IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. FERNANDO CLEMENTE-PEREZ, Defendant-Appellant, Petitioner on Review.	Washington County Circuit Court No. D104733M CA A147753 SC S062407

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the District Court for Washington County
Honorable Rick Knapp, Judge

Opinion Filed: March 26, 2014
Author of Opinion: Sercombe, Judge
Before: Ortega, Presiding Judge and De Muniz, Senior Judge.

Continued . . .

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

INTRODUCTION

ORS 166.250(1)(b) generally prohibits the unlicensed possession of a concealed, readily accessible handgun in a vehicle. ORS 166.250(2)(b) creates an exception to that, and other firearm prohibitions in ORS 166.250(1), that allows a person to possess a concealed firearm "within the person's place of residence" without obtaining a license. This case involves the scope of that "place of residence" exception. The issue here is whether that exception extends outside the walls of a person's home. The particular question is whether the exception allows a person to conceal a handgun inside of a vehicle parked on the person's property but not inside of a garage or other structure. It is clear from the text, context, and legislative history, that the 1925 legislature who adopted that part of the statute did not intend the exception to be so broad.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Does the "place of residence" exception apply to a handgun concealed inside of a vehicle parked outside of a person's residential structures under a stand-alone awning?

First Proposed Rule of Law

No. Correctly construed the "place of residence" exception applies to handguns concealed only inside of the person's residential structure, such as the person's house.

Second Question Presented

In order to prove that a defendant committed the crime of unlawful possession of a firearm based on concealing a gun within a vehicle, must the state prove that defendant was "occupying" the vehicle at the same time that the gun was concealed within the vehicle?

Second Proposed Rule of Law

No. The statute requires the state to prove that defendant possessed the handgun by exercising control over it while the handgun was unlawfully concealed within the vehicle. Because a person can exercise control over a handgun without being in close proximity to it the statute does not require that the state prove that defendant was "occupying" the vehicle at the time he possessed the handgun.

Summary of Argument

Defendant was convicted of unlawfully possessing a concealed handgun within his truck pursuant to ORS 166.250(1)(b). He claims that while the handgun was inside of his truck, it was also within his place of residence for purposes of the statutory exemption in ORS 166.250(2)(b). That statute allows a person to possess a handgun "within the person's place of residence," without violating the firearm

prohibitions in ORS 166.250(1). But the truck—which was parked near defendant's garage, off to the side of his driveway, underneath a stand-alone awning (SER 1)—was neither within his place of residence, nor was it his place of residence.

By choosing to use the term "residence," which was synonymous with "dwelling place" and similar terms, the 1925 legislature who enacted the statutory exemption indicated that "place of residence" meant the physical space in which the person actually lives—in other words, the person's residential structure such as their house or apartment. The legislature's use of "within" before the phrase "place of residence" provides further evidence that it intended to refer to structures, which have clearly defined interiors. It is also consistent with the development of the exception and broader historical circumstances allowing people more leeway for weapons to protect residential structures. Defendant's pickup truck was not within any residential structure. Accordingly, the exception did not apply.

Defendant also contends that the statute prohibiting a person from possessing a concealed handgun within a vehicle, ORS 166.250(1)(b), requires the state to prove that the person was occupying the vehicle while the handgun was concealed in it. It does not. The text and context of the statute demonstrate that the state must prove that the concealed handgun was inside the vehicle and that defendant possessed it. Because a person can possess a handgun without being in close proximity to it, the person can possess it while he or she is outside the

vehicle. Moreover, defendant's argument is unpreserved and, even if he is correct about the statute, the state proved that he was within his truck with the concealed handgun.

ARGUMENT

Oregon law prohibits most people from possessing concealed firearms on their persons or within a vehicle unless they have a concealed handgun license. ORS 166.250; ORS 166.260. Defendant violated the law by possessing a concealed handgun that was inside of his truck, which was parked near his house under a temporary awning. The handgun was not within his "place of residence" because his truck was neither a residential structure itself, nor was it within a residential structure. Accordingly, the exception did not apply.

A. Defendant's handgun, concealed inside of his pickup truck, was not "within [his] place of residence" for purposes of ORS 166.250(2)(b).

