

Filed: June 7, 2012

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Respondent on Review,

v.

JESSE VANCE MOSS,

Petitioner on Review.

(CC 08CR0445; CA A141464; SC S058860)

En Banc

On review of an order of the Court of Appeals.

Argued and submitted March 8, 2011, at the University of Oregon School of Law, Eugene, Oregon. Reassigned March 27, 2012.

Kristin Carveth, Deputy Public Defender, Salem, argued the cause and filed the brief for petitioner on review. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Cecil A. Reniche-Smith, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

LANDAU, J.

The order of the Court of Appeals is affirmed.

Durham, J., dissented and filed an opinion, in which De Muniz and Walters, JJ., joined.

1           LANDAU, J.

2           Oregon's fugitive dismissal rule, ORAP 8.05(3), provides that, when a  
3 criminal defendant has absconded during the pendency of an appeal, an appellate court  
4 may dismiss the appeal, as long as the defendant "has not surrendered" at the time of the  
5 dismissal. In this case, defendant filed a notice of appeal and then absconded. The state  
6 moved to dismiss. In the meantime, defendant was arrested and returned to custody. On  
7 the basis of his return to custody, defendant opposed the motion to dismiss, arguing that  
8 he had "surrendered." The state responded that the mere fact that an absconding  
9 defendant has been apprehended by police is not sufficient to establish that he has  
10 "surrendered" within the meaning of the rule. The Court of Appeals agreed with the state  
11 and dismissed the appeal. We allowed defendant's petition for review and, for the  
12 reasons that follow, affirm the order of dismissal.

13           The relevant facts are uncontested. In February 2009, after his convictions  
14 for interfering with a peace officer, disorderly conduct, and criminal trespass, defendant  
15 was sentenced to 24 months' probation, the conditions of which included payment of  
16 fines and fees in accordance with a payment schedule and completion of community  
17 service. Defendant timely appealed, challenging the conviction for disorderly conduct.

18           Meanwhile, defendant failed to complete community service and failed to  
19 pay the fines and fees as agreed. On July 15, 2010, the trial court issued an order to show  
20 cause why defendant's probation should not be revoked, directing defendant to appear on  
21 August 17, 2010. Defendant did not appear as directed. The trial court found that  
22 defendant "has absconded from probation" and issued a bench warrant for defendant's

1 arrest. Three days later, on August 20, 2010, the state filed a motion to dismiss  
2 defendant's appeal pursuant to ORAP 8.05(3) on the ground that defendant had  
3 absconded.

4 On September 2, 2010, defendant filed a response in opposition to the  
5 state's motion. He did not challenge the state's assertion that he had absconded. Rather,  
6 he argued that dismissal was no longer permitted because he had "surrendered" within the  
7 meaning of the rule in light of his return to custody. In support of that contention,  
8 defendant submitted a copy of an OJIN printout, indicating that the police had served him  
9 with an arrest warrant on August 22, 2010, and that he had appeared before the trial court  
10 the following day.

11 The Court of Appeals dismissed the appeal. Defendant petitioned for  
12 review, arguing that the Court of Appeals erred. His return to custody, he argues,  
13 constitutes "surrender" within the meaning of ORAP 8.05(3) and thus precludes dismissal  
14 of the appeal. The state responds that the rule requires more than merely having been  
15 arrested to constitute the sort of "surrender" that precludes the dismissal of an absconding  
16 defendant's appeal. Thus framed, the issue is one of interpretation; specifically, the  
17 interpretation of the term "surrender" as it is used in ORAP 8.05(3). In *State v. Robbins*,  
18 345 Or 28, 188 P3d 262 (2008), this court resolved a dispute concerning the  
19 interpretation of a different portion of ORAP 8.05(3) by applying the rules of  
20 interpretation that ordinarily apply to statutes and administrative rules. We follow that  
21 example in this case.

22 Accordingly, we begin with the text of the rule, which provides, in part:

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

8 ORAP 8.05(3). When a disputed term in a statute or rule is undefined by that rule, we  
9 assume that it partakes of its ordinary meaning. *See, e.g., State v. Murray*, 340 Or 599,  
10 604, 136 P3d 10 (2006) ("Absent a special definition, we ordinarily would resort to  
11 dictionary definitions, assuming that the legislature meant to use a word of common  
12 usage in its ordinary sense.").

13           The term "surrender" has a variety of different "ordinary" meanings:

14       "*vt* **1** : to make a surrender in law of : as **a** : to give up (an estate) to the  
15 holder in remainder or reversion **b** : to relinquish (as rights or claims under  
16 a patent) to the grantor **c** : to deliver (the principal) into lawful custody **2 a** :  
17 to yield to the power, control, authority, or possession of another : give or  
18 deliver up possession of upon compulsion or demand : cease trying to  
19 retain or control and agree to yield \* \* \* **b** : to give up completely or agree  
20 to forgo esp. in favor of another : abandon, resign, or relinquish possession  
21 of usu. for the sake of another : assent to loss of possession or exercise of  
22 or power or control over \* \* \* **3 a** : to give (oneself) up into the power of  
23 another esp. as a prisoner **b** : to give (oneself) over to something \* \* \* *vi* :  
24 to give oneself up into the power of another : YIELD \* \* \*."

25 *Webster's Third New Int'l Dictionary* 2301-02 (unabridged ed 2002). Some of the  
26 definitions seem consistent with defendant's proposed reading of the rule. For example,  
27 the definition, "to yield to the power, control, authority, or possession of another," seems  
28 consistent with defendant's contentions in this case. Other definitions, however, are  
29 consistent with the state's proposed reading of the rule. The first definition states that the  
30 term means "to make a surrender in law of : as \* \* \* to deliver (the principal) into lawful

1 custody." Similarly, an alternate definition is "to give up completely or agree to forgo."  
2 In both examples, the term "surrender" is used to refer to a voluntary act of delivery or  
3 relinquishment, not in response to force or compulsion.

4 Oregon statutes reflect the same variety of usages that the dictionary  
5 definitions spell out. Some statutes use the term in a sense that is arguably close to the  
6 one that defendant proposes. ORS 398.348(2), for example, authorizes a court martial to  
7 punish a person "who before or in the presence of the enemy" either "surrenders or  
8 delivers up any command." Others use the term in the sense of an intentional voluntary  
9 act, one that is not taken in response to force or compulsion. ORS 73.0604(1)(a), for  
10 example, provides that a person entitled to enforce an instrument may discharge the  
11 obligation of another to pay that instrument "[b]y an intentional voluntary act, such as  
12 surrender of the instrument."

13 Similarly, statutes pertaining to criminal law, custody, and appeal use the  
14 term "surrender" to refer to voluntary -- and not compelled -- relinquishment or delivery.  
15 Statutes concerning extradition of criminal defendants, for example, provide that "the  
16 Governor, at the discretion of the Governor, either may surrender the person on the  
17 demand of the executive authority of another state or may hold the person until the  
18 person has been tried and discharged, or convicted and punished in this state." ORS  
19 133.817. Clearly, the Governor's act of "surrendering" the defendant is a voluntary --  
20 indeed, expressly discretionary -- act. ORS 135.280, which governs the failure of a  
21 defendant to comply with the terms of a release agreement, provides that the court may  
22 issue a notice of forfeiture of any security that the defendant has posted and, if "the

1 defendant does not appear or satisfy the court having jurisdiction that appearance and  
2 surrender by the defendant was, or still is, impossible and without fault of the defendant,  
3 the court shall enter judgment for the state[.]"

