IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
MICHAEL RAYMOND LAFOUNTAIN,
Defendant-Appellant.

Union County Circuit Court
F22130; A162123

Russell B. West, Judge.

Submitted February 26, 2018.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and John Evans, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Jeff J. Payne, Assistant Attorney General, filed the brief for respondent.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

LAGESEN, P. J.

Conviction on Count 1 reversed; remanded for resentencing; otherwise affirmed.

LAGESEN, P. J.

At the time of the events in this case, a person required to report as a sex offender committed a crime under Oregon law if that person "move[d] to a new residence and fail[ed] to report the move and the person's new address." ORS 163A.040(1)(d) (2015), *amended by* Or Laws 2017, ch 418, § 1. The question in this case is how that provision applies to someone who is homeless: What does it mean to "move to a new residence" in that circumstance? Defendant, a registered sex offender, reported his residence as a parking lot behind a Chevron gas station, and he subsequently spent periods of time in jail, at a homeless shelter, and across the street from the Chevron. The state charged defendant with violating ORS 163A.040(1)(d) (2015), on the ground that defendant's time spent in those places were moves to "new residences" that had not been reported. After a bench trial, the trial court agreed and convicted defendant.

On appeal, defendant argues that a "residence" for purposes of the reporting statutes is a place that a person intends to return to as a home, and not locations where someone is staying temporarily as a prisoner, visitor, or traveler. In his view, the evidence in the record does not give rise to a reasonable inference that he had actually established a residence anywhere other than the Chevron address that he reported. As we explain below, we agree that the state failed to prove that defendant "move[d] to a new residence." We therefore reverse his conviction on that count, remand for resentencing, and otherwise affirm.

I. BACKGROUND

Defendant is a convicted sex offender who is required to report and register under ORS chapter 163A. On four occasions between 2012 and 2014, defendant completed registration forms that listed his residence as the Union County Jail, where he was serving time. On January 20, 2015, defendant completed a registration form that listed "1519 Adams Ave\Prkng lot behind." (Some uppercase omitted.) 1519 Adams Avenue is a Chevron gas station in La Grande.

Throughout 2015, defendant was on post-prison supervision and was supervised by Browne, a parole and probation officer. On January 29, 2015, defendant told Browne that he was considering absconding from supervision. After reporting the following day, January 30, defendant stopped reporting to Browne.

Two or three weeks later, defendant was arrested in Salem, and he was transported back to Union County. Browne talked to defendant while he was in custody, and defendant told him that, after being released, he was planning to live at the "Ketchup Castle," a nickname for a local building (since burned down). However, upon his release, defendant again absconded.

In July 2015, defendant again was arrested in Salem. Because of concerns about his mental health, Marion County officials did not transport defendant back to Union County. Browne directed defendant to return to Union County after his release and to report to Browne, but defendant never reported to him.

In December 2015, defendant was arrested in Jackson County. He was transported to Marion County and was released from the Marion County Jail on January 31, 2016. Again, he did not report to Browne upon his release.

On February 10, 2016, defendant was arrested in Salem on a detainer issued by Browne. The record is not clear as to what happened next, but it appears that defendant may have been transported to the Union County Jail. In any event, about two weeks later, Browne sent an email to the state police, alerting them that defendant was out of compliance with his sex offender reporting obligations.

Trooper Madsen began investigating the case. He learned that defendant's last registration had been on January 20, 2015, and had listed the parking lot behind the Chevron as his address. Madsen went to the Chevron station at that address and talked with a store clerk, Colucci. Colucci had worked at the Chevron for five years, typically from 10:00 a.m. to 7:00 p.m. To his knowledge, defendant was not living on Chevron's property. Although defendant had come into the Chevron convenience store more frequently in

2014, Colucci had only seen defendant once or twice in the preceding year and was not aware that defendant had ever spent the night on the property.

After visiting the Chevron, Madsen next went to the Union County Jail, where he spoke with defendant. Madsen drew a rough map of the Chevron station and asked defendant to point out where he lived. Defendant indicated where he was living by placing an "X" on the map directly across the street from the Chevron station.[1]

Two weeks later, after he had been released from the Union County Jail, defendant met with Browne at his office. Defendant told Browne that he was "frequently between" Medford and Salem over the past year, and that he had remained in Salem after he was released from the Marion County Jail in January, because he could not afford the return trip home to La Grande. Defendant told Browne that he stayed at the Gospel Mission in Salem and that he had decided to stay at that shelter, rather than with his brother in Salem, because he knew that Browne would find him at the shelter.

The state eventually charged defendant with one felony count of failure to report as a sex offender under ORS 163A.040(1)(d) (2015) and ORS 163A.040(3)(b)(B), based on the allegation that he had failed to report within "10 days of the date upon which the person moves to a new residence and is required to report the move and the person[']s new address." He was also charged with one count of failing to make an annual report, a misdemeanor. ORS 163A.040 (1)(e). Defendant pleaded guilty to failing to make the annual report, and the felony count was tried to the court.