As relevant here, ORS 166.250(1)(b) states that, subject to a number of statutory exceptions, "a person commits the crime of unlawful possession of a firearm if the person knowingly * * * [p]ossesses a handgun that is concealed and readily accessible to the person within any vehicle." One of the statutory exceptions—in ORS 166.250(2)(b)—allows a United States citizen over the age of 18, to own, possess and keep handguns "within" his or her "place of residence or place of business." ORS 166.250(2)(b), which applies to all of the firearm crimes

in ORS 166.250(1), also states that "no permit or license" is required to "possess[] or keep[] within the person's place of residence or place of business any handgun."

Here, defendant concealed a handgun within his pickup truck. He took the handgun out of the pickup truck, shot his wife's cell phone, and then returned the gun to the truck, concealing it again. (Tr 104). The truck was near defendant's driveway, under a temporary stand-alone awning. (SER 1). The state charged defendant with unlawfully possessing a concealed handgun within a vehicle. (ER 1). At trial, defendant moved for a judgment of acquittal arguing that the handgun, while inside of his pickup truck, was within his place of residence. (Tr 140-49). The trial court and Court of Appeals correctly rejected that argument. As explained below, defendant's handgun was not within his residence.

1. Defendant's handgun was not "within" his "place of residence" because it was not within any residential structure.

When construing a statute this court's "paramount goal" is to discern the legislature's intent. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). Here, the statutory text, context, and the limited legislature history support that "within the person's place of residence" means within the person's residential structure.

a. The statutory text in context indicates that the 1925 legislature intended "place of residence" to mean the person's residential structure.

As described above, ORS 166.250(2)(b) creates an exception to the general prohibition against possessing a concealed firearm without a license that allows an

adult citizen to own, possess, or keep handguns "within the person's place of residence or business." Here, the issue is what constitutes "within the person's place of residence."

The law that eventually became ORS 166.250 originally stated:

> Except as otherwise provided in this act, it shall be unlawful for any person within this state to carry concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver or other firearm capable of being concealed upon the person without having a license to carry such firearm * * * . This statute shall not be construed to prohibit any citizen of the United States, over the age of eighteen years, who resides or is temporarily sojourning within this state * * * who is not within the excepted classes prescribed by section 2 hereof, from owning, possessing or keeping *within his place of residence* or place of business any pistol, revolver or other firearm capable of being concealed upon the person, and no permit or license to purchase, own, possess or keep any such firearm *at his place of residence* or place of business shall be required of any such citizen.

Or Laws 1925, ch 260 § 5 (emphases added). ORS 166.250, its predecessor statutes, nor any other provision of the criminal code, provides a comprehensive definition of the term "place of residence."[1]

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[1] The current version of the statute does, however, specify that certain vehicles may qualify as a "residence" for purposes of the statute: "As used in this subsection, 'residence' includes a recreational vessel or recreation vehicle while used, for whatever period of time, as residential quarters." ORS 166.250(2)(b). Defendant does not assert that his pickup truck was a "recreational vehicle"—a term that is statutorily defined as a vehicle "designed for human occupancy." ORS 446.003(37).

Contemporaneous dictionaries demonstrate that the 1925 legislature would have intended that "place of residence" in this context mean a residential structure, like a house. *See Perry*, 336 Or at 53 (court "may seek guidance from dictionaries that were in use at [the] time" a statute was enacted). *Black's Law Dictionary* from 1933 defined "residence" as "[t]he place where a man makes his home, or where he dwells permanently or for an extended period of time. One's *house or dwelling*." *Black's Law Dictionary* (3d ed 1933) (emphasis added). The 1910 edition of *Webster's New International Dictionary* defined "residence" as "[t]he place where one actually lives or has his home; a person's dwelling place or place of habitation; an abode." *Webster's New Int'l Dictionary* 1814 (1910). Other dictionaries of the time similarly equated "residence" with "dwelling" "habitation" and "abode." Benjamin J. Pope, 2 *Legal Definitions* (1920) 1398 ("residence is defined to be the place of abode, a dwelling, a habitation"); W.J. Byrne, *A Dictionary of English Law* 768-69 (1923) ("residence" synonymous with "place of abode"); William Edward Baldwin, *Bouvier's Law Dictionary* 1061 (1926) ("residence" is "[t]he abode where one actually lives").

