IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ROBERT GORDON DAVIS, Defendant-Appellant Petitioner on Review.	Clatsop County Circuit Court Case No. 131084 CA A154382 SC S063216

PETITIONER'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Clatsop County
Honorable Philip L. Nelson, Judge

Affirmed Without Opinion: April 1, 2015
Before: Ortega, Presiding Judge, and DeVore, Judge, and Garrett, Judge

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
ROND CHANANUDECH #113527
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
rond.chananudech@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
SHANNON T. REEL #053948
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
shannon.t.reel@state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

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STATEMENT OF THE CASE

Nature of the Proceeding

This criminal case involves a question of statutory interpretation regarding the meaning of the term "custody" for purposes of imposing criminal liability under the escape in the third degree statute. Specifically, the issue is whether a person who fails to comply with a police order to "stop," is guilty of escaping from custody. The state charged defendant with, *inter alia*, third-degree escape. ORS 162.145. At trial, defendant argued that he did not commit third-degree escape because the state presented insufficient evidence that he escaped from "custody." The trial court disagreed, and a jury found him guilty.

Defendant appealed and argued that the trial court erred by denying his motion for judgment of acquittal. The Court of Appeals affirmed without opinion, and this court allowed review. *State v. Davis*, 270 Or App 351, 350 P3d 234, *rev allowed*, 357 Or 550, __ P3d __ (2015).

Question Presented and Proposed Rule of Law

Question Presented

Does a person "escape from custody" when, after an approaching police officer identifies himself, the person fails to comply with the officer's

command, "Stop, police," and flees from that officer and a trailing patrol vehicle with activated siren and overhead lights?

Proposed Rule of Law

No. "Escape" means "the unlawful departure of a person from custody." A person is in custody when the person is actually or constructively restrained following a "formal" arrest, that is, after an officer actually restrains the arrestee or after the arrestee submits to the arresting officer. A person who flees when a police officer attempts to stop or arrest the person does not commit escape because he is not yet "in custody."

Statement of Historical and Procedural Facts

Seaside Police Officers Brandon Petersen and Yohannis Korpela responded to a report that a shirtless man at a convenience store was attempting to fight a group of people. Tr 55. Petersen and Korpela arrived in separate patrol cars. Tr 55. Petersen saw defendant, who had his shirt off, walk away from a group of people. Tr 88. Korpela was in his patrol car at a four-way stop when Petersen got out of his patrol car and identified himself as a police officer. Tr 55, 88. Defendant ran, and Petersen yelled the command, "stop." Tr 88. Defendant did not stop. Tr 88.

Petersen chased defendant, and Korpela followed while activating his emergency lights and sirens. Tr 56. Petersen repeatedly yelled, "stop, police." Defendant jumped on the bed of a pickup truck. Tr 56.

Korpela told defendant that he was under arrest, and that he would be pepper sprayed if he did not put his hands behind his back. Tr 59. Defendant was noncompliant. Tr 59-60. Korpela "pepper-sprayed" defendant. Tr 59. Defendant assumed a fighting stance, clenched his fists, and lifted a sandbag from the truck bed. Tr 63-64. Petersen deployed his Taser and temporarily incapacitated defendant. Tr 64. Defendant removed the Taser wire, and Korpela deployed his Taser. Tr 64. Ultimately, Korpela and Petersen handcuffed defendant. Tr 67. After the arrest, defendant kicked Petersen. Tr 71.

The state charged defendant with, *inter alia*, third-degree escape, for continuing to flee from police when Petersen identified himself as a police officer and commanded defendant to stop.[1] At the close of the state's case, defendant moved for a judgment of acquittal arguing that the state failed to prove that defendant was in custody, an element of escape. Tr 111-12.

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[1] The state also charged defendant with and the jury found him guilty of interfering with a peace officer, resisting arrest, and attempted assault on a public safety officer for defendant's conduct on the pickup truck.