At the conclusion of the state's case, defendant moved for a judgment of acquittal, arguing that the state's evidence proved that he was not in La Grande at various times, and may have been in Medford and Salem, but that "nothing has been introduced as evidence in this record of any particular new residence by [defendant]." He relied on our decision in *State v. Hiner*, 269 Or App 447, 345 P3d 478

[1] Madsen could not recall whether defendant placed the X himself or whether defendant directed Madsen where to put it.

(2015), in which we held that the statute required the state to prove not only that a person has left a previous residence, but that the person acquired a new one. He explained that "we have a circumstance very like that here. The state has put on persuasive evidence, in my view, to show that [defendant] was not here [in La Grande] continuously, but in my view has fallen far short of proving that [defendant] ever established a residence elsewhere."

The state offered two responses. First, the state argued that the location that defendant had marked on the map for Madsen, which was across the street from the Chevron station, was not the same as the reported address of "1519 Adams Ave\Prkng lot behind." In the state's view, "[t]hat alone shows that *** he wasn't living where he was supposed to be." Alternatively, as a "second theory," the state argued that defendant had been released from jail and had then been picked up four different times on the other side of the state and was staying at a shelter. That, the state argued, was legally sufficient evidence to prove a violation of the statute.

The trial court denied the motion for a judgment of acquittal, and the state proceeded to make its closing argument, at which time the court pressed the state on its understanding of the statutory requirement to report a move to a new residence. The court inquired, as a hypothetical, whether a person who is "couch surfing" and stays at a different place every night would be required to report a new residence every single day. The prosecutor responded affirmatively that, "if someone is a convicted sex offender and they just want to go couch-surfing and they have 365 different houses that they would stay at and they stay at any one every night, I think they're in violation." But, the state contended, defendant had not simply been at a different place every night: He had been at a homeless shelter for "a length of time" and had not reported that move.

Defendant's closing argument reiterated the lack of proof that he established a new residence, pointing out that the state had not offered any evidence as to how long defendant had stayed at the shelter in Salem. At that point, the trial court itself introduced an additional theory as to how

defendant may have violated the statute. The court asked, "Wasn't being in jail for a period of time establishing residence?" Defendant responded that jail was not properly considered a "residence," in part because it was involuntary.

The trial court ultimately found defendant guilty, explaining that defendant had violated the statute in various ways. First, the court found that defendant "was not living behind the Chevron station. If anything, he was living across the street, which was not the correct address." Second, the court found that defendant "moved to a new residence when he went to jail," because he was there overnight for a period of time. Third, the court found that defendant "admitted living between Medford and Salem. He was living somewhere down there." And, finally, the court found that "he moved to this mission [in Salem] and he was there for a period of time after January 31st, 2016, and did not report that."

Defendant now appeals the ensuing judgment of conviction, arguing that the trial court misconstrued ORS 163A.040(1)(d) (2015).[2] Defendant contends that a "residence" is a place that a person considers home and to which the person expects to return on a regular basis, not the types of transient or involuntary stays evidenced in this record. The state, on the other hand, argues that "'residence' has no minimal temporal requirement" but, even if this court were to conclude that it does, the evidence was sufficient to permit an inference that defendant maintained a residence at the Salem mission and the Union County and Marion County jails.

II. ANALYSIS

A. *Standard of Review*

"When a defendant's challenge to the legal sufficiency of the state's evidence depends upon the meaning of the statute defining the offense, we review the trial court's construction of the statute for legal error. *** Then, based

[2] Defendant also raises various assignments of error premised on the state's failure to allege that he had knowledge of the requirement that he report his move. Because we agree with defendant's contention regarding the legal sufficiency of the evidence, we do not reach those other assignments of error.

on the proper construction of the statute, we view the evidence in the light most favorable to the state to determine whether a rational factfinder could have found the elements of the offense beyond a reasonable doubt." *State v. Holsclaw*, 286 Or App 790, 792, 401 P3d 262, *rev den*, 362 Or 175 (2017).

B. *The Meaning of ORS 163A.040(1)(d) (2015)*

The overarching question presented here—how to apply sex offender reporting requirements to a person who is homeless—is a question of first impression in the Oregon appellate courts, but it is a problem that many jurisdictions have confronted since the nationwide proliferation of sex offender registration and community notification laws over the past three decades. As a matter of historical context, Oregon has required sex offenders to report a change of "residence" since 1989. *See* Or Laws 1989, ch 984, § 2 (requiring a person convicted of a "sex crime" to notify the closest parole or probation office in writing, during the five years following release, "whenever the person changes residence"). In 1991, the legislature added an annual registration requirement for sex offenders; it also attached criminal consequences to the failure to report a change of residence and made the failure to file the annual registration a violation. Or Laws 1991, ch 389, § 4.

