's sponsor, Representative Prozanski, explained that the purpose of the amendment was to ensure that a protester who passively resisted arrest would not be charged with *either* resisting arrest or interfering with a peace officer:

> Mr. Chair the -9's basically cover an area that you and I had spoken about and was brought to the attention [*sic*] after we talked at our last hearing. This is where we would be holding someone accountable for interfering with a peace officer. *And the intent of all this previous legislation including resisting arrest, that if someone was passively resisting they would not be, let's say subject to a charge of either resisting arrest and it is* [*sic*] *always been intended that they not be subject to a charge for interfering with a peace officer.*
>
> And this basically clarifies that if someone is passively resisting such as in a protest situation they would not be subject to this law. *Specifically as if an officer asks them or ordered them to stand up to be arrested, that could be interpreted as a refusal to obey a lawful order of an officer. And since this was supposed to protect the safeguards of the individuals that are peacefully without any violence, protesting that they would not be held accountable so long as it was only passive resistance.*

Tape Recording, House Committee on Judiciary, Subcommittee on Criminal Law, HB 3374, May 6, 1999, Tape 179, Side B at 148-66 (emphasis added). Therefore, as amended, ORS 162.347 exempts both

activity that is punishable under the resisting-arrest statute, ORS 162.347(3)(a), as well as activity that is not punishable under that statute because it falls within ORS 162.315's passive-resistance exception, ORS 162.347(3)(b).

Taken together, the context of ORS 162.247—specifically, the original version of that statute, and the related crime of resisting arrest—and its legislative history indicate that the legislature added the passive-resistance exception to ensure that a person who passively resists *an arrest*—and therefore could not be prosecuted for the crime of resisting arrest under the resisting arrest statute—would also not be prosecuted for interfering with a peace officer by virtue of committing the same act. *See State v. Ziska*, 355 Or 799, 807, 334 P3d 964 (2014) ("[a]nalysis of the context of a statute may include prior versions of the statute," and includes "wording changes in a statute over time"). Put differently, the legislature did not intend to create a *new* exception for "passive resistance" that would apply to situations that did not involve an arrest. It simply sought to "clarify" that persons who passively resisted arrest, and therefore would not fall within the exception for "situations in which the person is engaging in activity that would constitute resisting arrest under ORS 162.315," would not be prosecuted for refusing to comply with a lawful order.

By contrast, nothing in the legislative history or earlier versions of ORS 162.247 indicates that the legislature intended for the "passive resistance" exception to apply to the refusal to comply with a lawful order in a non-arrest situation. Admittedly, the text of the statute does not expressly limit the passive-resistance exception to arrests. But the context in which the exception was enacted, and the legislative history that accompanied it, indicate that the phrase "passive resistance" refers to passive resistance to an arrest that cannot be prosecuted for the crime of resisting arrest—that is, to capture the same category of conduct that was already addressed by the resisting-arrest statute.

In this case, defendant was not under arrest when he refused to comply with the officer's lawful order to leave the bus station. The passive-resistance exception therefore did not apply to him, and the trial court did not err when it refused to give his requested jury instruction.

C. Alternatively, if the passive-resistance exception applies to situations other than arrests, the legislature intended for it to apply only to acts of civil disobedience.

If the passive-resistance exception applies outside the context of arrests, this court must determine what the phrase "passive resistance" means in the non-arrest context. As explained below, the legislature intended for "passive resistance" to mean more than the mere refusal to comply with a lawful order. It intended for the exception to apply to acts of civil disobedience.

When the legislature amended ORS 162.247 in 1999 to add the "passive resistance" exception to the crime of interfering with a peace officer, Representative Prozanski and Chair Kevin Mannix explained that the exception for passive resistance would ensure that individuals engaged in passive resistance as an act of civil disobedience would not be prosecuted for either resisting arrest or interfering with a peace officer:

> Representative Bowman: Does the [amendment] change current law so that, so that *passive resistance or civil disobedience* is now prohibited with this change?
>
> Chair Mannix: We were careful, if I may, I can answer that. I was around when we were dealing with these statutes in Judiciary a few years back. We went through *true civil disobedience*, the lying down, and tried to craft it so that if you were lying down and the officers had to pick you up, that was okay. On the other hand, if they tried to pick you up and you started swinging at them or whatever, doing something physically, we made a good record on that too, that that became at least interference if not resistance, but you had to be doing something physically to resist or to interfere, but just being passive was not—because *were trying to respect what I call the traditional civil rights passive resistance* where you just say you're protesting and will not move.
>
> Representative Prozanski: Mr. Chair, we have also when the bill was before the committees last time I made that a very clear record, because in my community there are a lot of people that do want to *have passive resistance under the MLK approach or the Gandhi approach* of just basically—just being there as a presence but not doing anything physically to a—in the way of waving your arms or swinging stuff and that was made clear. And that's the other reason that I wanted to make certain that this—that the law itself, *the crime of interfering would not include a passive civil disobedience protester*.