Specifically, defendant argued that saying "stop, police" was insufficient to place defendant in custody. Tr 111-12.

The trial court denied the motion, concluding that defendant was in constructive custody when police yelled, "stop, police":

> "THE COURT: Well, I think on that one, where you have stop and then stop, police, at least -- while we were waiting for your last witness, it would have been nice if it had said, 'stop, you're under arrest, stop police,' but I think saying, 'stop, stop, police' is sufficient to establish a person is in constructive custodies -- in constructive custody."

Tr 119-20.

The jury found defendant guilty of third-degree escape. Tr 180. The Court of Appeals affirmed without opinion. *Davis*, 270 Or App at 351.

Summary of Arguments

The state charged defendant with third-degree escape for fleeing from police after the police told him to stop. To prove that defendant committed escape, the state had to show that he unlawfully departed from custody. "Custody" is defined as "the imposition of actual or constructive restraint by a peace officer pursuant to an arrest or court order, but does not include detention in a correctional facility, youth correction facility or a state hospital." ORS 162.135(4). The plain text, context, and the legislative history demonstrate that the term "custody," as used in the escape statutes, refers to imposition of restraint *after* an officer accomplishes an arrest. Arrest and custody are two

distinct and mutually exclusive terms. An arrest occurs when (1) an officer restrains a person by physically taking control of the person's body to formally charge the person with a crime or (2) the person acquiesces or submits to the authority or control of the arresting officer. Custody is the condition of being restrained—actually or constructively—after the arrest is complete. Accordingly, to commit third-degree escape, a person must first have been arrested and formally placed into police custody. A suspect continuing to run while an officer yells, "stop, police" does not commit escape because he was never arrested, and, thus, not yet in custody.

Argument

I. Introduction

The issue in this case involves the scope of the third-degree escape statute, ORS 162.145, and the term "custody" as it is defined in ORS 162.135(4). This court resolves those issues by applying the statutory interpretation methodology articulated in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143(1993), and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) (determining the legislature's intent in enacting the statute by examining text and context of the statute, and considers any helpful legislative history).

The text in the statute is the best evidence of the legislature's intent. *Gaines*, 346 Or at 171. The escape in the third degree statute provides:

> "(1) A person commits the crime of escape in the third degree if the person escapes from custody.
>
> "(2) It is a defense to a prosecution under this section that the person escaping or attempting to escape was in custody pursuant to an illegal arrest.
>
> "(3) Escape in the third degree is a Class A misdemeanor."

ORS 162.145.

The legislature defined "escape" and "custody," as follows:

> "As used in [ORS 162.135 to 162.205], unless the context requires otherwise:
>
> "* * * * *
>
> "(4) 'Custody' means the imposition of actual or constructive restraint by a peace officer pursuant to an arrest or court order, but does not include detention in a correctional facility, youth facility or a state hospital.
>
> "(5) 'Escape' means the unlawful departure of a person from custody or a correctional facility * * *."

ORS 162.135.

As the plain text of the statute demonstrates, restraint alone is insufficient to constitute custody.[2] The definition includes qualifiers. A peace officer must

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[2] The dictionary supplements the meanings of some of the pertinent terms: "Departure" is defined as "removal from a place" and "the act of going away." *Webster's Third New Int'l Dictionary*, 604 (unabridged ed 2002). The term "from" in this context is "used as a function word to indicate * * * change or transition from state or condition to another or replacement of one thing by another." *Webster's* at 913.

restrain the individual, and the restraint must be "pursuant to arrest." The phrase, "pursuant to" means "in the course of carrying out." *Webster's Third New Int'l Dictionary*, 1848 (unabridged ed 2002). Thus, the peace officer must have restrained the person in the course of carrying out an arrest. By using the term "pursuant to arrest" the legislature could not have intended "custody" and "arrest" to be synonymous because the meaning of custody would be nonsensical.