Other states adopted similar laws around the same time, and, in 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. The act required states to adopt sex offender registration laws that met certain requirements in order to avoid losing federal law enforcement funding. Pub L 103-322, §§ 170101-170303, 108 Stat 1796, 2038-45 (1994). In 1996, Congress amended the Wetterling Act to include requirements for community notification statutes, Pub L 104-145, 110 Stat 1345 (1996) (known as "Megan's Law"), and to create a federal database of registration information, Pub L 104-236, 110 Stat 3093 (1996). Among other things, the Wetterling Act directed states to "inform the person that if the person changes residence address, the person shall give the new address to a designated State law enforcement agency in writing within 10 days." 42 USC § 14071(b)(1)(ii)

(1996).[3] Oregon, like many other states, thereafter amended its sex offender registration and notification statutes to bring them into conformance with federal guidelines. Or Laws 1997, ch 538 (reducing the time for reporting a change of residence from 30 days to 10 days, among other changes).

The Wetterling Act did not statutorily define "residence" or explicitly address the possibility that some sex offenders might be homeless, nor did Oregon's or many other states' laws that were enacted or amended in the wake of the federal legislation. In many jurisdictions, that resulted in a host of legal challenges regarding the application of those requirements to homeless persons, ranging from the interpretation of the terms "residence" and "address,"[4] to the

[3] In 2006, Congress replaced the Wetterling Act with the Sex Offender Registration and Notification Act (SORNA), which was intended to create a more uniform and effective registration system. *See generally Gundy v. United States*, ___ US ___, ___, 139 S Ct 2116, 2121, ___ L Ed 2d ___ (2019) (describing the history of sex offender registration laws). SORNA includes a statutory definition of the term "resides": "The term 'resides' means, with respect to an individual, the location of the individual's home or other place where the individual *habitually lives*." 42 USC § 16911(13) (2007) (emphasis added). The United States Department of Justice has provided guidance stating that "habitually lives" includes "any place in which the sex offender lives for at least 30 days." The National Guidelines for Sex Offender Registration and Notification, 73 Fed Reg 38062 (July 2, 2008); *id.* at 38055-56 ("Sex offenders who lack fixed abodes are nevertheless required to register in the jurisdictions in which they reside ***. Such sex offenders cannot provide the residence address required by section 114(a)(3) because they have no definite 'address' at which they live. Nevertheless, some more or less specific description should normally be obtainable concerning the place or places where such a sex offender habitually lives—*e.g.*, information about a certain part of a city that is the sex offender's habitual locale, a park or spot on the street (or a number of such places) where the sex offender stations himself during the day or sleeps at night, shelters among which the sex offender circulates, or places in public buildings, restaurants, libraries, or other establishments that the sex offender frequents. Having this type of location information serves the same public safety purposes as knowing the whereabouts of sex offenders with definite residence addresses.").

[4] *See, e.g.*, *Twine v. State*, 395 Md 539, 550, 910 A2d 1132, 1138 (2006) ("Because the ordinary meanings of 'residence' and 'address' connote some degree of permanence or intent to return to a place, and appellant was homeless, he had not acquired a residence within the contemplation of the statute. The statute does not address how compliance can be achieved by a person in appellant's circumstances."); *State v. Iverson*, 664 NW2d 346, 352 (Minn 2003) (observing that, as used in context, "the definition for 'residence,' 'address,' and 'living address' must include the characteristics of an offender knowing about the living situation at least five days in advance of moving there, and that it be a place at which an offender can receive mail"); *State v. Pickett*, 95 Wash App 475, 479, 975 P2d 584, 586-87 (1999) (holding that the evidence "is undisputed that

constitutionality of applying the statutes at all.[5] In the wake of these challenges, many states amended their registration statutes to expressly address the application of the reporting requirements for homeless persons.[6] *See State v. Adams*, 91 So 3d 724, 742 (Ala Crim App 2010), *cert den*, 91 So 3d 755 (Ala 2012) (noting that "the legislatures of other states have provided for the means to monitor the whereabouts

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[the defendant] was living on the streets, sometimes staying in parks in Everett and Seattle, sometimes on the sidewalks of downtown Seattle. [His] situation is not contemplated by the statute. Because 'residence' and 'residence address' connote some permanence or intent to return to a place, it is impossible for [him] to comply with the statute as written"); *cf. Com. v. Wilgus*, 615 Pa 32, 43, 40 A3d 1201, 1208 (2012) (holding that, "[u]nlike some other states that have ruled on this issue, Pennsylvania clearly defines 'residence' for registration purposes"); *People v. Allman*, 321 P3d 557, 566 (Colo App 2012) (explaining that Colorado has a statutory definition of "residence" and that, under that definition, "a motor vehicle, if 'used, intended to be used, or usually used for habitation,' may be a residence, even if not parked in a fixed location").

[5] *See, e.g.*, *Santos v. State*, 284 Ga 514, 516, 668 SE2d 676, 678 (2008) (holding that Georgia's registration requirement was unconstitutionally vague as applied to sex offenders without a street or route address, because it provided no notice "of what conduct is required of them, thus leaving them to guess as to how to achieve compliance with the statute's reporting provision"); *State v. Adams*, 91 So 3d 724, 754 (Ala Crim App 2010), *cert den*, 91 So 3d 755 (Ala 2012) (holding that a statute requiring a sex offender to provide "an actual address at which he or she will reside or live" was unconstitutional as applied to a homeless person; "for someone who does not have a fixed place where he or she lives continuously for some period and where mail can be received, it is impossible to comply with the statute"); *State v. Jenkins*, 100 Wash App 85, 91, 995 P2d 1268, 1271, *rev den*, 141 Wash 2d 1011 (2000) (holding that "one reasonably could conclude that a person without a fixed, regular place to sleep does not have a residence under the terms of the statute. Persons of common intelligence must necessarily guess as to the types of living situations that the term 'residence' encompasses. Because of these defects, the term 'failure to register' lacks sufficient definiteness as to the proscribed conduct.").