4           What the foregoing demonstrates is that the rule is at least ambiguous. The  
5 interpretations proffered by both defendant and the state are plausible, in the sense that  
6 they are consistent with ordinary meaning and with usage in various state statutes. The  
7 question for us is which of those multiple possible senses of the word "surrender" is the  
8 one likely intended by those who adopted the rule. *See State v. Cloutier*, 351 Or 68, 96,  
9 261 P3d 1234 (2011) ("Dictionaries, after all, do not tell us what words mean, only what  
10 words *can* mean, depending on their context and the particular manner in which they are  
11 used." (Emphasis in original.)). We answer that question by considering the context  
12 within which the rule was adopted. *Robbins*, 345 Or at 34-37 (considering context of  
13 adoption of ORAP 8.05(3)).

14           What is known as "the fugitive dismissal rule" -- or in some jurisdictions,  
15 "the fugitive disentitlement doctrine" -- is an equitable doctrine that dates back to the  
16 late-nineteenth century. *See generally* Mitchell Waldman, Annotation, *Application of*  
17 *"Fugitive Disentitlement Doctrine" in Federal Civil Actions*, 176 ALR Fed 333 (2002);  
18 Anthony Michael Altman, *The Fugitive Dismissal Rule: Ortega-Rodriguez Takes the Bite*  
19 *Out of Flight*, 22 Pepp L Rev 1047, 1049-53 (1995) (discussing historical development of  
20 "the fugitive dismissal rule"); Jason W. Joseph, *The Fugitive Dismissal Rule Applied to*  
21 *Pre-Appeal Fugitivity*, 84 J Crim L & Criminology 1086, 1086-91 (1994) (same). Under  
22 that long-established legal principle, appellate courts possess inherent authority to

1 dismiss a defendant's appeal if that defendant has absconded from the court's jurisdiction.

2 Courts have identified several rationales for the rule. The initial  
3 justification for the rule was the unenforceability of judgments against a fleeing  
4 defendant. *See, e.g., Smith v. United States*, 94 US 97, 97, 24 L Ed 32 (1876) ("It is  
5 clearly within our discretion to refuse to hear a criminal case in error, unless the  
6 convicted party \* \* \* is where he can be made to respond to any judgment we may  
7 render.").

8 But the courts invoking the rule were quick to add a second consideration,  
9 namely, the fact that absconding from an appellate court's jurisdiction amounted to a  
10 waiver -- or a "disentitlement" -- of the right to pursue the appeal. As the United States  
11 Supreme Court explained in *Molinaro v. New Jersey*, 396 US 365, 366, 90 S Ct 498, 24 L  
12 Ed 2d 586 (1970),

13 "No persuasive reason exists why this Court should proceed to adjudicate  
14 the merits of a criminal case after the convicted defendant who has sought  
15 review escapes from the restraints placed upon him pursuant to the  
16 conviction. While such an escape does not strip the case of its character as  
17 an adjudicable case or controversy, *we believe it disentitles the defendant to*  
18 *call upon the resources of the Court for determination of his claims.*"

19 (Emphasis added.)<sup>1</sup> More recently, in *Ortega-Rodriguez v. United States*, 507 US 234,

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<sup>1</sup> The notion that disentitlement is an important rationale for the fugitive dismissal rule did not originate with *Molinaro*. It dates back at least to *Allen v. Georgia*, 166 US 138, 141-42, 17 S Ct 525, 41 L Ed 949 (1897), in which the Court upheld a state court's dismissal of a fugitive defendant's appeal even after the defendant's recapture. *Allen*, in turn, cited even earlier decisions, including *Commonwealth v. Andrews*, 97 Mass 543, 544 (1867), in which the Supreme Judicial Court of Massachusetts held that, "[s]o far as the defendant had any right to be heard under the constitution, he must be deemed

1 240, 113 S Ct 1199, 122 L Ed 2d 581 (1993), the Supreme Court explained that  
2 "[e]nforceability is not \* \* \* the only explanation we have offered for the fugitive  
3 dismissal rule." Citing *Molinaro*, the court explained that, "the rule allowing dismissal of  
4 fugitives' appeals has rested in part on enforceability concerns, and in part on a  
5 'disentitlement' theory that construes a defendant's flight during the pendency of his  
6 appeal as tantamount to waiver or abandonment." *Ortega-Rodriguez*, 507 US at 240.

7           Most courts applying a fugitive dismissal rule have adopted the rationale  
8 referred to in *Molinaro* and *Ortega-Rodriguez* that, aside from the fact that allowing an  
9 absconding defendant to proceed with an appeal creates enforceability problems, such a  
10 defendant who flees from a court's jurisdiction waives or forfeits the right to proceed with  
11 the appeal. *See generally* James L. Buchwalter, Annotation, *Effect of Escape by, or*  
12 *Fugitive Status of, State Criminal Defendant on Availability of Appeal or Other Post-*  
13 *Verdict or Post-Conviction Relief -- State Cases*, 105 ALR 5th 529, 573-98, § 11 (2003 &  
14 Supp 2009). In such jurisdictions, even the eventual recapture of an absconding criminal  
15 defendant does not lead to the reinstatement of the appeal. As one court representative of  
16 that view explained, "[i]n escaping, appellant has demonstrated his contempt for the  
17 justice system of which the appellate court is one part. Merely because  
18 -- no thanks to him -- he is recaptured, it is not evident that he regains the right to review  
19 that he earlier forfeited." *U.S. v. Puzanghera*, 820 F2d 25, 26 (1st Cir), *cert den*, 484 US

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to have waived it by escaping from custody and failing to appear and prosecute his exceptions in person[.]"

1 900 (1987).

2           Moreover, as has been noted by many courts, refusing to reinstate an appeal  
3 following recapture discourages escapes, encourages voluntary surrender, and promotes  
4 the efficient operation of the courts. *See, e.g., Degen v. United States*, 517 US 820, 824,  
5 116 S Ct 1777, 135 L Ed 2d 102 (1996) ("Disentitlement 'discourages the felony of  
6 escape and encourages voluntary surrenders' and 'promotes the efficient dignified  
7 operation' of the courts." (Quoting *Estelle v. Dorough*, 420 US 534, 537, 95 S Ct 1173,  
8 43 L Ed 2d 377, *reh'g den*, 421 US 921 (1975.)); *State v. Moran-Soto*, 150 Idaho 175,  
9 179, 244 P3d 1261 (Idaho App 2010) ("[D]ismissal discourages escapes and encourages  
10 fugitives to surrender."); *Reid v. Commonwealth*, 57 Va App 42, 53-54, 698 SE2d 269  
11 (2010) (same).

12           Some courts take a more limited view of the fugitive dismissal rule. They  
13 reject the waiver or forfeiture rationale and hold instead that the enforceability of  
14 appellate judgments is the sole purpose of the rule. Those courts regard recapture as  
15 grounds for reinstating a previously absconding criminal defendant's appeal. *See, e.g.,*  
16 *People v. Estrada*, 570 NYS2d 150, 150, 173 AD2d 555 (App Div 2d Dept), *appeal den*,  
17 78 NY2d 954 (1991); *State v. Tuttle*, 713 P2d 703, 705 (Utah 1985) ("[A] criminal appeal  
18 dismissed after escape may be reinstated unless the State can show that it has been  
19 prejudiced by the defendant's absence and the consequent lapse of time.").

20           In Oregon, there was no formally adopted fugitive dismissal rule until  
21 1993. Early on, however, the courts recognized their inherent authority to dismiss a  
22 criminal appeal when the defendant absconds. And, from the beginning, the rationale for

1 the exercise of that inherent authority was not limited to the enforceability of appellate  
2 judgments. Rather, the Oregon appellate courts appear to have adopted the view that the  
3 dismissal of the appeal of an absconding defendant is appropriate because the defendant  
4 has waived the right to proceed and that only a voluntary return will suffice to undo that  
5 waiver.