II. In 1971, the legislature intended the term "arrest" to mean placing a person into custody, and it understood that "custody" is a condition that exists *after* a formal arrest.

"Arrest" and "custody" are legal terms of art; that is, they have well-established legal meanings in existence at the time of legislation. When words are legal terms of art, this court gives precedence to their legal meaning. *Ogle v. Nooth*, 355 Or 570, 578, 330 P3d 572 (2014).

The legislature intended the words "arrest" and "custody" to describe two distinct conditions. Support for defendant's position comes from the meaning

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"Imposition" means "the act of imposing: as * * * applying by compelling means." *Webster's* at 1136. The term "restraint" refers to a condition imposed. "Restraint" means "the *condition of being restrained*, checked, or controlled **:** deprivation of liberty : CONFINEMENT" *Webster's* at 1937 (emphasis added). "Actual" means "in existence or taking place at the time." *Webster's* at 22. "Constructive" means "derived from or depending on construction or interpretation: not directly expressed: inferred—often used in law of an act or *condition assumed from other acts* or conditions which are considered by inference or by public policy as amounting to or involving the act or condition assumed." Webster's at 489 (emphasis added).

of the term "arrest" in 1971 when the legislature enacted the escape statutes as part of the comprehensive revision of the state's criminal code. *See* Or Laws 1971, ch 743, § 189-192 (enacting third-degree escape statutes); *State v. Garcia*, 288 Or 413, 416, 605 P2d 671 (1980) (describing history of 1971 criminal code revision).

A. "Arrest" means formally taking a person into custody or actually restraining a person.

When the legislature revised the criminal code in 1971 it did not statutorily define "arrest." *State v. McClure*, 355 Or 704, 708, 335 P3d 1260 (2014). The transitive verb "arrest" was not statutorily defined in ORS 133.005 until 1973—after the legislature enacted the escape statute.[3] This court construed the pre-1973 meaning of "arrest," in the resisting arrest statute, ORS 162.315, in *McClure*. Because resisting arrest and escape were enacted as part of the revision to the criminal code, the meaning of "arrest" in *McClure* is relevant to this case. *See Gaines*, 346 Or at 177 n 16 ("Ordinarily, only statutes enacted simultaneously with or before a statute at issue are pertinent context for interpreting that statute.").

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[3] ORS 133.005(1) provides:

> "'Arrest' means to place a person under actual or constructive restraint or take a person into custody for the purpose of charging that person with an offense. A 'stop' as authorized under ORS 131.605 to 131.625 is not an arrest."

In *McClure*, police officers informed the defendant that there was an outstanding warrant for his arrest for a parole violation and began to restrain him. 355 Or at 705. The defendant resisted the officer's attempts by holding onto a utility pole, tightening his arms, and grasping at one officer's fingers while the officers repeatedly told the defendant to "stop resisting." *Id*. The defendant was convicted of resisting arrest, which prohibits a person from intentionally resisting a peace officer in making an arrest. The defendant appealed his conviction arguing that an arrest for a parole violation did not qualify as an arrest under ORS 133.005. According to the defendant, the statutory definition of arrest required police to restrain him "for the purpose of charging him with an offense," but a parole violation was not an offense. *Id*. at 706.

Because ORS 133.005 was enacted after the resisting arrest statute, this court looked to the meaning of "arrest" in 1971. *Id*. at 708. At that time, two statutes defined "arrest": *Former* ORS 133.210 (1969), *repealed by* Or Laws 1973, ch 836 § 358 , defined arrest as "the taking of a person into custody so that he may be held to answer for a crime"; and *former* ORS 133.250 (1969), *repealed by* Or Laws 1973, ch 836, § 358, provided, "[a]n arrest is made by an actual restraint of the person of the defendant or by his submission to the custody of the officer." This court noted that when the legislature enacted ORS 133.005, it did not change the substantive meaning of the term "arrest" as it was

understood in 1971. *Id*. at 709 (citing Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Procedure Code, Final Draft and Report § 89, 52 (November 1972)).