[6] *See, e.g.*, *State v. Breidt*, 187 Wash App 534, 542-43, 349 P3d 924, 928 (2015) (explaining amendments by Washington's legislature to include procedures specifically for people without a fixed address" to eliminate the vagueness problem identified by the appellate court and stating that, "[i]f people are without a fixed address, there are provisions that explicitly apply to them. And, if a person goes from having a residence address to being homeless, it is clear that the provisions regarding residences no longer apply."); Wash Rev Code Ann § 9A.44.130 (4)(a)(vi) ("Any person who lacks a fixed residence and leaves the county in which he or she is registered and enters and remains within a new county for twenty-four hours is required to register with the county sheriff not more than three business days after entering the county and provide the information required in subsection (2)(a) of this section."). For a more comprehensive list, see Note, Elizabeth Esser-Stuart, "*The Irons Are Always in the Background": The Unconstitutionality of Sex Offender Post-Release Laws As Applied to the Homeless*, 96 Tex L Rev 811, 856 (2018) (setting forth an appendix of state laws that specifically address the reporting requirements for homeless sex offenders).

of homeless indigent sex offenders" and describing some of those means, including weekly or monthly reports for persons without fixed residences).

Oregon's experience has been different thus far. There are no published appellate opinions addressing the application of the "change of residence" provisions to homeless persons. And, although the legislature has amended the scheme many times over the past few decades, none of those amendments has statutorily defined "residence" or clarified how to apply the reporting requirements to homeless persons. *See* Note, Elizabeth Esser-Stuart, *"The Irons Are Always in the Background": The Unconstitutionality of Sex Offender Post-Release Laws As Applied to the Homeless*, 96 Tex L Rev 811, 828 and n 114 (2018) (listing Oregon among 19 states that "do not provide any statutory guidance for homeless registrants seeking to comply with the required registration").

With that background, we turn to the provision at issue, ORS 163A.040(1)(d) (2015), to determine how the legislature intended that statute to apply in these circumstances. In interpreting the statute, our goal is to ascertain the intent of the legislature that enacted it, *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009), which we do by examining the text and context of the provisions at issue, looking to legislative history as necessary. *State v. Klein*, 352 Or 302, 309, 283 P3d 350 (2012). "In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties." *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997).

Part of our work in construing ORS 163A.040(1)(d) (2015) was already done by this court in *Hiner*. In that case, the question was whether the requirement to report when a person "moves to a new residence" is triggered by leaving one residence, as the state argued, or whether it is triggered when the person acquires a new residence, as the defendant contended. 269 Or App at 449. After examining the text, context, and legislative history of the statute, we explained that it requires the state to prove two elements: "[T]he reporting requirement is triggered when the defendant has both left

his former residence and acquired a new residence." *Id.* at 452.[7]

The further question that we did not address in *Hiner*—and that is squarely posed by this case—is what constitutes a "residence" for purposes of the statute. Because that term is not defined by statute, we first look to its plain meaning. *State v. Gonzalez-Valenzuela*, 358 Or 451, 460, 365 P3d 116 (2015) (describing that as "a key first step" in determining what particular terms mean). "[A]s stilted as the approach may sometimes seem, we frequently consult dictionary definitions of the term[ ], on the assumption that, if the legislature did not give the term a specialized definition, the dictionary definition reflects the meaning that the legislature would naturally have intended." *Comcast Corp. v. Dept. of Rev.*, 356 Or 282, 296, 337 P3d 768 (2014).

That is how we approached the meaning of "residence" in *State v. Reigard*, 243 Or App 442, 259 P3d 966, *rev den*, 350 Or 717 (2011), our only other published decision construing that term in the context of sex offender registration and notification statutes.[8] In *Reigard*, the defendant argued that an earlier version of ORS 163A.040(1)(d) was unconstitutionally vague because it provided insufficient notice that his conduct—spending all of his days and nights at his girlfriend's house rather than where he was paying rent—constituted a "change of residence." We rejected that

[7] After our decision in *Hiner*, the legislature amended the statute to eliminate the requirement that the state prove that the defendant acquired a new residence. Or Laws 2017, ch 418, § 1. Those changes apply to conduct occurring on or after the effective date of the amendments and are not at issue in this case. Or Laws 2017, ch 418, § 2.