Webster's in turn defined "dwelling" as "place or *house* in which a person lives." *Webster's New Int'l Dictionary* at 687 (emphasis added). And, it defined "place" as "[a] locality or spot occupied as a dwelling place or the like" and as "[a] building, part of a building, or other spot, set apart for a special purpose." *Id.* at 1646. It defined "habitation" as "[p]lace of abode; settled dwelling; residence;

house." *Id.* at 967 (emphasis added). And it defined "abode" as "where one dwells; abiding place; residence; a dwelling; a habitation." *Id.* at 6; *see also* Byrne, *A Dictionary of English Law* 4 (describing an "abode" as "[a] man's *house* or other residence in which he lives with his family and sleeps at night") (emphasis added); Baldwin, *Bouvier's Law Dictionary* 27 ("abode" is "[w]here a person dwells"). Taken together, those somewhat circular definitions support the conclusion that the legislature used the phrase "place of residence" to mean a person's residential structure, such as a house.

Defendant asserts that while "place of residence" means where a person lives, it is not limited to a residential structure. (Def Br 10). In defendant's view, a person lives on his or her entire property. (*See* Def Br 10-11 describing a person's "residence" as "the land on which a person live[s]" and "the property on which a person's domicile sits"). Defendant asserts that had the 1925 legislature intended that the exception apply only to residential structures, then it would have used a term such as "building" or "dwelling." (Def Br 14). But the common contemporaneous definitions of "residence," while referring to the place a person lives, also suggest that the place is a structure by equating it to a "dwelling place," "abode" and "habitation." So, the use of "residence" demonstrates that the legislature meant a residential structure.

Moreover, the 1925 legislature's use of "within" preceding "place of residence" supports construing the term to mean a residential structure. "Within"

meant, at that time, "[i]n the inner part; as pertains to the *interior* or *inside*." *Webster's New Int'l Dictionary* 2344 (1910) (emphasis added). That term suggests that the legislature was referring to a structure—which has an interior—and not wide open land. Had the legislature meant anywhere on a person's real property, it likely would have used the word "on" which meant "at the surface of * * * upon," *id*. at 1502. Accordingly, the text, in context, supports that the 1925 legislature intended that "within a person's place of residence" meant within the structure where the person lived.[2]

Defendant asserts, in the alternative to his position that "place of residence" means all real property, that it means residential structures and associated curtilage.

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[2] The Court of Appeals, relying on its prior decision in *State v. Leslie*, 204 Or App 715, *rev den*, 341 Or 245 (2006), held that a person's "place of residence" is where the person actually lives as demonstrated by where the person regularly eats, drinks, and sleeps and that no evidence suggested defendant was living in his truck. *Clemente-Perez*, 261 Or App 146, 153-54, 322 P3d 1082 (2014); *see also State v. Wolf*, 260 Or App 414, 37 P3d 377 (2013) (court relying on *Leslie's* construction of the statute to conclude that a person who was staying at a campsite for a week, was within his place of residence when he was outside of his tent but in his designated campsite). In *Leslie*, the court considered whether the defendant's truck—in which he was living—was his place of residence. 204 Or App at 723. It rejected the state's position that the person's "place of residence" for purposes of the exception must be permanent in nature based on its conclusion that the contemporaneous definition on which the state relied from *Bouvier's Law Dictionary* defined "legal residence" while the statute was referring to a person's "actual residence." *Id*. The court considered neither *Webster's* definition of "residence" nor the significance of the legislature's use of "within" before "place of residence."

(Def Br 18-19). As explained above, however, the 1925 legislature would have understood "place of residence" to have its ordinary meaning which was synonymous with "dwelling place," "abode," and "habitation"—terms that refer to residential structures.