The court also looked at its prior case law interpreting the arrest statute and found it to be consistent with its interpretation.

> "The definition of 'arrest' * * * in *former* ORS 133.250: 'an actual restraint of the person of the defendant, or * * * his submission to the custody of the officer.' Thus, in [*State v.*] *Groda*, [285 Or 321, 591 P2d 1354 (1979)] the court understood ORS 133.005 to be consistent with *former* ORS 133.250 and to mean that an officer arrests a person both when the officer in fact substantially restrains that person's liberty and when the officer **formally** informs the person that the person is under arrest.
>
> "Similarly, in *State v. Heintz*, 286 Or 239, 594 P2d 385 (1979), the court held that the drawing of a defendant's blood was a reasonable search incident to arrest even though the defendant was unconscious at the time of the blood draw and had not been formally arrested. The court cited *Groda* and ORS 133.005(1) in support of its conclusion that 'an arrest includes the placing of a person under actual or constructive restraint.'"

Id. at 710 (boldface added). Based on the legislative history, the existence of pre-1973 arrest statutes, and the prior case law, this court concluded that an arrest occurs in two distinct circumstances: (1) "when an officer formally takes a person into custody" or (2) "when an officer actually restrains a person." *Id*. at 711. Ultimately, the court held that the defendant's conduct constituted resisting arrest. *Id*. at 714.

McClure is significant because it shows that the pre-1971 arrest statutes both refer to "custody" as the end result of an arrest. *See former* ORS 133.210

("the taking of a person into custody") *and former* ORS 133.250 ("An arrest is made by the actual restraint of the person of the defendant or by his submission to the custody of the officer"). The statutes demonstrate different methods for achieving that result: (1) the officer actually restrains the arrestee by physically taking control of the person's body—*i.e.*, places the arrestee in handcuffs; or (2) the arrestee submits to police control—that is, turns himself in or follows the officer's formal commands.

Accordingly, the meaning of "custody" in the context of pre-1971 arrests, shows that the phrase, "pursuant to arrest," refers to restraint after a formal arrest. After a person is handcuffed or submits to police control, that person can be in custody by either actual restraint—meaning officers continue to hold onto him—or constructive restraint—where the officer directs the person's movement without physical contact. During that period, any unlawful departure would constitute escape in the third degree.

B. The legislature intended "custody" to occur after a formal arrest but before confinement in jail or prison.

The commentary to the criminal code supports defendant's position that the legislature intended "custody" to occur *after* the arrest. The commentary to ORS 162.135 provides:

> "Subsection (3) defines 'custody' as the imposition of actual or constructive restraint by a peace officer pursuant to either (a) an arrest, or (b) a court order. * * * 'Custody' is intended to apply to custodial situations other than correctional facility confinement,

> *i.e.*, while the actor is under actual or constructive restraint but not yet committed to a correctional facility."

Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 189, 193 (July 1970). The phrase "custodial situation" would make little sense if it applied to situations when officers were attempting to make an arrest, because the person would not yet be under actual or constructive restraint. Instead, "custodial situation" is an accurate way to describe a person who has been formally arrested but not yet transported to jail.

Indeed, research counsel for the subcommittee explained how a person could commit third-degree escape:

> "Mr. Wallingford explained that the only person who could be charged with escape in the third degree would be one who *had been arrested* for a misdemeanor *but not yet incarcerated*, *i.e.*, not yet delivered or committed to a detention facility."

Minutes, Oregon Criminal Law Revision Commission, Subcommittee No. 1, Nov 6, 1969, at 7 (emphasis added). Mr. Wallingford's explanation demonstrates that "custody" was meant to only encompass the period of time an officer restrains a person between the formal arrest and the confinement in a correctional facility. That explanation is consistent with the manner in which pre-1971 cases used the term custody to mean following a formal arrest. *See State v. Allen*, 152 Or 422, 433, 53 P2d 1054 (1936) (rejecting the defendant's argument that the officer lacked authority to arrest them when "the attempted

arrest was not completed by the taking of the defendants into the actual custody of the officer, or their submission to his custody").