6 On point in that regard is this court's decision in *State v. Broom*, 121 Or  
7 202, 253 P 1042 (1927). In that case, the defendant was convicted, in two separate cases,  
8 of violating the Prohibition Law and sentenced to jail and a fine. *Id.* at 204-05. The  
9 defendant posted an undertaking of bail and, upon release, appealed both convictions.  
10 When this court affirmed the first conviction, the defendant was ordered to return to  
11 custody. *Id.* at 205. As the court described the events that followed,

12 "[t]he defendant not appearing and surrendering himself to the custody of  
13 the law, the sheriff undertook to execute the directions of the order and take  
14 the defendant into custody, and, as a result thereof, located defendant in the  
15 Marion County jail at Salem, Oregon, where he was serving a sentence for  
16 a third crime against the Prohibition Law for which he was convicted  
17 subsequent to his convictions hereinbefore alluded to."

18 *Id.* The defendant escaped from jail and remained a fugitive while the second appeal  
19 remained pending. The question arose whether to continue with that appeal. As the court  
20 framed the question, "[c]an this fugitive from justice, from his concealed lair beyond the  
21 confines of this jurisdiction, invoke the power of this court to hear his cause upon appeal  
22 in the matter of his second conviction?" *Id.* at 206. The court answered the question with  
23 the following explanation:

24 "The authorities abundantly sustain the proposition that, in the  
25 absence of a statute regulating the procedure, it is within the discretion of

1 the court to hear or not to hear the appeal of a prisoner who escapes  
2 pending his appeal. See *Smith v. United States*, 94 U. S. 97, a leading case  
3 on this subject, where the United States Supreme Court, speaking through  
4 Mr. Chief Justice Waite, wrote:

5 "It is clearly within our discretion to refuse to hear a criminal  
6 case in error, unless the convicted party, suing out the writ, is where  
7 he can be made to respond to any judgment we may render. \* \* If  
8 we affirm the judgment, he is not likely to appear to submit to his  
9 sentence. If we reverse it and order a new trial, he will appear or  
10 not, as he may consider most for his interest. Under such  
11 circumstances, we are not inclined to hear and decide what may  
12 prove to be only a moot case.'

13 "The books disclose many rulings of other courts holding to the  
14 doctrine that a fugitive from justice who has been convicted of crime shall  
15 not be permitted to prosecute an appeal to reverse the judgment of  
16 conviction, or be heard for any purpose, *unless he resubmits himself to the*  
17 *custody of the law and the jurisdiction of the court[.]*"

18 *Id.* at 206-07 (emphasis added).

19 Thus, the court mentioned the enforceability of judgments as one  
20 justification for the exercise of discretion to dismiss the appeal of an absconding  
21 defendant. But it also stated that an absconding defendant must "resubmit[] himself to  
22 the custody of the law and the jurisdiction of the court" to avoid dismissal, consistently  
23 with decisions such as *Molinaro* and *Ortega-Rodriguez* that hold that the rationale for a  
24 fugitive dismissal rule is not merely enforceability.

25 That certainly is the manner in which the Court of Appeals subsequently  
26 read *Broom*. For example, in *State v. Sterner*, 124 Or App 439, 441, 862 P2d 1321  
27 (1993), *rev den*, 318 Or 583 (1994), the defendant was convicted of second-degree theft  
28 and was placed on probation. He filed a notice of appeal, but then absconded from the  
29 jurisdiction. The state moved to dismiss. *Id.* At the time, ORAP 8.05(3) had not yet

1 been adopted, and the state invoked the appellate court's inherent authority to apply the  
2 fugitive dismissal rule. The court agreed. Citing *Broom*, the court explained that "[a]  
3 criminal defendant should not be able to enjoy the benefits of the law while unlawfully  
4 avoiding its rigor," *Sterner*, 124 Or App at 443, an explanation more consistent with a  
5 rationale of waiver than of mere enforceability. Indeed, the court added at that point in  
6 its opinion a discussion of the United States Supreme Court's then-recent decision in  
7 *Ortega-Rodriguez*, and explained that, under that decision, "enforceability, disentanglement  
8 to court resources, deterrence and the advancement of the efficient, dignified operation of  
9 an appellate courts [are] theories underlying the dismissal of appeals filed by fugitives  
10 from justice." *Sterner*, 124 Or App at 442 n 3.

11           Perhaps even more significant is *State v. Lundahl*, 130 Or App 385, 387,  
12 882 P2d 644 (1994), a case in which the Court of Appeals dismissed a criminal appeal  
13 even though, by that time, the absconding defendant had been recaptured on a fugitive  
14 warrant. In fact, the defendant had been recaptured even before the filing of the notice of  
15 appeal. As a result, ORAP 8.05(3) -- which had been adopted several months earlier --  
16 did not apply. The Court of Appeals, relying on the inherent authority of appellate  
17 courts, cited both *Broom* and *Ortega-Rodriguez* and concluded that a criminal defendant  
18 who absconds from the jurisdiction should not be able to claim the benefits of an appeal.  
19 *Id.* at 389-90. The decision would make no sense if the sole rationale for a fugitive  
20 dismissal rule is the enforceability of the appellate judgment; defendant, after all, was in

1 custody at the time the notice of appeal had been filed.<sup>2</sup>

2           It was in that context that the Chief Justice of the Oregon Supreme Court  
3 and the Chief Judge of the Oregon Court of Appeals, in October 1993, adopted what is  
4 now ORAP 8.05(3). Order Adopting Amendments, Chief Justice Order No. 93-091 (Oct  
5 20, 1993). They did so following a process of proposal, comment, and amendment by the  
6 Oregon Rules of Appellate Procedure Committee, consisting of members of this court,  
7 the Court of Appeals, court staff, and members of the bar. According to documents on  
8 file pertaining to the 1993 amendments, the first mention of the possibility of adopting a  
9 formal fugitive dismissal rule appeared in a March 22, 1993, memorandum from  
10 Assistant Attorneys General Ann Kelley and Timothy Sylwester to then-Solicitor General  
11 Virginia Linder, a member of the ORAP Committee, on the subject of "[p]roposed  
12 amendments to ORAP." The memorandum proposed to amend ORAP 8.05 by adding a  
13 new subsection (3) to state the following:

14           "ORAP 8.05(3) If a defendant in a criminal case, a petitioner in a  
15 post-conviction proceeding, a plaintiff in a *habeas corpus* proceeding, a  
16 petitioner in a parole review proceeding, or a petitioner in a prison  
17 disciplinary case appeals from an adverse judgment and escapes or  
18 absconds from custody or supervision, the respondent on appeal may move  
19 for dismissal of the appeal. *The court thereafter shall allow the appellant*  
20 *14 days to surrender; if the appellant does not surrender within this time,*

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<sup>2</sup> It is true that the Court of Appeals opinion in *Lundahl* was not published until several months after the adoption of ORAP 8.05(3). The opinion, however, remains instructive about the state of the law before the adoption of that rule. See *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 129, 23 P3d 333 (2001) ("Oregon cases decided within a relatively short period after 1857[] are instructive" as to the state of the law before 1857).

1           *the court shall dismiss the appeal.*"

2 (Boldface omitted; second emphasis added.) The authors of the memorandum explained  
3 that "[t]he United States Supreme Court has a similar court rule, but without the 14-day  
4 window." The March 22, 1993, memorandum was forwarded to the committee as part of  
5 a series of memoranda from the Department of Justice proposing various amendments to  
6 the rules.

7           Thereafter, there appears on the committee's agenda a proposed amendment  
8 to ORAP 8.05(3). At some point, the reference to a 14-day "window" was deleted, and  
9 the current wording was substituted in its place. The materials on file do not provide  
10 further explanation or insight.