[8] The word "residence" appears in many different Oregon statutes, and we and the Supreme Court have construed the term in those other contexts. *E.g.*, *State v. Clemente-Perez*, 357 Or 745, 768-69, 359 P3d 232 (2015) (holding that "a person's 'place of residence' for purposes of ORS 166.250(2)(b) is the house or other structure in which a person lives—that is, a person's residential structure"). Notwithstanding the frequency with which it appears in statutes, it is far from having an established meaning as a term of art under Oregon law. *See generally Domicil*, 25 Am Jur 2d § 8 (2019) (explaining that "residence" has been described as a "'chameleon-like' concept" and that "it has been said that residence is something more than a mere physical presence and something less than domicil" (footnotes omitted)). None of those cases involves statutes similar enough to the sex offender registration and notification statutes, either in statutory wording or legislative purpose, to provide helpful guidance in this case.

challenge, explaining that "[t]he word 'residence' is commonly understood to include 'the place where one actually lives or has his home as distinguished from his technical domicile,' *Webster's Third New Int'l Dictionary* 1931 (unabridged ed 2002)." 243 Or App at 451. We held, based on that common meaning, that a person of ordinary intelligence in defendant's position—as someone who spent "all of his nonworking hours—both day and night—every day at his girlfriend's house and had even arranged to receive mail at that residence"—would have had a reasonable opportunity to know that he had changed his "residence" by actually living someplace new, regardless of whether he kept paying rent elsewhere. *Id.* at 451-52.

At issue in this case is not whether "residence" means a technical domicile, but rather the temporal aspect of what constitutes a residence. *Webster's* again is helpful. It defines "residence," in relevant part, as

> "**1 a :** the act or fact of abiding or dwelling *in a place for some time* **:** an act of making one's home in a place *** **2 a** (1) **:** the place where one *actually lives or has his home* as distinguished from his technical domicile (2) **:** a temporary or permanent dwelling place, abode, or habitation *to which one intends to return as distinguished from a place of temporary sojourn or transient visit* (3) **:** a *domiciliary* place of abode."

Webster's Third New Int'l Dictionary 1931 (unabridged ed 2002) (boldface in original; emphases added). The related verb "reside" is defined by *Webster's* as "to dwell *permanently or continuously* **:** have *a settled abode for a time*: have one's residence or domicile." *Id.* at 1931 (boldface in original; emphasis added). *Webster's* further explains that "reside" may be the "preferred term for expressing the idea that a person keeps or returns to a particular dwelling place as his fixed, settled, or legal abode," in contrast to words like "sojourn" or "stay," which are used in reference to short-term habitation that is for a more limited or uncertain time. *Id.* The *American Heritage Dictionary of the English Language* 1493 (5th ed 2011) likewise defines the word "reside" to mean "[t]o live in a place *permanently or for an extended period*." (Emphasis added.)

Contrary to the state's view, those definitions reflect the ordinary understanding that a "residence" is a place where a person is settled and intends to return for some period of time, as distinct from a place of transient visit or sojourn. As the dictionary definition reflects, some residences may be "temporary" in the sense that a person intends to live there for an extended but finite duration, such as a residence hall at a school. But not every temporary stay—such as an overnight stay by a traveler at a hotel or a homeless shelter—constitutes a person's "residence" within the ordinary meaning of that term. *Accord Andrews v. State*, 34 A3d 1061, 1063-64 (Del 2011) (explaining that the dictionary definitions of "residence" include "an element of permanence"; "The fact that one has three business days to reregister does not mean that one changes his residence anytime he stays in one location for three business days. A person who buys a house, for example, changes his residence on the first day he starts living there. *** By contrast, a person who stays with his friend for five or six days while waiting for his new house to be painted, has not changed his residence ***."); *Adams*, 91 So 3d at 737 (concluding that the "actual address at which he or she will reside or live" must "mean something different than a temporary place where one stays or sleeps"); *State v. Pickett*, 95 Wash App 475, 478, 975 P2d 584, 586 (1999) (similarly concluding that "[r]esidence as the term is commonly understood is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit").

The state has not identified anything in the statutory context or legislative history suggesting that the legislature intended to depart from the ordinary understanding that a "residence" is something distinct from a place of transient visit. As statutory context, the state points to ORS 163A.045(1), which provides that "[t]he purpose of ORS 163A.005 to 163A.235 is to assist law enforcement agencies in preventing future sex offenses." *See also State v. Matthews*, 159 Or App 580, 586-87, 978 P2d 423 (1999) ("The legislative history confirms that the registration requirement was not enacted to exact retribution for past sex offenses, but,

instead, to create a database of past sex offenders' identities and addresses to facilitate investigations of sex crimes." (Footnote omitted.)). In the state's view, that purpose would be frustrated if a sex offender could avoid the reporting requirement by moving to a new location every few days or if the reporting requirement is never triggered for a homeless person who moves from shelter to shelter.