C. The legislature intended to criminalize fleeing from "custody" and not fleeing from an arrest.

The statutory defense to third-degree escape adds support that the legislature understood custody to occur after a formal arrest. The commentary noted that a person does not commit a crime by simply "running away" from an officer:

> "The proposed section on resisting arrest * * * denies a person the right to resist by force or violence an arrest he believes to be illegal. In the judgment of the Commission the same rationale does not apply to escape in the third degree. The use of force or violence in effecting an escape will be punishable under first and second degree escape. *If an arrest and subsequent custody is illegal, a person should not be deprived of the defense if he merely 'runs away' from the detaining officer*. [ORS 162.145(2)] therefore gives the escapee a defense if he was in custody pursuant to an illegal arrest."

Commentary § 190-92 at 195 (emphasis added). By referring to "an arrest and subsequent custody," the legislature understood "custody" to occur after an arrest.

In addition, the italicized portions of the commentary demonstrate that the legislature never intended to criminalize nonviolently "running away." Indeed, the commentary to the resisting arrest statute echoed the commentary in the escape statutes: "Neither flight from arrest nor passive resistance should be made crimes in themselves." Commentary § 206 at 204 (internal quotation

marks omitted). That statement shows that the legislature never intended for "flight from arrest" to be a crime. Rather, the legislature intended flight from *custody* to be a crime. The distinction makes sense only if custody occurs *after* arrest. To interpret "custody" to include an investigatory encounter when an officer announces his presence and orders the defendant to stop would run counter to the legislature's clear statement of intent.

The legislature in 1971 understood the difference between fleeing from an arrest and escaping. Context for interpreting a statute "includes the law as it existed before the adoption of the 1971 criminal code." *State v. Blair*, 348 Or 72, 76, 228 P3d 564 (2010). The commentary to the escape statutes explained the relationship to existing law in 1971:

> "ORS 162.322, 162.324, 162.330, 162.340 would be repealed. ORS 169.340 provides civil liability of a sheriff for escape of a defendant in a civil action. This statute would not be affected. ORS 144.500(2)(b) provides that unauthorized absence of a person from a work release program assignment constitutes an escape from official detention. This statue would be amended to delete reference to ORS 162.322 to 162.326."

Commentary § 190-92 at 195 (emphasis in original). Notably absent from the list of existing law was *former* ORS 133.280,[4] which authorizes police to use any means possible to capture a person who *flees from or resists an arrest*. The

[4] *Former* ORS 133.280 provides, "If after notice of intention to arrest the defendant, he either flees or forcibly resists, the officer may use all necessary and proper means to effect the arrest."

absence demonstrates that the legislature never intended fleeing from an arrest to constitute escape.

Instead, *former* ORS 133.280 appears in the commentary to the resisting arrest statute. In explaining the resisting arrest statute's relationship to the then existing law, the commentary noted that resisting arrest was similar to *former* ORS 133.280:

> "ORS 133.280 provides *that if after notice of intention to arrest the defendant, he either flees* or forcibly resists, the officer may use all necessary and proper means to effect the arrest. ORS 133.270 and 133.330 require that the arresting officer disclose his authority when proceeding under warrant and without a warrant. (See Art. 4 for further comment)."

Commentary § 206 at 205 (emphasis added). The inclusion of *former* ORS 133.280 in the commentary to the resisting arrest statute demonstrates that the legislature never contemplated that fleeing from an arrest—as opposed to fleeing from custody—constituted escape. Instead, the legislature understood arrest and custody to be two separate and mutually exclusive conditions. To constitute escape, the person must flee *after* the arrest while the person is in custody.