Defendant relies on case law developed in the search and seizure context to assert that the land immediately around a residential structure is considered part of the residential structure. (Def Br 19). It is not apparent that search and seizure law provides relevant context for the statute at issue. But, in any event, to the extent that it does, the land around a residential structure is not always treated the same as the area inside the structure. In the context of the officer safety doctrine, this court has recognized that there is a "significant difference" between a "pathway" that leads to a residence and areas surrounding the residence and the area inside the "physical boundary established by the walls and doors of the residence." *State v. Foster*, 347 Or 1, 12, 217 P3d 168 (2009). That difference is likewise significant with respect to this exception, which provides more leeway for the protection of a person's home.

b. Construing the statute to apply to residential structures is also consistent with the broader historical circumstances.

Relevant context for construing a statute also includes the historical circumstances and preexisting common law. *State v. Pipkin*, 354 Or 513, 526-29, 316 P3d 255 (2013) (this court "do[es] not interpret text in isolation; [it] also

consider the historical context against which that text was enacted"); *State v. McCullough*, 347 Or 350, 354, 220 P3d 1182 (2009) ("It is helpful [when analyzing the meaning of ORS 163.165,] to review briefly the historical background of the crime of hindering prosecution"). As explained below, the historical context against which the statute was enacted included allowing people more latitude to use force to protect the person's home, than other portions of the person's real property and a distrust of concealed weapons. That context supports the state's position that the 1925 legislature intended to allow unlicensed concealed weapons only in residential structures and not, as defendant contends, anywhere on a person's real property.

The use weapons to protect one's home has been common for centuries. *See State v. Bartmess*, 33 Or 110, 129-30, 54 P 167 (1898) ("A man's house is regarded as his castle * * * which affords him and his family a 'city of refuge'" that force may be used to protect). But the same use of force was not historically allowed to protect property outside of a person's house or other residential structure. *See id.* at 130 (the same right to use force to expel someone from one's home does not "extend beyond the limits of the dwelling and its customary outbuildings"); *Lee v. State*, 92 Ala 15, 9 So 407 (1891) (using deadly force "in defense of one's dwelling may be excusable in the eye of the law, when there

would be no legal justification for the taking of human life, in like circumstances, to prevent trespass upon property that is not the dwelling house").[3]

Defendant relies on a 1920 Oregon case regarding using force to protect one's property, *State v. Holbrook*, 98 Or 43, 188 P 947 (1920). (Def Br 10). He asserts that the case demonstrates that the right to protect property extended beyond the house to other portions of a person's real property. (*See* Def Br 10-11). But that reads too much into the case. There, this court considered whether it was proper to instruct the jury that homicide is justified when committed "to prevent commission of a felony on the property of such person, or upon property in his possession, or upon or in a dwelling house where such person may be." 98 Or at 74. But, this court did not hold that the instruction was a correct statement of the law. Rather, it held that instruction was not "harmful to the defendants." *Id.* The court explained that the evidence supported an argument that defendants were in their dwelling house (although it was a flimsy structure) and that, in any event, the instruction was helpful to them because it "provided another avenue of escape from the charge." *Id.*

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[3] In the context of the Second Amendment, the United States Supreme Court explained that the "home"—in contrast to other parts of real property—is where "the need for defense of self, family, and property is most acute." *District of Columbia v. Heller*, 554 US 570, 628, 128 S Ct 2783, 171 L Ed 2d 637 (2008).

Moreover, in addition to the historical acceptance of a person's use of force to protect inside of the person's home, there was also a historic distrust of concealed weapons. *See e.g. State v. Chandler*, 5 La Ann 489, 489-90 (1850) (upholding prohibition on concealed carrying of weapons and recognizing that open carrying of a weapon puts others on notice that a person is armed while concealed carrying can lead to "bloodshed and assassinations committed on unsuspecting persons"); *Aymette v. State*, 21 Tenn 154, 160-61 (1840) (differentiating between open and concealed carrying of weapons and suggesting that concealed carrying is done "for purposes of private assassination" and that open carrying makes more sense for self-protection). Both the historical distrust of concealed weapons and of a person's right to protect the inside of their home with greater force than other areas would have informed the 1925 legislature. Consistent with those historical circumstances, the legislature wrote an exception that would allow otherwise prohibited uses of handguns, including possession of unlicensed concealed handguns, only inside residential structures and not in the open spaces on a person's property where it is more likely that a person would have contact with others.

c. The limited legislative history supports construing the exception to apply only to residential structures.