Although the tracking and community notification goals of the sex offender registration and notification statutes may be frustrated in the case of homeless persons, the state's solution—to require a new report based on every change of location—would not necessarily solve the problem. If a person has 10 days to report a change of residence and is sleeping somewhere different each night, the reported change of residence would be stale by the time of the report. And an impossibly difficult registration scheme, where homeless sex offenders are required to report in person as often as daily, could frustrate tracking and notification goals by discouraging any compliance whatsoever by those offenders. *See State v. Burbey*, 243 Ariz 145, 147, 403 P3d 145, 147 (2017) (observing that the Arizona legislature had amended its reporting statutes to ease compliance for homeless persons, and that interpreting a change of "residence" or "address" to include "every time the person moves from one street location to another" would defeat the purpose of the amendments); *Jeandell v. State*, 395 Md 556, 560, 910 A2d 1141, 1144 (2006) ("If 'residence' were simply a 'living location,' as the Court of Special Appeals found, a homeless registrant might have to notify the Department of a change in residences at least every seven days, if not more frequently, with the prospect that the new residence listed in each notice may be out of date and therefore inaccurate. Such a result is inconsistent with the framework of the statute." (Footnote omitted.)). In any event, although those competing policy concerns raise important considerations, we are not at liberty to rewrite the statute to remedy a perceived gap in the reporting requirements when there is no plausible textual support for that interpretation. *See Halperin v. Pitts*, 352 Or 482, 496, 287 P3d 1069 (2012) ("[E]ven assuming that plaintiffs are correct in their characterization of the legislative policy reflected in ORS 20.080(1),

we simply do not have authority to rewrite the terms of a statute to accomplish what we may suspect the legislature intended but did not actually enact into law.").[9] That function—of resolving those competing policy concerns—is the role of the legislature, as has been the case in the other states to have grappled with the complicated issue of how best to keep track of sex offenders who are homeless so that law enforcement may achieve the legislature's intended public safety objective of "preventing future sex offenses." ORS 163A.045(1). It is not a function that we may perform by giving the word "residence" in ORS 163A.040(1)(d) (2015) something other than its usual meaning, in the absence of any indication that the legislature intended the word "residence" to have a specialized meaning in the context of the sex offender registration statutes.[10]

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[9] In *Nichols v. United States*, ___ US ___, 136 S Ct 1113, 1118, 194 L Ed 2d 324 (2016), the Court reached the same conclusion in a case in which the government advocated against the ordinary meaning of a "change" of residence to broaden the coverage of SORNA:

> "As we long ago remarked in another context, '[w]hat the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.' *Iselin v. United States*, 270 US 245, 251, 46 S Ct 248, 70 L Ed 566 (1926). Just so here."

[10] We are not aware of legislative history indicating otherwise. On the contrary, it appears that the legislature may be aware of the need to specifically address how to handle the registration of homeless sex offenders. As noted earlier, 299 Or App at 322 n 7, the legislature in 2017 amended ORS 163A.040(1)(d) to overturn the result of our decision in *Hiner*—that is, that the state must prove that the defendant had established a new residence. During hearings on those proposed amendments, Aaron Knott, the legislative director for the Department of Justice, explained that the requirement to prove a new residence worked in some situations but failed to address, among other things, the "most obvious fact pattern, someone who simply does not have a permanent residence—they're moving from shelter to shelter or even bridge to bridge." Audio Recording, House Committee on Judiciary, HB 2360, Feb 16, 2017 (comments of Aaron Knott, DOJ legislative director), https://olis.legl.state.or.us (accessed Aug 8, 2019). At various points during the hearings, committee members and witnesses discussed problems related to the definition of "residence" under the statutes and alluded to prolonged difficulty among stakeholders in reaching consensus on how to address that issue. *E.g.*, Audio Recording, House Committee on Judiciary, HB 2360, Feb 16, 2017 (question from Rep A. Richard Vial about the definition of "residence"), https://olis.legl.state.or.us (accessed Aug 8, 2019); Audio Recording, House Committee on Judiciary, HB 2360, Feb 16, 2017 (testimony from Aaron Knott describing earlier legislative efforts to address reporting requirements for people who lack a fixed residence), https://olis.legl.state.or.us (accessed Aug 8, 2019); Audio Recording, Senate Committee on Judiciary, HB 2360, May 11, 2017 (testimony of Ken Nolley, Oregon Voices, describing proposed 2015 legislation

For these reasons, we conclude that the legislature used the term "residence" in ORS 163A.040(1)(d) (2015) consistently with the ordinary understanding that it refers to a place where a person is settled beyond just a transient visit or sojourn. *See People v. McCleod*, 55 Cal App 4th 1205, 1218, 64 Cal Rptr 2d 545, 553 (1997), *as modified on denial of reh'g* (July 16, 1997) (explaining that the meaning of "residence" depends on statutory context but that, as used in the context of sex offender registration statutes, the term would be "understood by a person of common intelligence as 'connot[ing] more than passing through or presence for a limited visit'").