11           The March 22, 1993, memorandum itself, however, is significant for at  
12 least two reasons. First, it introduced the word "surrender" to the rule and used the word  
13 in a way that fairly obviously refers to a voluntary act on the part of the absconding  
14 defendant. Second, it explicitly referred to the United States Supreme Court's fugitive  
15 dismissal rule, which -- as that court had held only two weeks earlier in *Ortega-*  
16 *Rodriguez* -- identified waiver or disentitlement as a purpose of the rule.

17           Under the circumstances, it is most likely that those who adopted ORAP  
18 8.05(3) intended the reference to "surrender" after absconding to require more than a  
19 return to custody following arrest. Rather, for at least four reasons, the term was most  
20 likely intended to refer to a voluntary return. First, that reading of the term is consistent  
21 with the ordinary meaning of the term. Second, it is also consistent with how the term  
22 "surrender" is used in other statutes, particularly statutes pertaining to criminal law,

1 custody, and release during the pendency of an appeal. Third, the Oregon case law  
2 context within which the rule was adopted demonstrates that this state's appellate courts  
3 understood the rationale for the pre-ORAP fugitive dismissal rule to include a defendant's  
4 voluntary waiver of a right to proceed with the appeal; reinstating an appeal for anything  
5 other than a voluntary "surrender" is inconsistent with that purpose. Fourth, nothing in  
6 the records that exist pertaining to the adoption of ORAP 8.05(3) suggests that those who  
7 adopted the rule intended to depart from that understanding. To the contrary, what we do  
8 know of the circumstances surrounding the adoption of the rule suggest that it was  
9 intended to reflect the prevailing understanding about the authority of the courts and the  
10 rationales for the exercise of that authority.

11 Defendant insists that reading ORAP 8.05(3) to permit dismissal of an  
12 appeal unless the absconding defendant voluntarily resubmits to custody would  
13 impermissibly infringe on his statutory right to appeal. According to defendant, because  
14 ORS 138.020 provides that "the defendant may as a matter of right appeal from a  
15 judgment in a criminal action," this court has limited authority to adopt rules that  
16 compromise that right and may only do so if "necessary" for the prompt and orderly  
17 administration of the business of the courts.

18 The short answer to defendant's contention is that, even assuming that he is  
19 correct about the limited nature of this court's authority to adopt rules governing its own  
20 business -- a matter that we do not decide -- that assumption is insufficient to support the  
21 conclusion that he draws from it. Irrespective of any limits on this court's own authority  
22 pertaining to a defendant's statutory right to appeal, the fact remains that defendant may

1 waive that right. As the foregoing authorities demonstrate, that is precisely what a  
2 criminal defendant does when he or she absconds from the jurisdiction of the courts once  
3 an appeal has been filed. If absconding amounts to a voluntary waiver or forfeiture of the  
4 right to proceed with an appeal under ORAP 8.05(3), it is illogical to regard a "surrender"  
5 in the face of compulsion as sufficient to undo that waiver.

6           Returning to the facts of this case, it is not contested that defendant  
7 absconded during the pendency of his appeal. Under ORAP 8.05(3), the Court of  
8 Appeals was entitled to grant the state's motion to dismiss the appeal on that ground so  
9 long as the court -- by the time it acted on the motion -- had not been advised that  
10 defendant had "surrendered." In this case, by the time the court had acted on the state's  
11 motion, it had been advised only that defendant had absconded, that a bench warrant had  
12 issued for his arrest, that the police had served the warrant on defendant, and that only  
13 following his arrest did he appear in court. That does not constitute "surrender" within  
14 the meaning of the rule. Accordingly, the Court of Appeals did not err in granting the  
15 state's motion to dismiss.

16           We turn, then, to the dissent. As we understand it, the dissent's principal  
17 contention is that our interpretation of ORAP 8.05 conflicts with the plain meaning of the  
18 word "surrender," as reflected in dictionary definitions. As we have noted, however, not  
19 all of the dictionary definitions are so limited. Moreover, examples from the Oregon  
20 Revised Statutes confirm that our interpretation of the word "surrender" is consistent with  
21 the ordinary meaning of the term. The dissent's response is to assert that, in such cases,  
22 the legislature has simply chosen to use the term in other than its ordinary sense. Of

1 course, that amounts to question-begging, for it assumes the very matter in dispute;  
2 namely, the ordinary meaning of the word.

3           The dissent also takes issue with our reference to the case law context in  
4 which ORAP 8.05 was adopted, in particular, the Court of Appeals decisions in *Sterner*  
5 and *Lundahl*. The dissent does not dispute that those decisions support our reading of the  
6 rule. Rather, it contends that they are irrelevant, because "Court of Appeals decisions are  
7 not precedents that bind this court." \_\_\_ Or at \_\_\_ (slip op at 15) (Durham, J.,  
8 dissenting).

9           No one suggests that *Sterner* and *Lundahl* are "binding" on this court. We  
10 do regard them as relevant context for the adoption of the rule, however. That rule, after  
11 all, was adopted not just by this court, but also by the Chief Judge of the Court of  
12 Appeals, following consideration by a committee that included members of the Court of  
13 Appeals. We do not understand why it is unreasonable to assume that those who adopted  
14 the rule took into account the existing state of the law -- including Court of Appeals  
15 decisions -- when they did so.

16           Finally, the dissent asserts that we have stood "the rule on its head" by  
17 relieving the state of the burden of proving the negative, that is, that defendant did not, in  
18 fact, surrender himself back into custody. \_\_\_ Or at \_\_\_ (slip op at 18) (Durham, J.,  
19 dissenting). We have done no such thing.

20           It is not entirely clear whether the rule imposes the burden of proof that the  
21 dissent asserts. The rule simply states, in the passive voice, that the court may dismiss an  
22 appeal because a defendant has absconded, if it "has not been advised otherwise." But,

1 we need not decide in this case whether that phrasing imposes a burden of proof on one  
2 party or the other. Even assuming for the sake of the argument that the state bears such a  
3 burden, we conclude that it met that burden in this case.

4                   The order of the Court of Appeals is affirmed.

1 DURHAM, J., dissenting.

2 Following his conviction for second-degree disorderly conduct and other  
3 crimes, defendant appealed to the Court of Appeals, contending that the trial court should  
4 have granted his motion for judgment of acquittal of the disorderly conduct charge.

5 While the appeal was pending, the state moved to dismiss the appeal under ORAP  
6 8.05(3), arguing that defendant had escaped or absconded from supervision and was a  
7 fugitive from justice.

8 ORAP 8.05(3) provides, in part:

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

16 What governs the outcome in this case is the intended meaning of the  
17 phrase "has not surrendered" in that rule. The majority presents a lengthy history of the  
18 treatment accorded to appeals by escaped prisoners in the state and federal courts of other  
19 jurisdictions and, in *dictum*, comments by this court in one case about that subject. The  
20 majority attributes great interpretative weight to its historical recital. I do not, for reasons  
21 that I shall explain. The majority then relies on its view of pre-rule caselaw and decisions  
22 of the Court of Appeals to narrow the meaning of "surrendered" in ORAP 8.05(3) so that  
23 it excludes a voluntary surrender *if* the police possess or serve an arrest warrant on the  
24 defendant. Additionally, the majority announces that the rule now imposes a waiver of  
25 defendant's statutory right to appeal, despite any support for that conclusion in the rule's

1 text, and shifts *to defendant* the burden to demonstrate that he *has surrendered*, despite  
2 the rule's contrary phrasing ("has not surrendered") and overall structure. That simply  
3 erases the state's obligation to prove a fact necessary to sustain the state's motion to  
4 dismiss. In committing those interpretive errors, the majority places the operation of  
5 ORAP 8.05(3) in a position of maximum conflict, rather than cooperation, with every  
6 party's statutory right to appeal a judgment in a criminal action. *See* ORS 138.020  
7 ("Either the state or the defendant may as a matter of right appeal from a judgment in a  
8 criminal action in the cases prescribed in ORS 138.010 to 138.310, and not otherwise.").  
9 Because the majority's gloss on ORAP 8.05(3) is both wrong and unnecessary, I  
10 respectfully dissent.