As this court explained in *Perry*, "the sequence of legislation that led to the 1925 enactment of what is now ORS 166.250(2)(b) suggests that the exception to

the comprehensive prohibition of concealed weapons was intended to be a *narrow one*." 336 Or at 55 (emphasis added).[4] At issue in *Perry* was the scope of the "place of business" exception, which parallels the "place of residence" exception. *Id*. at 51-52. The defendant in *Perry* argued that a "person's place of business" is wherever that individual is employed and so it applied to him when he was running a convenience store which he did not own. *Id*. This court disagreed and concluded that the exception applied only to the owner of a business. *Id.* After considering contemporaneous dictionaries, this court described the development of the statute. The court explained:

> That history demonstrates the legislature's ongoing concern with concealed weapons up to 1925. First, in 1885, the legislature imposed an outright ban on the carrying of concealed weapons by persons other than law enforcement officers. By later enactment, the legislature allowed for the carrying of concealed weapons on receiving a license. The 1925 statute created an exception to the general license requirement for persons in their place of residence or place of business. *Those statutes, read together, reveal the intent of the legislature to carve out a limited and specific exception to the requirement of obtaining a license to carry a concealed weapon.*

Id. (emphasis added).

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[4] There is no legislative record available to consider in construing "place of residence" in the statute. *See State v. Perry*, 165 Or App 342, 350, 996 P2d 995 (2000), *aff'd*, 336 Or 49 (2003) (legislative history concerning scope of place of residence or business exception in ORS 166.250(2)(b) was lost in the 1935 State Capitol Building fire).

The same rationale applies with equal force here. In creating the "place of residence" exception to the prohibition against the unlicensed carrying of concealed firearms—and the unlicensed concealment of weapons within a vehicle—the 1925 legislature would have intended to carve out only "a limited and specific exception." The limited nature of the exception supports restricting it to residential structures.

Further, to the extent it informs this court's analysis, later changes to the statute indicate that the legislature intended "place of residence" to mean residential quarters. *See Harris v. Board of Parole*, 288 Or 495, 501-02, 605 P2d 1181 (1980) (consulting later legislative history to determine whether the legislature's failure to enact legislation in response to a Supreme Court decision was intended to signal legislative agreement with the decision); *but see State v. Cloutier*, 351 Or 68, 103-04, 261 P3d 1234 (2011) (questioning the significance of subsequent legislative history). The 1985 legislature added to ORS 166.250(2): "As used in this subsection, 'residence' includes a recreational vessel or recreational vehicle while used, for whatever period of time, as residential quarters." Or Laws 1985, ch 544, § 3. That change and, in particular, the reference to "residential quarters" demonstrates that the legislature—at least at that time—understood that "residence" was focused on a defined place inside of which the person lived, at least temporarily. That supports that "place of residence"

means a residential structure—a structure that the person actually lives in, like a house or apartment.

In sum, based on the text in context, historical circumstances, and this court's prior construction of the exception as "narrow," this court should construe Oregon's "place of residence" exception to apply only to residential structures. It does not apply to a pickup truck parked near—but not within—a person's residential structures.[5]

B. This court should reject defendant's argument that the state had to prove that he was within his vehicle while the handgun was concealed in it.

Defendant asserts that he was entitled to a judgment of acquittal because the state failed to prove that he was within his truck when he possessed the concealed handgun. ORS 166.250(1)(b) provides that a person commits the crime of

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[5] To the extent this court construes the exception to apply, as the Court of Appeals did, to any place where a person carries on his or her daily living activities, the trial court correctly denied defendant's motion for judgment of acquittal. Defendant did not contend that he was living in the truck and no evidence suggested that he was doing so.