That brings us to the next question posed by this case, which goes beyond that temporal aspect of the term: Does the term "residence" include a jail?[11]

The ordinary meaning of the term "residence" that we have just identified does not provide a clear answer to that question. On the one hand, a jail or prison may often be something more than a place of transient visit for an inmate, depending on the length of incarceration. That gives rise to the possibility that the legislature could have intended a jail or prison to qualify as a "residence" for purposes of ORS 163A.040(1)(d) (2015). On the other hand, at least one characteristic of jails and prisons is at odds with the ordinary meaning of the term "residence." As noted, *Webster's* defines "residence" as a habitation "to which one intends to return," suggesting that the concept of a residence ordinarily encompasses the quality of being a place from which a person can depart, and to which a person can return, with some degree of freedom. Jails and prisons do not share that quality and, thus, may not have been what the legislature had in mind

to address reporting by homeless sex offenders). Mr. Knott explained that the bill to overturn *Hiner* was a narrow fix and did not resolve the "standing question" about how to register sex offenders without a traditional address. Audio Recording, Senate Committee on Judiciary, HB 2360, May 11, 2017 (testimony of Aaron Knott).

[11] Although the parties argue about whether defendant's time in jail could give rise to an inference that he had moved to a new "residence" within the meaning of the statute, they do not address the threshold question whether a jail can ever be considered the inmate's residence. But, as noted earlier, when the interpretation of a statutory term has been put at issue by the parties, it is our obligation to correctly construe it. *Stull*, 326 Or at 77.

when it used the term "residence" in ORS 163A.040(1)(d) (2015).

There are contextual clues, however, that indicate that the legislature did not contemplate a place of involuntary incarceration as a "residence." The initial reporting requirement applies to a person who "[i]s discharged, paroled or released on any form of supervised or conditional release from a jail, prison or other correctional facility or detention facility in this state" as a result of a sex crime. ORS 163A.010(2). The scheme imposes an initial obligation to report "[w]ithin 10 days following discharge, release on parole, post-prison supervision or other supervised or conditional release" to "the Department of State Police, a city police department or a county sheriff's office, in the county to which the person was discharged, paroled or released or in which the person was otherwise placed." ORS 163A.010 (3)(a)(A).

Once a person has complied with that initial reporting obligation, the person "shall subsequently *report, in person*, in the circumstances specified in paragraph (a) of this subsection, as applicable, to the Department of State Police, a city police department or a county's sheriff's office, in the county of the person's last reported residence." ORS 163A.010(3)(b) (emphasis added). The phrase "report, in person" refers to presenting oneself in person or making "one's whereabouts or activities know to someone" in person. *Webster's* at 1925 (defining the verb "report"). That phrase makes little sense when applied to someone who is already in the state's physical custody, and it is difficult to see how the manifest purpose of the reporting obligation—to allow law enforcement agencies to know the whereabouts of sex offenders in the community—is served in that circumstance. Moreover, ORS 163A.010(3)(b) directs the person to report "in person" in in the "county of the person's *last reported residence*." (Emphasis added.) Had the legislature contemplated involuntary incarceration as a "change of residence," it would not have required the inmate to report *in person* in the county of the *last reported residence*, which may or may not be the same county as the correctional facility. The result would be particularly anomalous in the case of an inmate who was transferred from a correctional

facility in one county to another. In that circumstance, the person's involuntary "change of residence" from one facility to another facility would trigger an "in person" reporting requirement in the *former* county that could not possibly be met by a person in the physical custody of the state or one of its counties.[12]

The broader historical context also suggests that the legislature would not have intended a place of involuntary incarceration to be a "residence" for reporting purposes. As noted earlier, the legislature amended Oregon's sex offender registration and notification statutes in 1997 in light of the Wetterling Act and Megan's Law, 299 Or App at ___, and it has continued to amend those state statutes against the backdrop of the related federal sex offender registration scheme. *See Hiner*, 269 Or App at 449-51 (describing 2009 legislative amendments to address venue problems regarding prosecution for failing to report a change of residence). Those related federal statutes have long made clear that the registration period for sex offenders does not include subsequent periods of incarceration. *See* 42 USC § 14071(b)(6) (1998) ("A person required to register *** shall continue to comply with this section, *except during ensuing periods of incarceration*, until ***") (emphasis added); 42 USC § 16915(a) (2007) (providing, under SORNA, that a sex offender "shall keep the registration current for the full registration period (*excluding any time the sex offender is in custody or civilly committed*)" (emphasis added)). We have no reason to believe that the legislature nonetheless intended to require sex offenders to report a move to or from a correctional facility under state law.

Absent any statutory context or legislative history that supports a contrary reading, we conclude that a correctional facility is not an inmate's "residence" for purposes of the crime of failing to report a move to a new residence under ORS 163A.040(1)(d) (2015). *Accord State v. Watson*, 160 Wash 2d 1, 10, 154 P3d 909, 914 (2007) (observing

[12] We recognize that ORS 163A.040(2)(a) creates an affirmative defense to criminal liability for failing to register in the county of the last reported residence, so long as the person registered in the county of the new residence. But that affirmative defense to criminal liability does not change the underlying reporting requirements.

that "incarceration and release are certainly not the same as moving voluntarily" but that change of residence and release from custody are separate triggers for reporting obligations under Washington's statutes); *Garcia v. Condarco*, 114 F Supp 2d 1158, 1160 (DNM 2000) ("[F]eatures in common between the Hobbs City Jail and structures found to be 'dwellings' within the meaning of the [Fair Housing Act] should not obscure the glaring difference between them: The Hobbs City Jail is designed as a detention facility not a 'residence.'").