11 I briefly review the pertinent facts. At the time of defendant's conviction,  
12 the court placed defendant on probation and required him to pay certain fines and fees,  
13 among other conditions. Defendant appealed from the court's judgment, challenging the  
14 disorderly conduct conviction. On July 15, 2010, the trial court, acting on information  
15 supplied by the appointed probation officer, issued an order to show cause to defendant,  
16 alleging that he had failed to pay the fines and fees, and ordering him to appear on  
17 August 17, 2010, to show cause why the court should not revoke probation. The state  
18 mailed the order to defendant's last known address.

19 On August 10, 2010, the probation officer filed a "Notice of Community  
20 Service Non-Compliance," which recited that defendant "[had] not been seen or heard  
21 from since 6/21/10" and had "[f]ailed to work the ordered monthly minimum of hours."  
22 The notice also recited that the probation officer had called defendant's telephone about a

1 community service contact and a female had answered and informed defendant of the  
2 call. The female relayed defendant's request to call back in 10 minutes; defendant did not  
3 return the probation officer's call. Notably, the record contains no indication that anyone  
4 served the probation officer's notice on defendant.

5           On August 17, 2010, the trial court entered an order finding that defendant  
6 had failed to appear to show cause and that "defendant has absconded from probation."  
7 Neither the order nor any other part of the record explains whether the court based that  
8 conclusion on defendant's failure to pay fines and fees, as alleged in the order to show  
9 cause, or on some other behavior not set out in the order to show cause, such as  
10 defendant's failure to appear for the show cause hearing. The court issued a bench  
11 warrant for defendant's arrest.

12           On August 20, 2010, the state filed a motion in the Court of Appeals to  
13 dismiss defendant's appeal of the disorderly conduct conviction. The state alleged that  
14 defendant had absconded from supervision and was a fugitive from justice.

15           The police served the trial court's bench warrant on defendant on August  
16 22, 2010. The record contains no information from the police about whether defendant  
17 yielded to the authority of the police when they served the warrant.

18           Defendant appeared before the trial court on August 23 and 24, 2010. He  
19 signed a conditional release agreement on August 25, 2010. Defendant contends, and the  
20 record appears to confirm, that he has been subject to the court's jurisdiction ever since  
21 and was no longer a fugitive from justice in any sense.

22           On September 2, 2010, defendant answered the state's motion to dismiss,

1 asserting that he had surrendered to the police, that the Court of Appeals had no authority  
2 to dismiss his appeal because he was "no longer" a fugitive due to his surrender and court  
3 appearance, and that the state was fully aware of his whereabouts. On September 14,  
4 2010, the Court of Appeals entered an order dismissing defendant's appeal. The order  
5 dismissing defendant's appeal stated:

6 "[The state] has moved to dismiss this appeal on the ground that  
7 [defendant] has absconded from the jurisdiction of the court as shown by  
8 his failure to maintain contact with his probation officer and to complete  
9 community service. *See generally* ORAP 8.05(3); *State v. Fettel*, 210 Or  
10 App 404, 150 P3d 1076 (2007). The motion is granted."

11 The order did not address whether defendant had surrendered before the court decided the  
12 state's motion.

13 Before turning to the interpretive problem presented here, I draw attention  
14 to the fact that ORAP 8.05(3) may not apply to defendant's conduct here. In *State v.*  
15 *Robbins*, 345 Or 28, 33, 188 P3d 262 (2008), this court pointed out that ORAP 8.05(3)  
16 authorizes the state to move for dismissal only if defendant "escapes or absconds from  
17 custody or supervision." *Robbins* explained that, to establish that a defendant has  
18 escaped or absconded, the state must show that the defendant intended to evade justice by  
19 flight, by hiding, by avoiding probation supervision, or by some combination of those  
20 actions. *Id.* at 36. According to *Robbins*, it is not sufficient that the defendant failed to  
21 attend one meeting with a probation officer or could not be located for a brief time. *Id.*

22 In this case, the state relied in its motion to dismiss on the trial court's  
23 conclusion in the show cause proceeding that defendant had absconded from probation.  
24 But the factual claim that initiated that proceeding in the trial court concerned only

1 defendant's alleged failure to pay fines or fees, as ordered in the judgment of his  
2 conviction. That conduct, if proven, does not constitute escaping or absconding from  
3 custody or supervision. Even assuming *arguendo* that the state could expand the scope of  
4 that hearing without notice to defendant, the state does not explain how the other problem  
5 that it raised -- an unreturned telephone call seeking a community service supervisor's  
6 contact information -- amounted to escaping or absconding from supervision. Finally,  
7 defendant's nonappearance for the show cause proceeding was a serious matter, but so  
8 was the missed meeting with a probation officer in *Robbins*. The state does not explain  
9 why the court should reach a different result here than that reached in *Robbins* with  
10 respect to whether missing an important appointment constitutes escaping or absconding  
11 from supervision.

12           Defendant, however, does not assert in this court that his behavior does not  
13 amount to escaping or absconding from supervision. He focuses, instead, on his  
14 contention that the Court of Appeals lacked authority to dismiss his appeal because, when  
15 the court decided the state's motion, the record was insufficient to show that he "had not  
16 surrendered" under ORAP 8.05(3).

17           ORAP 8.05(3) was adopted in 1993 by an order signed by the Chief Justice  
18 of this court and the Chief Judge of the Court of Appeals. Our objective here is to  
19 discover and give effect to the intent of those judicial officials in enacting the rule in  
20 1993. The majority correctly notes that, in construing ORAP 8.05(3), we must apply the  
21 same principles of interpretation that ordinarily apply to the interpretation of statutes and  
22 administrative rules.

1           ORAP 8.05(3) consists of three sentences. By its plain terms, the first  
2 sentence of ORAP 8.05(3) permits the state to *move* for dismissal of an appeal if a  
3 criminal defendant "escapes or absconds from custody or supervision." The second  
4 sentence of the rule provides that, "[i]f the [defendant] has not surrendered at the time the  
5 motion is decided by the court, the court may dismiss the appeal." The prefatory clause  
6 of the second sentence makes it plain that an appellate court obtains legal authority to  
7 grant the state's motion for dismissal only in the event that a negative fact exists, *i.e.*, that  
8 "the [defendant] has not surrendered" at the time that the court decides the state's motion.  
9 *See Blacknall v. Board of Parole*, 348 Or 131, 140, 229 P3d 595 (2010) (use of the word  
10 "if" in context of prefatory phrase sets out a condition that must be met and a result that  
11 may occur only "in the event that" or "so long as" that condition is satisfied). The third  
12 sentence in ORAP 8.05(3) adds an additional layer to the analysis. That sentence, which  
13 provides that, "[i]f the court has not been advised otherwise, the court may assume that  
14 the [defendant] has not surrendered when the court considers and decides the motion,"  
15 permits the court to assume the truth of the negative fact that a defendant "has not  
16 surrendered" unless the court is "advised otherwise," *i.e.*, if either party informs the court  
17 that the defendant *has* surrendered.