Further, if this court accepts defendant's alternative argument and construes the exception to apply to a person's home and surrounding curtilage, again the trial court still correctly denied defendant's motion for judgment of acquittal. The truck itself was not part of the curtilage of defendant's home because it was not an outbuilding (or inside of an outbuilding) and was not immediately next to the house. *See State v. Dixson/Digby*, 307 Or 195, 209, 766 P2d 1015 (1988) ("[T]he common-law distinguished 'open fields' from the 'curtilage,' *the land immediately surrounding and associated with the home*.") (quoting *Oliver v. United States*, 466 US 170, 180, 104 S Ct 1735, 80 L Ed 2d 214 (1984) (emphasis added)).

unlawful possession of a firearm if the person "possesses a handgun that is concealed and readily accessible to the person within any vehicle." Defendant argues that the phrase "within any vehicle" modifies "the person," rather than "handgun." (Def Br 27-31). Based on that construction of the statute, he argues that the state needed to prove that he was within his truck when he possessed the handgun. (Def Br 31).

That argument fails for three separate reasons. First, the argument is unpreserved. Second, the statute requires only that the handgun that he possessed be within the vehicle, not that defendant be within the vehicle. Third, even if the statute requires the state to prove that defendant was inside the truck when he possessed the handgun, the state presented sufficient evidence from which a rational trier of fact could infer that defendant had been within the truck when he possessed the gun.

1. Defendant failed to preserve his argument.

When defendant moved for a judgment of acquittal on the unlawful possession of a firearm charge, he advanced, at some length, two separate arguments. He argued first that his truck was within his place of residence. (Tr 140-47). Next he argued, as a matter of law, that when the handgun was concealed inside of his truck, it was not readily accessible because it was inside of a storage compartment located underneath the backseat. (Tr 146-52). On appeal he contends that his latter argument—about whether the gun was readily accessible—

preserved the argument he now makes—that the state failed to prove that *he* was within the truck when he possessed the concealed handgun. (Def Br 20-25). But because those are two distinct arguments, neither the trial court nor the state would have understood defendant to be arguing that the state had to prove that he was within the truck when he possessed the concealed handgun. Accordingly, defendant did not preserve his argument and this court should not reach the issue. *See State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000) (to preserve an argument for appeal, a party must provide the trial court "with enough clarity to permit it to consider and correct the error").

2. ORS 166.250(1)(b) requires that the *handgun* be within the vehicle, not that defendant be within the vehicle.

Moreover, ORS 166.250(1)(b) did not require the state to prove that defendant was "within" his truck at the time the handgun was concealed within it. Again, the statute provides that a person commits the crime of unlawful possession of a firearm if the person "[p]ossesses a handgun that is concealed and readily accessible to the person within any vehicle." ORS 166.250(1)(b). The statutory text, in context, establishes that "within any vehicle" modifies handgun and the legislative history does not demonstrate that the legislature intended otherwise.

a. The statutory text, in context, supports that "within any vehicle" modifies handgun.

Here, the text of ORS 166.250(1) may be ambiguous as to whether "within any vehicle" modifies person or handgun. But, the context indicates that the

phrase modifies handgun. Another provision of the statute, ORS 166.250(4),[6] focuses on the location of the *handgun* both in defining the term "readily accessible" and in creating an exception to that definition.[7] It provides that a handgun is "readily accessible" if "the handgun is within the passenger compartment of the vehicle." ORS 166.250(4). Thus, in defining the term "readily accessible," the legislature focused on where the *handgun* is kept, not where any person may be. And, in providing an exception in that definition, the legislature

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[6] ORS 166.250(4) provides:

> (a) Except as provided in paragraphs (b) and (c) of this subsection, a handgun is readily accessible within the meaning of this section if the handgun is within the passenger compartment of the vehicle.
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> (b) If a vehicle other than a [motorcycle, all-terrain vehicle, or snowmobile], has no storage location that is outside the passenger compartment of the vehicle, a handgun is not readily accessible within the meaning of this section if:
>
> (A) The handgun is stored in a closed and locked glove compartment, center console or other container; and
>
> (B) the key is not inserted into the lock, if the glove compartment, center console or other container unlocks with a key.

[7] The legislature added section (4) to the statute in 2009, ten years after it last amended the text of ORS 166.250(1)(b). *See* Or Laws 2009, ch 499, § 1 (amending section (4)); Or Laws 1999, ch 1040, § 1 (amending section (1)). Despite that timing, because section (4) defines a term used in ORS 166.250(1)(b), the statutes are directly linked and this court should consider ORS 166.250(4) in construing and applying ORS 166.250(1)(b).

focused on where the handgun is "stored," rather than on the location of any person—a handgun in the passenger compartment is not "readily accessible" if "[t]he handgun is *stored* in a closed and locked glove compartment, center console or other container," so long as the key is not inserted into the lock.