C. *Sufficiency of the Evidence*

With that understanding of what the state must prove under ORS 163A.040(1)(d) (2015), we turn to the parties' arguments regarding the sufficiency of the evidence, analyzing each of the four theories advanced at trial.

1. *Evidence that defendant established a new residence across the street from the Chevron*

In response to defendant's motion for a judgment of acquittal, the state argued below that defendant's statement to Madsen, in which defendant indicated that he was living directly across the street from the Chevron station, permitted an inference that defendant "wasn't living where he was supposed to be"—in other words, that he had established a new residence across the street from the Chevron rather than in the parking lot behind it, where he had last reported his residence. And the trial court agreed with that reasoning, stating that, "[i]f anything, he was living across the street, which was not the correct address."

On appeal, the state has abandoned that theory of liability—with good reason. Defendant's last reported address—"1519 Adams Ave\Prkng lot behind"—provided an approximate location near the Chevron station where defendant had been living as a homeless person, and there is no evidence in the record as to exactly where that residence was. Defendant provided a similarly approximate location to Madsen, a parking lot near the Chevron. On this record, no reasonable trier of fact could conclude from those two descriptions that defendant had actually established a "new

residence" somewhere other than the approximate location that he had last reported in January 2015.[13]

2. *Evidence that defendant was in the Marion County or Union County Jails*

Next we turn to the state's theory that the evidence was sufficient to permit an inference that defendant considered the Marion County Jail, where he was housed for "about a month," and the Union County Jail, where he was housed "for some time in March 2016," to be his new residences, because he had previously listed the Union County Jail as a residence between 2012 and 2014. That contention is foreclosed by our conclusion that jail is not the "residence" of an incarcerated person for purposes of ORS 163A.040 (1)(d) (2015). Even assuming that defendant considered himself to be residing at the jail where he was housed, that subjective belief does not change the meaning of the statute or expose him to criminal liability under ORS 163A.040(1)(d) (2015).

3. *Evidence that defendant was "frequently between Medford and Salem"*

The trial court reasoned that defendant "admitted living between Medford and Salem. He was living somewhere down there." However, under *Hiner*, it is not enough for the state to prove that defendant was no longer living at his former residence. The state must prove that defendant *established a new residence. Hiner*, 269 Or App at 452. Defendant's admission that he was frequently between Medford and Salem would permit a jury to find that he had left his residence in Union County, but it does not permit an inference that he had established a new residence in those places—that is, that he was living in those places as anything other than a traveler or transient visitor.

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[13] On cross-examination, Madsen testified that the two locations were "not even the same address" but conceded that "it's possible" that "somebody would describe the place that you've marked as an 'X,' as behind the Chevron station." To the extent that defendant inaccurately described the address of his residence on his registration form, that is a different offense—a misdemeanor rather than a felony. *See* ORS 163A.040(1)(f) (making it a crime to "fail[] to provide complete and accurate information"); ORS 163A.040(3) (making that crime a misdemeanor).

4. *Evidence that defendant was staying at a shelter in Salem*

Last, we turn to the state's contention that, "[a]t a minimum, defendant maintained a 'residence' at the Gospel Mission in Salem, after he was released from the Marion County jail on January 31, 2016." The state relies on testimony by defendant's parole and probation officer, Browne, that defendant had told him that he stayed at the Gospel Mission rather than with his brother in Salem, because he knew that Browne would find him at the shelter. In the state's view, that evidence is sufficient to establish that defendant considered that shelter to be his home—a place that he expected to return and where he knew that he could be found.

We disagree that Browne's testimony supplies a sufficient basis on which to conclude that the Gospel Mission was defendant's "new residence." As we explained above, a "residence" within the meaning of the reporting statutes is a place where a person actually lives and intends to return as something more than a transient visitor. Although Browne's testimony indicates that defendant expected to be found at the shelter by his parole and probation officer, there is nothing in the record that establishes how long he had been staying or would have been permitted to stay at the shelter. When asked to further explain defendant's statements about staying at the shelter, Browne testified:

> "Specifically the days [he was at the shelter], I couldn't tell you for sure the days he had been there. But he did say that he couldn't afford to come home; so he'd remained in Salem. He went to the Gospel Mission. Unknown for how long, but that's—he knew that I would find him there."

On this record, a factfinder would be required to speculate as to whether the Gospel Mission was the type of place where defendant could stay longer than overnight or a few days as a transient visitor. In light of the context of defendant's statement, in which he contrasted his stay at the shelter with returning "home" to Union County, and without anything in the record explaining the nature of the Gospel Mission or defendant's period of stay, the evidence is legally insufficient to prove that defendant had made that shelter

his "new residence" within the meaning of ORS 163A.040 (1)(d) (2015).

For the foregoing reasons, we conclude that the state's evidence was legally insufficient to prove that defendant violated ORS 163A.040(1)(d) (2015), and the trial court should have granted his motion for a judgment of acquittal on that charge. We therefore reverse his conviction.

Conviction on Count 1 reversed; remanded for resentencing; otherwise affirmed.