In summary, a police officer accomplishes an arrest—*i.e*, taking the person in custody—by two means: putting a person in actual restraint or having the person submit to the arrest. Only after one of those actions has occurred, is the person in "custody"—either by remaining in "actual restraint" or being

constructively restrained. The 1971 legislature enacted the escape statutes to make a criminal offense the unlawful departure from that custody. Temporally, an arrest must occur before the custody.

D. References to "custody" and "arrest" in other statutes of the criminal code demonstrate that custody and arrest describe separate and distinct conditions of confinement.

Other statutes in the criminal code demonstrate that the legislature understood "custody" and "arrest" to be two mutually exclusive terms. Context includes other related statutes. *State v. Carr*, 319 Or 408, 411-12, 877 P2d 1192 (1994). When the legislature uses the same terms in related statutory provisions that were enacted as part of the same law, this court interprets the terms to have the same meaning in both sections. *Tharp v. PSRB*, 338 Or 413, 422, 110 P3d 103 (2005). The justification statutes (ORS 161.235 - 161.265) contain several instances where the legislature used "custody" and "arrest" to mean separate and distinct conditions. Those statutes were enacted as part of the same comprehensive revision of Oregon's criminal laws as the escape statute. Or Laws 1971, ch 743, §§27-33, 189-193.

The legislature differentiated between "custody" and "arrest" when it described police-citizen interactions. The legislature authorized police to use physical force in making an arrest *or* in preventing an escape:

> "Except as provided in ORS 161.239, a peace officer is justified in using physical force upon another person only when

> and to the extent that the peace officer reasonably believes it necessary:
>
> "(1) To make an arrest or *to prevent the escape from custody of an arrested person* unless the peace officer knows that the arrest is unlawful[.]"

ORS 161.235 (emphasis added).[5] The use of the phrase "custody of an arrested person" supports defendant's interpretation that "arrest" is the act of taking the person into custody and "custody" occurs after the formal arrest. *See, e.g.*, ORS 161.255 (allowing a private citizen to use physical force "to make an arrest or to prevent the escape from custody of an arrested person").

III. Defendant's interpretation is consistent with this court's case law.

When construing a statute, this court considers its prior interpretation of the statute. *State v. McAnulty*, 356 Or 432, 441, 338 P3d 653 (2014). This court has interpreted the escape statute in three instances. The first case considered whether a defendant was in custody before an arrest. The last two cases involve circumstances where the defendants were clearly in custody or a correctional facility following an arrest.

In *State McVay,* the officers cited the defendant for an alcohol violation and tried to take him to a detoxification facility when the defendant ran away. 313 Or 292, 833 P2d 297 (1992). The state charged the defendant with third-degree escape. The state conceded, and this court agreed that the defendant was

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[5] ORS 161.239 authorizes police to use "deadly physical force" in making an arrest or in preventing an escape.

not in "custody" for purposes of the escape statute because the officers were exercising their authority under ORS 426.460 to take the defendant to a treatment facility and did not arrest him. *Id*. at 295.

In *State v. Lonergan*, the officers had chased the defendant on foot and in a car, handcuffed him, walked him back to the patrol car, and placed him against the trunk of the car. 344 Or 15, 176 P3d 374 (2008). When the officer reached into the car to contact dispatch, the defendant fled. He was apprehended again and resisted arrest. The beginning of custody was never at issue in *Lonergan*, but this court did note that when the defendant was arrested and placed against the trunk of the patrol car, he was in custody, because he was under 'actual or constructive restraint by a peace officer pursuant to an arrest.'" *Id*. at 21. This court concluded that the defendant committed third-degree escape when he stood and ran at that point. *Id*. at 22.