ORS 166.250(4)(b) (emphasis added).

To be sure, the legislature also required that the individual "possess" the handgun. Possessing requires some dominion and control, which often, but not always, may involve physical proximity to the handgun. ORS 161.015(9), which applies in this case, "encompasses two alternative ways of possessing property that this court traditionally has recognized: (1) physically controlling the property ('actual' possession) and (2) exercising some other kind of dominion or control over the property ('constructive' possession)." *State v. Barger*, 349 Or 553, 247 P3d 309 (2011) (discussing *State v. Fries*, 344 Or 541, 545-47, 185 P3d 453 (2008)). "Put differently, to 'possess' a thing traditionally means to control it, and 'actual possession' and 'constructive possession' are simply different types of control." *Id*.; *see also State v. Connally*, 339 Or 583, 591, 125 P3d 1254 (2005) (making a similar point about the ordinary dictionary meaning of the term "possession"). Here, defendant exercised control over the gun not only when he was holding it to remove it from the truck or put it back in the truck, but also, as owner of both the truck and the handgun (Tr 102), he exercised control over it

before and after he committed each of those acts. So, he possessed it inside and outside his of truck.

In sum, ORS 166.250(4) contradicts defendant's argument that the legislature was not concerned with where individuals *store* their guns. (See Def Br 27-28 (making arguments)). The definition of readily accessible and the exception to that definition demonstrate that the legislature was concerned with the placement and storage of handguns in vehicles—which makes sense in light of the mobility of vehicles.

b. Legislative history demonstrates that the legislature intended to broaden the statute to include passengers in a vehicle but not that it intended the statute to apply only to occupants of the vehicle.

Defendant asserts that the 1999 amendments to the statute demonstrate that the legislature intended to require that the person be in the vehicle at the time he or she possessed the concealed handgun. (Def Br 28-31). But, the history does not indicate that the legislature intended that the statute would apply *only* to individuals within a vehicle. Rather, it merely indicates that the legislature intended that the statute cover passengers, as well as drivers. And it is clear that the changes were intended to broaden the scope of the statute.

In 1999, the legislature amended ORS 166.250, in part, in response to the Court of Appeals decision in *State v. Williams*, 161 Or App 111, 984 P2d 312 (1999). At that time, the statute provided that a person committed the crime of

unlawful possession of a firearm if the person knowingly "[c]arrie[d] concealed and readily accessible to the person within any vehicle which is under the person's control or direction any handgun, without having a license to carry such firearm." ORS 166.250 (1993). In *Williams*, the Court of Appeals held that police lacked probable cause to arrest the defendant—who had been a passenger in a car—for carrying a concealed weapon after finding a weapon under the seat the defendant was sitting in because there was no evidence that the defendant had any interest in the car. *Id.* at 118-19.

In response to *Williams* and to a separate concern that "carries" was too narrow, the legislature amended the statute to eliminate the requirement that the vehicle be "under the [defendant]'s control or direction" and changed "carries" to "possesses." Testimony, Senate Committee on Judiciary, HB 3374, Jun 30, 1999, Tape 261, Side A (statements of Assistant Attorney General David Amesbury and Marion County District Attorney Dale Penn). Witnesses explained that, under *Williams*, the ban on concealed weapons within vehicles applied only to owners or drivers, who controlled the vehicle. *Id.* (statements of Amesbury and Penn). Thus, district attorneys would find it difficult to prosecute a passenger in a drive-by shooting for unlawful possession. *Id.* (statement of Penn).

Assistant Attorney General David Amesbury explained that there was also concern that because the statute applied only to "carrying" a concealed weapon, the statute would not apply when a handgun was concealed in a glove compartment,

under a seat in the car, or other location in the vehicle but not in the physical possession of the individual. *Id*. (statements of Amesbury); *see State v. Morrison*, 25 Or App 609, 549 P2d 1295 (1976) ("carrying" a handgun means the handgun is on the person or in the immediate vicinity). He explained that changing the statute to prohibit "possessing" a handgun would reach situations where the handgun was within the vehicle but not in the immediate vicinity of any individual. *See* Testimony, Senate Committee on Judiciary, HB 3374, Jun 30, 1999, Tape 261, Side A (statements of Amesbury); ORS 161.015(9) (1999) (defining "[p]ossession," to mean "to have physical possession *or otherwise to exercise dominion or control over property*." (emphasis added)).