Internet Audio Recording, House Committee on Judiciary, Subcommittee on Criminal Law, HB 3374, May 4, 1999, 3:26 to 7:20 and 20:05 to 22:00 (emphasis added). That passage indicates that the legislators understood the term "passive resistance" to refer not to the simple refusal to comply with a lawful order, but to refusals to comply that constitute acts of civil disobedience.

The question then becomes what the legislature meant by "civil disobedience." The plain meaning of "civil disobedience" that appears in *Webster's* is the "refusal to obey the demands or commands of the government esp. as a nonviolent collective means of forcing concessions from the government." *Webster's* at 413. In 1999, *Black's Law Dictionary* defined "civil disobedience" as "[a] form of lawbreaking employed to demonstrate the injustice or unfairness of a particular law and indulged in deliberately to focus attention on the allegedly undesirable law." *Black's Law Dictionary* 245 (6th ed 1990).[6]

By referring to "passive resistance under the MLK approach or the Gandhi approach," the bill's sponsor referred to a more specialized definition of passive resistance and civil disobedience than *Webster's* provides, and is more

---

[6] The 2009 edition of *Black's* defines "civil disobedience" slightly differently, as "[a] deliberate but nonviolent act of lawbreaking to call attention to a particular law or set of laws believed by the actor to be of questionable legitimacy or morality." *Black's Law Dictionary* 280 (9th ed 2009).

in keeping with the *Black's* definition. In effect, he used the term "passive resistance" as a term of art, as defined by the leaders of the civil rights movement. *Cf. Comcast Corp. v. Dep't of Revenue*, 356 Or 282, 296, 337 P3d 768 (2014) (court does not assume that words have their "ordinary meaning" when "the legislature uses technical terminology—so-called 'terms of art'—drawn from a specialized trade or field").

In the civil rights context, passive resistance is not the mere refusal to comply with an order—it is a refusal to comply that is motivated by a sense of morality or injustice. In other words, civil disobedience was not disobedience for its own sake; rather its purpose was to effect some social change. *Cf.* Martin Luther King, Jr., *Letter from Birmingham Jail*, reprinted in 26 U.C. Davis L. Rev. 835, 840-41 (1993) ("[O]ne has a moral responsibility to disobey unjust laws. * * * An unjust law is a code that is out of harmony with the moral law."); 67 *Collected Works of Mahatma Gandhi* 184-85, GandhiServe Found., http://www.gandhiserve.org/e/cwmg/cwmg.htm (quoted in Nehal A. Patel & Ksenia Petlakh, *Gandhi's Nightmare: Bhopal and the Need for A Mindful Jurisprudence*, 30 Harv. J. Racial & Ethnic Just. 151, 179 (2014)). ("civil disobedience authorizes disobedience of unjust laws or unmoral laws of a state which one seeks to overthrow[.]")

Therefore, by defining "passive resistance" with reference to those theories, the legislature was referring to a refusal to obey an order that has a particular motivation. In other words, it was referring to an intentional violation of the law that is inactive in nature, public, and motivated by reasons of principle or conscience. *See* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 New Eng. L. Rev. 3, 15-18 (2003) (describing key features of civil disobedience). Accordingly, a person who disobeys a peace officer's lawful order in that manner and with that motivation would not be guilty of the crime of interfering with a peace officer.

1. Defendant's proposed definition of "passive resistance" would cause the exception to all but swallow the rule.

Defendant would have this court adopt a definition of passive resistance that "appl[ies] to any interference or disobedience that does not consist of physical action, but instead takes an inactive form, like a failure or refusal to move one's body." (Pet Br 3). Thus, under defendant's proposed definition, all cases of inactive refusals to comply would fall within the passive resistance exception, regardless of the person's motivation for noncompliance.

That cannot have been what the legislature intended, because that definition would largely eliminate the crime of interfering with a peace officer by refusing to comply with a lawful order. *See* ORS 174.010 ("[W]here there are several provisions or particulars such construction is, if possible, to be

adopted as will give effect to all."). As this court once noted, "Whatever the term 'passive resistance' may encompass, it speaks to particular fact patterns at the fringes of the lawful order inquiry," and the exception "is not broad enough to obfuscate the meaning of the overall prohibition on 'refusing to obey a lawful order by [a] peace officer." *State v. Illig-Renn*, 341 Or 228, 243, 142 P3d 62 (2006) (so stating in context of rejecting facial vagueness challenge to ORS 162.247(1)(b)).

Typically, a person refuses to comply with an order verbally, or by refusing to act. Nothing in ORS 162.247(1)(b) contemplates that a person must "refuse to comply" with an order by engaging in some kind of physical action. *State v. Gaines*, 346 Or at 177 ("The offense of interfering with an officer requires only that the person refuse to obey a lawful order, not that he or she disobey in a physical way."). Thus, the exception would largely swallow the rule, rather than existing "at the fringes of the lawful order inquiry." Because defendant's proposed definition would not give effect to all parts of the statute, this court should reject it.