18           The meaning of the term "surrender" is key to an understanding of the  
19 second and third sentences of ORAP 8.05(3). *Webster's* supplies the following definition  
20 of the verb "surrender":

21           **1** : to make a surrender in law of : as \* \* \* **c** : to deliver (the principal) into  
22 lawful custody. **2 a** : to yield to the power, control, authority, or possession  
23 of another : give or deliver up possession of upon compulsion or demand :

1           cease trying to retain or control and agree to yield [examples: surrendered  
2           the fort; forced to surrender the ship] \* \* \* **b** : to give up completely or  
3           agree to forgo esp. in favor of another : abandon, resign, or relinquish  
4           possession of [usu] for the sake of another : assent to loss of possession or  
5           exercise of or power or control over [example: surrendered his chair to the  
6           lady] \* \* \* **3 a** : to give (oneself) up into the power of another esp. as a  
7           prisoner **b** : \* \* \* : to give oneself up into the power of another : YIELD  
8           [examples: ordered the troops to surrender; the enemy must soon  
9           surrender]."

10    *Webster's Third New Int'l Dictionary 2301-02 (unabridged ed 2002).*

11           The phrase "has not surrendered" in ORAP 8.05(3) refers to an action that  
12    has not occurred. Applying the elements set out in the definition and considering the  
13    context of this case, that action consists of yielding oneself to the power, control,  
14    authority, or possession of the state, such as submitting to the custody of an arresting  
15    officer.<sup>1</sup> The pertinent phrase in the rule, "has not surrendered," thus describes a  
16    condition in which the required action, *i.e.*, the yielding of oneself to state authority, has  
17    not occurred.

18           The majority correctly begins with the ordinary dictionary definitions of  
19    "surrender." The majority posits that some definitions support defendant while other  
20    definitions support the state, and concludes from that review that the arguments of each  
21    side are plausible and that the term "surrender" is ambiguous.

22           In my view, the majority gives insufficient analytical attention to the

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<sup>1</sup>           A widely-used legal dictionary adopts the same view. According to *Black's Law Dictionary* 1581 (9th ed 2009), the noun "surrender" means "[t]he act of yielding to another's power or control."

1 pertinent definitions of "surrender." The definitions all require a volitional act of  
2 submitting, relinquishing, or yielding. But the majority fails to acknowledge that the  
3 pertinent definitions either include yielding behavior that expressly responds to the power  
4 of another or they say nothing about whether the yielding behavior must be purely  
5 voluntary. Citing examples that purportedly support the state, the majority says,

6 "Other definitions, however, are consistent with the state's proposed  
7 reading of the rule. The first definition states that the term means 'to make  
8 a surrender in law of : as \* \* \* to deliver (the principal) into lawful  
9 custody.' Similarly, an alternative definition is 'to give up completely or  
10 agree to forgo.' In both examples, the term 'surrender' is used to refer to a  
11 voluntary act of delivery or relinquishment, not in response to force or  
12 compulsion."

13 *State v. Moss*, \_\_\_ Or \_\_\_, \_\_\_ P3d \_\_\_ (2012) (June 7, 2012) (slip op at 3-4) (quoting  
14 *Webster's* at 2301-02)..

15 The majority's statement about those examples is incorrect. The reference  
16 to "deliver[ing] (the principal) into lawful custody" says nothing about whether the act of  
17 delivering is, or must be, a response to any form of compulsion or pressure. The same is  
18 true of the example "to give up completely or agree to forgo."<sup>2</sup>

19 The majority also fails to observe that one of the listed definitions precisely  
20 fits the sort of yielding behavior that this case involves: "**3 a** : to give (oneself) up into

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<sup>2</sup> The majority's quotation of the cited example is incomplete. The full text of the example in *Webster's* suggests that the example refers more logically to property or, perhaps, a public office, not a person's custody, and does not at all exclude yielding behavior in response to authority or pressure from external circumstances. In no way does the example confine itself solely to a purely voluntary choice, as the majority states.

1 the power of another esp. as a prisoner." *Id.* (slip op at 3) (quoting *Webster's* at 2301-02).  
2 Clearly, that example refers to a prisoner's conduct in submitting to a police officer's  
3 power or authority to arrest pursuant to a warrant. That action describes a "surrender,"  
4 regardless of whether the prisoner chose to yield under the compulsion of superior force  
5 or purely from an unpressured desire to return to custody. In focusing on the presence of  
6 the terms "agree" and "assent" in *other* definitional examples that have nothing to do with  
7 the context of this case, the majority simply refuses to see that a "surrender" includes the  
8 act of yielding to a police officer's authority to arrest, whether or not the arrestee  
9 subjectively desires to submit to that arrest.<sup>3</sup> Assuming *arguendo* that there is an  
10 interpretive task here, it is only to confirm that the judges who adopted ORAP 8.05(3)  
11 intended to adopt the most plainly applicable sense of the term "surrender" for the present  
12 context rather than another sense, used in distinguishable contexts, requiring that a choice  
13 to submit be free of any coercive influence by the police or an arrest warrant.

14 That point deserves emphasis. A quick reading of the opinions in this case  
15 may lead a reader to conclude that the legal point that divides the majority opinion and  
16 this dissent concerns the voluntariness of a defendant's conduct in submitting to police  
17 custody following an escape. That is not correct. Both the majority and this dissent  
18 agree that the term "surrender" refers to volitional conduct by the surrendering party, *i.e.*,

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<sup>3</sup> Properly viewed, a "surrender" in this context calls for an action that amounts to yielding or submitting to the officer's authority to arrest. In the absence of such an action, the bare fact that the police have recaptured a defendant would not demonstrate that the defendant surrendered.

1 yielding behavior consequent on the actor's choice to submit to the power or authority of  
2 another. Every definition of "surrender" reflects that common element.

3           What divides the majority opinion and this dissent is an analytical twist by  
4 the majority that finds no support whatever in the definitions of "surrender." The  
5 majority trumps any consideration of defendant's factual assertion that he surrendered to  
6 the police by pointing to the fact that the police possessed a warrant for defendant's arrest  
7 and, at some unidentified point during the event that resulted in defendant's return to  
8 custody, the police delivered the warrant to defendant. The majority's incorrect focus on  
9 the service of an arrest warrant on defendant simply evades the central issue that ORAP  
10 8.05(3) requires us to answer: After he escaped or absconded from supervision, did  
11 defendant surrender to the state's control? It is clear that nothing in the ordinary meaning  
12 of "surrender" precludes a defendant from volitionally choosing to submit to police  
13 authority, and thus fully surrender to the police, regardless of whether the police also  
14 possess or serve an arrest warrant at some point.

15           To create some support for its view, the majority refers to several uses of  
16 the term "surrender" in very different legal settings. But that effort only strengthens  
17 defendant's position here. For example, the majority refers to the term "surrender" in  
18 ORS 73.0604(1)(a) as one that refers to "an intentional voluntary act, one that is not taken  
19 in response to force or compulsion." *Id.* (slip op at 4). The reason that that is true is not  
20 because of the ordinary meaning of "surrender," but rather because, in the text of that  
21 statute, the legislature expressly limited application of the statute to an intentional  
22 voluntary act. Thus, that statute provides that one may discharge another's obligation to

1 pay under an instrument "[b]y an intentional voluntary act, such as surrender of the  
2 instrument." ORS 73.0604(1)(a). The textual qualifications that accompany that usage  
3 of "surrender" deprive that example of any persuasive weight in favor of the state's  
4 position.