Defendant focuses on one particular statement that Amesbury made. (Def Br 30). In response a question from Senator Burdick about whether the change to "possesses" from "carries" would apply to a passenger in a vehicle, Amesbury said that the statute would apply to "any person in a vehicle who possess[es] a handgun that is readily accessible and concealed." *Id.* That statement does not indicate that presence inside the vehicle is *required*; rather, in context, it simply confirms his understanding that the statute would cover passengers as well as drivers. So ultimately, while the legislature expanded the reach of ORS 166.250 and clarified that it applies to passengers within a vehicle, nothing in the legislative history indicates that the legislature intended to require that the person be within the vehicle in order to be in possession of the weapon concealed within that vehicle.

As described in the previous section, ORS 166.250's context demonstrates that the legislature was concerned with the placement and storage of handguns inside vehicles. That is consistent with the legislature's more specific concern about passengers and drive-by shootings and "carrying" versus "possessing" a handgun. The underlying concern is with concealing a handgun in a vehicle—which is mobile. And, concealing a handgun inside a vehicle is dangerous, and poses essentially the same risks to the community, whether those who possess (*i.e.* control) the handgun are inside the vehicle or standing outside, within arm's reach. Accordingly, it is the location of the *handgun* inside a vehicle—together with possession—which does not require actual presence in the vehicle—that are key.

3. In any event, a rational jury could find from the evidence that defendant had been "within" the truck when he possessed the handgun.

Even if ORS 166.250(1)(b) required the state to prove that defendant possessed a concealed handgun while *he* was "within" the truck, the evidence allowed a jury to find that he had done so. Defendant argues that there was no evidence that he "occupied" the truck when it contained the concealed weapon. (Def Br 31). But, nothing in the statute required that the state show that defendant "occupied" the truck. At the most—if defendant is correct that "within the vehicle" applies to the person and not the gun—the statute required that defendant was "within" the truck. The state presented evidence to meet that requirement.

The evidence demonstrated that, before shooting his wife's cell phone, defendant went to his pickup truck and retrieved the handgun from a storage compartment inside the truck. (Tr 104). Then, after shooting his wife's cell phone, defendant returned to his truck and replaced the handgun in the same storage compartment. (Tr 104). Defendant necessarily had at least a portion of his body "within" the truck when he did those two things.

And, the jury could infer that he actually had a significant portion of his body within the pickup truck because the handgun was not easy to retrieve or replace. It was wrapped in a towel and stuffed inside a storage compartment under the truck's backseat. (Tr 107; *see also* Ex 4-5, 8-10 (pictures of backseat and storage compartment)). The backseat had to be pulled forward and folded up in order to access the storage compartment. (Tr 107, 111). Deputy Brown described removing the gun from the storage compartment as a "process." (Tr 123). And because the truck was parked under the awning, which had numerous poles relatively close together, it was difficult to open the backdoor very wide to reach the back seat to lift it up and access the storage compartment. (Tr 121-22; SER 1). Accordingly, the jury could reasonably infer that defendant had to more fully insert himself into the vehicle to be in a position to replace or retrieve the handgun than if the truck had been parked somewhere that he could completely open the door. Ultimately, from the evidence, a rational jury could find that defendant was "within" his truck when he retrieved or replaced the gun.

The trial court correctly denied defendant's motion for judgment of acquittal because the state was not required to prove that defendant was within the truck when he possessed the concealed handgun and even it was required to do so, it did.

CONCLUSION

The trial court correctly denied defendant's motion for judgment of acquittal for all the reasons explained above. This court should affirm the judgments of the trial court and the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 3, 2015, I directed the original Brief on the Merits of Respondent on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Daniel C. Bennett, attorneys for petitioner on review, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6461 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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