In *State v. Lane*, the defendant fled from a courtroom after the trial court revoked his pretrial release and remanded him to the custody of the sheriff for transportation to the county jail. 341 Or 433, 435, 144 P3d 927 (2006). The defendant was convicted of second-degree escape, for escaping a correctional facility, and third-degree escape for escaping from custody. The defendant conceded that he had committed third-degree escape but argued that the courtroom did not qualify as a correctional facility. *Id*. at 438. This court did not directly construe "custody." But in holding that the courtroom was a

correctional facility, this court stated that the defendant was in "constructive custody of the correctional facility":

> "In that respect, we note an additional fact that removes the issue from doubt: the presence of the deputy sheriff who had brought the codefendants [from jail] to court. Those two codefendants clearly remained in constructive custody, and the sheriff was the symbol of that status. Judge Thompson's order placed defendant directly under the authority of the deputy sheriff, *i.e.*, placed defendant in the same position as his two codefendants. And that position was, as we have noted, *constructive custody in a correctional facility*. We conclude that defendant, when he left the courtroom, escaped from a correctional facility under ORS 162.155(1)(c)."

Id. at 440 (emphasis added).

Those cases do not conflict with defendant's interpretation of the term custody. *McVay* demonstrates that custody cannot occur before an arrest. In *Lonergan*, the defendant escaped from custody well after he was formally arrested. Those two cases support defendant's position that "custody" occurs after an arrest.

The brief discussion of constructive custody in *Lane* is also consistent with defendant's interpretation that custody is the condition of being restrained *after* an arrest. This court's comparison of the defendant's position after the judge revoked his release status to "constructive custody in a correctional facility," suggests that "custody" is the equivalent to the restraint imposed on an inmate.

IV. The state presented insufficient evidence that defendant committed escape, because he was not in custody.

The state charged defendant with third-degree escape. The state's legal theory was that defendant unlawfully departed from custody when he failed to comply with Officer Petersen's command to "stop." Custody does not occur until after the formal arrest or when the defendant submits to police control. First, the officer did not actually restrain defendant as part of a formal arrest prior to defendant's departure. That is, neither Officers Petersen nor Korpela had actually constrained defendant. By yelling , "Stop, police," the state offered evidence that Petersen intended to or attempted to restrain defendant; However, officer Petersen had not yet effectuated his arrest—that is he had not actually physically restrained defendant by placing him in handcuffs or conducting any other act associated with formal arrest.

Second, defendant did not submit to the arrest, which would have placed him under the constructive restraint of the officers. The state did not offer any evidence that defendant was in constructive restraint as part of a formal arrest procedure; defendant was not in the patrol car on his way to the jail or participating in a formal arrest procedure when he chose to flee.

Defendant was not arrested, in fact, until after officers pepper-sprayed him, deployed their Tasers, and finally physically subdued. He was subsequently convicted of interfering with a peace officer's lawful order,

resisting arrest, and attempted assault of a peace officer. The state simply should not have added an additional charge—escape in the third degree—because defendant initially sought to evade the police through nonviolent means. Thus, defendant was never in custody and the state failed to present sufficient evidence to convict defendant of third-degree escape.

CONCLUSION

Based on the foregoing, defendant respectfully asks that this court to reverse the Court of Appeals decision to affirm defendant's conviction for third-degree escape and remand to the trial court for further proceedings.

Respectfully submitted,

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

ESigned

_____

ROND CHANANUDECH OSB #113527
DEPUTY PUBLIC DEFENDER
Rond.Chananudech@opds.state.or.us

Attorneys for Defendant-Appellant
Robert Gordon Davis

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

Petition length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this petition (as described in ORAP 5.05(2)(a)) is 4,928 words.

Type size

I certify that the size of the type in this brief on the merits 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'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 24, 2015.

I further certify that I directed the Petitioner's Brief on the Merits to be served upon Paul Smith attorney for Respondent on Review, on August 24, 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

_____

ROND CHANANUDECH OSB #113527
DEPUTY PUBLIC DEFENDER
Rond.Chananudech@opds.state.or.us
Attorneys for Petitioner on Review
Robert Gordon Davis