5           The majority cites the authority of the Governor under ORS 133.817, at the  
6 Governor's discretion, either to surrender a prisoner in response to another state  
7 executive's demand or to hold that person in this state for trial, conviction and  
8 punishment. The majority labels the Governor's act under that statute as "discretionary,"  
9 and thus purely voluntary. *Moss*, \_\_\_ Or at \_\_\_ (slip op at 4). No one could disagree.  
10 But that, again, results from the legislature's incorporation of text in the statute that  
11 makes that conclusion inescapable. As the legislature recognized, that is not a conclusion  
12 that flows from the unmodified term "surrender," and the majority does not advance the  
13 discussion here by refusing to recognize that fact.

14           The majority next offers a lengthy discussion of the history of what some  
15 courts have called the "fugitive dismissal rule." Significantly for our purposes, that "rule"  
16 refers in almost all cases not to a statute or court rule, but to an exercise of appellate court  
17 discretion, varying with the facts of the individual case, to dismiss (or decline to dismiss)  
18 the appeal of a criminal defendant who had escaped from custody during the pendency of  
19 an appeal. What the majority cites are the various explanations given by those courts for  
20 their particular discretionary choices; they are not court decisions interpreting the words  
21 of a positive statute or rule, like ORAP 8.05(3), that incorporates the concept of  
22 "surrender."

1           The majority loses track of that distinction with serious adverse  
2 consequences in this case. The majority explains that some courts, in explaining a  
3 dismissal, identified the problem as one concerning the enforceability of the appellate  
4 court judgment. Those decisions pointed to the fact that an escaped fugitive was not  
5 "where he can be made to respond to any judgment we may render." *Smith v. United*  
6 *States*, 94 US 97, 97, 24 L Ed 32 (1876). In addition to rationalizing a dismissal of the  
7 appeal, that explanation also justified the court in continuing the appeal if, after escaping,  
8 the defendant returned to custody, because the defendant once again was in a place where  
9 he could be subjected to the court's judgment.

10           Other courts, however, adopted different, more punitive reasoning to  
11 support the dismissal of fugitive appeals. Those courts asserted that an escape constituted  
12 a waiver by the defendant of his or her right to appeal, or that the act of escaping  
13 "disentitled" the defendant to continue with the appeal. *See Ortega-Rodriguez v. United*  
14 *States*, 507 US 234, 240, 113 S Ct 1199, 122 L Ed 2d 581 (1993), (the Court noted that it  
15 had identified that additional justification for dismissal in *Molinaro v. New Jersey*, 396  
16 US 365, 366, 90 S Ct 498, 24 L Ed 2d 586 (1970)). The upshot of the latter reasoning  
17 was that the basis for a dismissal was established at the point of an escape. Any  
18 subsequent surrender or other return to custody by the defendant would have no effect on  
19 the court's dismissal decision, because the only relevant fact was whether defendant had  
20 escaped.

21           The cases cited by the majority never address what may constitute a  
22 "surrender" by an escaped fugitive, because a surrender is beside the point to each line of

1 reasoning. Courts adhering to an enforceability rationale focused on whether the  
2 defendant was once again in a place where the court could enforce its judgment, and it  
3 mattered little whether the defendant had returned to custody through a surrender to the  
4 police or a recapture by the police. Courts following the waiver or disentanglement line of  
5 reasoning, as noted, focused solely on whether the defendant had escaped, and they  
6 logically disregarded as irrelevant any subsequent surrender by the defendant.

7           One case, however, does discuss the meaning of a fugitive dismissal rule,  
8 including a surrender standard, that one state adopted. The case demonstrates the  
9 importance of correctly interpreting the text that a lawmaker has employed regarding the  
10 concept of surrender. In *Estelle v. Dorrough*, 420 US 534, 535 n 1, 95 S Ct 1173, 43 L  
11 Ed 2d 377 (1975), the Court considered a Texas statute, Texas Code of Criminal  
12 Procedure Ann., Art. 44.09, which provided:

13           "If the defendant, pending an appeal in the felony case, makes his  
14 escape from custody, the jurisdiction of the Court of Criminal Appeals shall  
15 no longer attach in the case. Upon the fact of such escape being made to  
16 appear, the court shall, on motion of the State's attorney, dismiss the appeal;  
17 but the order dismissing the appeal shall be set aside if it is made to appear  
18 that the defendant has voluntarily returned within ten days to the custody of  
19 the officer from whom he escaped; and in cases where the punishment  
20 inflicted by the jury is death or confinement in an institution operated by  
21 the Department of Corrections for life, the court may in its discretion  
22 reinstate the appeal if the defendant is recaptured or voluntarily surrenders  
23 within thirty days after such escape."

24           That statute established different appellate dismissal procedures based on  
25 the severity of the punishment imposed in the trial court. An escape in all felony cases  
26 meant that the appellate jurisdiction of the Texas Court of Criminal Appeals no longer  
27 attached. In cases involving a sentence less than death, the appellate court was required

1 to dismiss the appeal unless "the defendant has voluntarily returned within ten days to the  
2 custody of the officer from whom he escaped." However, for cases involving a sentence  
3 of life in prison or death, the statute granted discretion to the appellate court to reinstate  
4 the appeal "if the defendant is recaptured or voluntarily surrenders within thirty days after  
5 such escape."

6           The Court considered, but rejected, a challenge asserting that the two  
7 classifications in the statute lacked a rational relation to its purpose. *Estelle* is helpful  
8 here because the Texas statute considered in that case is, or appears to be, a prototype for  
9 ORAP 8.05(3), except that Oregon's appellate court rule omits the adverb "voluntarily"  
10 that the Texas statute used twice. That word in the Texas statute confirmed that a return  
11 to custody or surrender must be strictly voluntary to avoid dismissal of the appeal. The  
12 Texas court had noted that the statute "encourages voluntary surrenders." *Id.* at 537  
13 (*citing Rodriguez v. State*, 457 SW2d 555, 556 (Tex Crim App 1970)). But the omission  
14 of the term "voluntarily" in Oregon's rule indicates that Oregon's rule protects the appeal  
15 if a surrender occurs whether the surrender reflects either an uncoerced choice or a  
16 willingness to give up in the face of a warrant or superior police power. The textual  
17 contrast between the Texas statute and ORAP 8.05(3) regarding the term "surrender"  
18 could not be more vivid, but the majority does not address that matter; the majority does  
19 not cite or discuss the Texas statute examined in *Estelle*.

20           The majority attempts to link Oregon to the branch of caselaw that is most  
21 punitive to escaped criminal defendants -- the "waiver" or "disentitlement" branch -- by  
22 citing this court's 1927 decision in *State v. Broom*, 121 Or 202, 253 P 1042 (1927).

1 *Broom* identified all the variant reasons, discussed above, that many other courts had  
2 relied on to justify dismissing appeals and referred in a sentence to "many rulings of other  
3 courts" precluding an appeal by an escaped fugitive "unless he resubmits himself to the  
4 custody of the law and the jurisdiction of the court." *Id.* at 206-07. But *Broom* did not  
5 adopt any of the cited case decisions as Oregon law. The court disposed of the appeal in  
6 *Broom* on grounds that rendered the discussion of the "fugitive dismissal rule" *dictum*.  
7 Nothing in the record indicates that ORAP 8.05(3) was intended to adopt the  
8 "resubmission" comment in *Broom* as the meaning of the term "surrender."