The definition that the Court of Appeals adopted in *Patnesky* and applied in this case suffers from the same infirmity. Under that definition, "the term 'passive resistance' applies only to 'specific acts or techniques that are commonly associated with civil disobedience.'" *State v. McNally*, 272 Or App

at 207 (quoting *Patnesky*, 265 Or App at 366). The Court of Appeals explained its focus on "acts and techniques" in *Patnesky*:

> We ask whether the defendant was engaging in specific acts or techniques that area commonly associated with governmental protest or civil disobedience. The statute does not draw distinctions based on the particular message conveyed by those acts or techniques, and we need not concern ourselves with such distinctions. That is, the decisive question is not whether the purpose of defendant's actions was (to pick one example) to force concessions from the government; the question is whether defendant was engaging in an act or technique commonly associated with that kind of protest. That view is consistent with the plain meaning of "passive resistance," which speaks to resistance that "depends mainly on *techniques* and *acts* of noncooperation." *Webster's* at 1651 (emphasis added).

265 Or App at 366.

The problem with that analysis is that the passive refusal to comply with a lawful order from a police officer is necessarily a "technique commonly associated with civil disobedience." Rosa Parks' arrest for refusing to give up her bus seat and the lunch-counter sit-ins that took place throughout the South in 1960—classic examples of civil disobedience—illustrate that "technique." *See generally* David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U. S. F. Law Rev. 645, 648-49 (1995). What characterizes the act of refusal to comply with an order as an act of civil disobedience is that it is motivated by

conscience or principle.[7] Because the Court of Appeals' definition divorces the act of refusing to comply from the motivation behind it, it fails to accurately capture the legislature's intent in enacting the passive resistance exception.

2. If this court adopts the state's alternative construction, the trial court erred by failing to give defendant's requested jury instruction because defendant presented evidence to support it.

If a requested jury instruction is legally correct, supported by the evidence, and its content is not captured by another instruction, a trial court has no discretion to refuse to give it. *State v. McBride*, 287 Or 315, 319, 599 P2d 449 (1979). In this case, defendant requested the following special instruction:

> If you find that [defendant] engaged in activity that would constitute resisting arrest or passive resistance th[e]n you should find [defendant] not guilty of Interfering with a Peace Officer.

(ER 5; App Br 6). That instruction correctly stated the law as provided in ORS 162.247(3)(b). Therefore, defendant was entitled to the instruction if the evidence supported it.

And it did, when viewed in the light most favorable to defendant. Defendant testified that, when a police officer approached him at the

---

[7] Defendant does not challenge the constitutionality of ORS 162.247(1)(b). Nevertheless, the state notes that the exception for passive resistance, as the state urges this court to define it, would alleviate any potential overbreadth concerns by exempting from prosecution passive acts of refusal that express the actor's opinion. *See generally State v. Ciancianelli*, 339 Or 282, 292-93, 121 P3d 613 (2005) (discussing Art. I, § 8, prohibition on laws that restrict the expression of opinion).

Greyhound bus station and told him to leave, defendant said, "why, I haven't done anything wrong. * * * And I said—I said I'm not going to leave, this is my way home[.]" (Tr 140-41). The officer took defendant's bag outside and defendant followed; "the argument continued of just telling me to leave over and over again, telling me to leave, and I'm, like, I'm not—I'm not leaving, I'm not leaving." (Tr 143). Outside, the officer

> even had the audacity of turned to the crowd and play [*sic*] to them, say—turn around and talk to the crowd after I had this already completely humiliating situation ask them can I give him more chances to leave.
>
> And I mean, in all this, it was so easy to draw—draw me into this huge state of aggression and then act like I'm the problem when I am obviously having to suffer this huge injustice.

(Tr 143).

That evidence, if believed by the jury, supported a reasonable inference that defendant refused to comply with the law because he believed that it was being unjustly applied to him—that is, as a matter of principle. Accordingly, if the passive-resistance exception applied in this case, the trial court erred by failing to give the instruction.

CONCLUSION

If this court adopts the state's first proposed rule of law, it should affirm. If it adopts the state's alternative, second proposed rule of law, it should reverse the decisions of the Court of Appeals and the trial court with respect to defendant's conviction for Interfering with a Peace Officer, and remand for a new trial.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Jamie K. Contreras

JAMIE K. CONTRERAS #022780
Assistant Attorney-in-Charge,
Criminal Appeals
jamie.k.contreras@doj.state.or.us

Attorneys for Respondent on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 5, 2016, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Andrew Robinson, attorneys for petitioner on review, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,411 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(2)(b).

/s/ Jamie K. Contreras

JAMIE K. CONTRERAS #022780
Assistant Attorney-in-Charge,
Criminal Appeals
jamie.k.contreras@doj.state.or.us

Attorney for Respondent on Review
State of Oregon

JKC:aft/7284823