9           The majority cites two decisions of the Court of Appeals as part of the  
10 "context" that preceded the adoption of ORAP 8.05(3) in 1993. *See Moss*, \_\_\_ Or at \_\_\_  
11 (slip op at 10-11) (citing *State v. Sterner*, 124 Or App 439, 862 P2d 1321 (1993) and  
12 *State v. Lundahl*, 130 Or App 385, 882 P2d 644 (1994)). Both cases cited this court's  
13 *dictum* in *Broom*, and the United States Supreme Court decision in *Ortega-Rodriguez*, to  
14 justify dismissing the appeals of absconded defendants pursuant to inherent court  
15 authority. But the conclusions in those Court of Appeals decisions are not precedents  
16 that bind this court. The majority cannot evade that fact by suggesting that those  
17 decisions were "context" for the adoption of ORAP 8.05(3). They are not. This court  
18 had discussed the basis of appellate court authority to dismiss the appeal of an  
19 absconding criminal defendant in only two cases, *Broom* and *City of Portland v. Parchen*,  
20 113 Or 209, 231 P 980 (1925), and, in each case, the court's discussion of that question  
21 amounted to *dictum* and did not establish a binding rule of this court. Moreover, those  
22 Court of Appeals decisions do not address the meaning of the term "surrender" in ORAP

1 8.05(3), because the disputes in those cases arose before the adoption of ORAP 8.05(3).  
2 Thus, the two Court of Appeals decisions are both nonbinding and off the point of this  
3 case.

4           The majority concludes that the committee that developed and  
5 recommended adoption of ORAP 8.05(3) probably intended to incorporate the "waiver"  
6 or "disentitlement" line of reasoning presented in some decisions of the United States  
7 Supreme Court and other courts addressing fugitive dismissals. It draws that conclusion  
8 from a reference in a memorandum dated March 22, 1993, between employees of the  
9 Oregon Department of Justice and then-Solicitor General Virginia Linder. The  
10 memorandum, which *may* have been shared (we cannot know whether it was in fact  
11 shared) with the Oregon Rules of Appellate Procedure Committee, enclosed a proposed  
12 form of ORAP 8.05(3). The proposal used the term "surrender" but did not define or  
13 explain that term. The memorandum mentioned that the United States had "a similar  
14 court rule," but did not cite or discuss that rule.

15           In searching for the intended meaning of "surrender" in ORAP 8.05(3), the  
16 majority will not find it in the memorandum mentioned above. That document does not  
17 purport to reflect the thinking, let alone the intent, of the committee that recommended  
18 adoption of ORAP 8.05(3). It is the intent of the adopting committee (and, ultimately the  
19 Chief Justice and Chief Judge) that counts, not the opinion of persons outside the  
20 committee. The committee ultimately adopted a proposed rule, but did not indicate that it  
21 incorporated some uncited federal law in doing so.

22           The majority attributes significance to the memorandum by making the

1   conclusory statement that the memorandum used the term "surrender" in a way that  
2   "fairly obviously refers to a voluntary act on the part of the absconding defendant."  
3   *Moss*, \_\_\_ Or at \_\_\_ (slip op at 13). In fact, the memorandum states nothing about the  
4   meaning of the word "surrender." Additionally, as I explained, the term "surrender"  
5   refers most logically, in this context, to both a purely voluntary submission to an officer's  
6   authority to arrest *and* a submission or yielding to a police officer in response to his or  
7   her superior power, force, or authority. The majority has no justification for confining  
8   the meaning of "surrender" in a way that precludes its ordinary application in the context  
9   of a defendant's submission to an arresting officer's authority.

10           The majority also errs in concluding that the reference in the memorandum  
11   to the "similar court rule" of the United States Supreme Court meant that the proposed  
12   rule adopted the "waiver" and "disentitlement" rationales for dismissal that the Court had  
13   addressed in *Ortega-Rodriguez*. The flaw in that conclusion is clear because the words of  
14   ORAP 8.05(3) contradict it. Oregon's rule does not contain any wording indicating that,  
15   by escaping or absconding, a criminal defendant "waives" or is "disentitled" to pursue an  
16   appeal. As explained above, the rule provides that an escape only entitles the state to  
17   *move* for dismissal. The court loses authority under the rule to grant a motion to dismiss  
18   if the defendant surrenders at any time before the court decides the motion. If anyone  
19   advises the court that a surrender has occurred, the state remains obligated to sustain its  
20   motion by demonstrating that the defendant "has not surrendered." The continued  
21   viability of the appeal of an escaped defendant through the time of the appellate court's  
22   decision, and the significance under the rule of the assertion that the defendant has

1 surrendered, combine to contradict the majority's claim that an escape constitutes a  
2 waiver of the right to appeal. That conclusion simply overlooks the substance of  
3 Oregon's rule.

4 I turn now to a consideration of the record in this case. In response to the  
5 state's motion to dismiss, defendant advised the Court of Appeals in writing that he had  
6 surrendered to the police, that the warrant for his arrest was served on August 22, 2010,  
7 that he was no longer a fugitive, that the police knew of his whereabouts, and that he was  
8 present in the trial court for a hearing on this case on August 31, 2010.

9 In response, the state submitted no other facts. In particular, the state made  
10 no showing that defendant's arrest entailed no submission on his part to the authority of  
11 the arresting officers.

12 The majority examines the foregoing record and concludes, contrary to that  
13 record, that defendant never advised the Court of Appeals that he had surrendered.  
14 Instead, the majority reviews defendant's factual assertions about his surrender and  
15 concludes, "[t]hat does not constitute 'surrender' within the meaning of the rule." *Id.* at  
16 \_\_\_ (slip op at 15).

17 The majority's approach stands the rule on its head. The rule's third  
18 sentence requires only that a party must *advise* the court that the defendant has  
19 surrendered. Once that advice occurs, the rule requires the state, as the moving party, to  
20 show that the appellant "has not surrendered," which is the condition that must exist  
21 before the court has the authority to dismiss the appeal. But under the majority's reading  
22 of the rule, defendant failed to advise the court that he had surrendered to the police, even

1 though he did so explicitly state, because defendant *also* indicated that, at some point, the  
2 police had served an arrest warrant upon him. That reading of the rule, as noted,  
3 erroneously relieves the state of its responsibility under the rule to demonstrate that "the  
4 [defendant] has not surrendered at the time the motion is decided by the court." ORAP  
5 8.05(3).

6 As a consequence of the majority's reconstruction of the rule, the state  
7 prevails in effecting the dismissal of defendant's appeal without making any showing  
8 about the circumstances of defendant's return to custody beyond the service at some point  
9 of an arrest warrant. For all that the record discloses, defendant's submission to the  
10 police may have been completed without regard to the arrest warrant. The majority  
11 relieves the state of any obligation to submit the necessary facts to the court on that key  
12 question.

13 Oregon's rule, as it stands after today's opinion, authorizes the dismissal of  
14 the appeal of a criminal defendant who escapes or absconds, or even a probationer who  
15 violates probation, and is later arrested, even if the defendant fully cooperates with and  
16 submits to the arrest, *if* the police possess and serve an arrest warrant on the defendant.  
17 Where the defendant's whereabouts are fully known to the court and the state, and the  
18 defendant figuratively is sitting in court awaiting the outcome of his or her appeal, there  
19 seems to me to be little or no justification to authorize dismissal of the appeal and, thus,  
20 to nullify the defendant's statutory right to appeal. If Oregon's rule now purports to  
21 authorize an appellate court to dismiss an appeal even though the defendant has  
22 submitted to the state's authority and is in custody, then the rule undermines the statutory

1 right of appeal. To remedy the problem identified above, the Chief Justice and the Chief  
2 Judge should amend ORAP 8.05(3) to focus the rule on whether the defendant has  
3 *returned to custody* following an escape, not on whether the defendant surrendered to the  
4 police purely voluntarily, or simply has been recaptured. If the Chief Justice and Chief  
5 Judge decline to do so, the legislature should step in to protect the opportunity of every  
6 citizen to appeal a criminal judgment.

7           For the foregoing reasons, I dissent from the majority's affirmance of the  
8 decision of the Court of Appeals to dismiss defendant's appeal.

9           De Muniz and Walters, JJ., join this dissenting opinion.