IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ADRIAN FERNANDEZ, Defendant-Appellant Petitioner on Review.	Lane County Circuit Court Case No. 21CR40459 CA A179207 S071340

PETITIONER'S BRIEF ON THE MERITS

Review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Lane County
Honorable Jay McAlpin, Judge

Opinion Filed: July 31, 2024
Author of Opinion: Aoyagi, P. J.
Before: Before Aoyagi, Presiding Judge, Joyce, Judge, and Jacquot, Judge.

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
MARC D. BROWN #030825
Senior Deputy Defender
Oregon Public Defense Commission
1175 Court Street NE
Salem, OR 97301
Marc.D.Brown@opdc.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

DANIEL A. RAYFIELD #064790
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
TIMOTHY SYLWESTER #813914
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
timothy.sylwester@doj.oregon.gov
Phone: (503) 378-4402
Attorneys for Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

Defendant pleaded guilty to one count of online sexual corruption of a child in the first degree, a felony. Factually, the charge arose from a Facebook sting operation by a Eugene police officer posing as a 15-year-old girl. The offense of online sexual corruption of a child in the first degree is classified as an 8 on the sentencing guidelines crime seriousness scale. OAR 213-017-0004(12).

Prior to his sentencing hearing, defendant filed a sentencing memorandum in which he argued that the term of incarceration for online sexual corruption of a child in the first degree violates the proportionality protections of Article I, section 16, of the Oregon Constitution.[1] In his memorandum, defendant did not challenge his criminal history score but focused, instead, on the crime seriousness ranking for the offense. At his sentencing hearing, defendant reiterated his proportionality argument. Tr 14-15. The trial court ruled that the crime seriousness classification for the offense did not produce an unconstitutionally disproportionate sentence. Tr 16-17. The

[1] Article I, section 16, of the Oregon Constitution provides, in relevant part, "Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."

trial court classified defendant as an 8-H sentencing guidelines offender and imposed a presumptive 20-month term of incarceration.

On appeal, defendant argued that the 20-month term of incarceration was an unconstitutionally disproportionate sentence. To illustrate his point, defendant noted that other sexual offenses classified as category 8 offenses include rape in the second degree, sexual abuse in the second degree, and sexual abuse in the first degree, all of which require physical contact between the perpetrator and the victim. App Br 11. Defendant further observed that rape in the third degree, an offense requiring sexual intercourse with a person under the age of 16, is classified as a 6 on the crime seriousness scale, as is sodomy in the third degree which is committed when a person engages in oral or anal intercourse with a person under the age of 16. App Br 11-12. Additionally, defendant noted that attempted rape in the third degree, a similar offense to online corruption of a child, is classified as a category 4 on the crime seriousness scale. App Br 12-13.

In its Respondent's Brief, the state asserted that defendant's argument that his sentence violated the proportionality clause of Article I, section 16, was unreviewable because the trial court imposed a presumptive sentence under the sentencing guidelines. Resp Br 3-4.

In his reply brief, defendant acknowledged that, as a general rule, presumptive guidelines sentences are not reviewable but argued that the plain

text of ORS 138.105(8)(c)(A) provides authority to review a claim that the trial court's crime seriousness classification is reviewable when the argument is that the classification creates a disproportionate sentence. Reply Br 2-8.

The Court of Appeals held that ORS 138.105(8)(a)(A) precludes review of presumptive sentences and narrowly construed the exception in ORS 138.105(8)(c)(A) to apply only when the sentencing court "misapplies the rules of the Oregon Criminal Justice Commission regarding the crime seriousness scale that are part of the felony sentencing guidelines." *State v. Fernandez*, 334 Or App 81, 87, 555 P3d 350, *rev allowed*, 373 Or 121 (2024).

Defendant petitioned for review, presenting two questions. The first involved the issue of reviewability and the second involved the substantive issue—whether the classification of online sexual corruption of a minor in the first degree as an 8 on the crime seriousness scale produced a disproportionate sentence. This court allowed review on a revised version of the first question and omitted the second question. As a result, defendant's brief on the merits focuses solely on the question of reviewability and anticipates that, if this court agrees with defendant, it will remand the case for the Court of Appeals to address the merits in the first instance.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Does ORS 138.105(8)(a)(A) deny an appellate court authority to review an Article I, section 16, proportionality challenge to a sentencing guidelines sentence?

Proposed Rule of Law

No, ORS 138.105(8)(a)(A) does not deny appellate review of an Article I, section 16, proportionality challenge to a presumptive guidelines sentence. ORS 138.105(8)(a)(A) precludes appellate review of discretionary decisions that place a sentence within the presumptive range, such as the decision to impose the term of incarceration at the high end of the presumptive range. But if that provision does include any sentencing issue, including constitutional disproportionality for a presumptive sentence, then the exception in ORS 138.105(8)(c)(A) authorizes review of a proportionality challenge to such a sentence. When a sentencing court imposes an unconstitutionally disproportionate sentence based on a vertical proportionality problem inherent in the crime seriousness classification of a conviction, the sentencing court has erred in ranking the crime seriousness classification of the current crime. To avoid such an error, the sentencing court needs to correctly rank of the crime seriousness of the current offense.

SUMMARY OF ARGUMENT

A defendant does not have a constitutional right to appeal. The right to appeal is statutory. Once the legislature creates a right to appeal, the appellate court has the authority to review any issue arising in the appeal unless the legislature expressly precludes review of an issue. Here, the text, context, and legislative history of ORS 138.105(8)(a)(A) does not show a legislative intent to terminate the authority of an appellate court to review a sentence for constitutional proportionality under Article I, section 16. If this court concludes that the legislature did intend to terminate the authority of an appellate court to review such an issue in cases in which the sentence was imposed under the sentencing guidelines rules, the text, context, and legislative history show that the exception in ORS 138.105(8)(c)(A) authorizes appellate review.

Since 1864, the appellate courts have had the authority to review sentences for constitutional violations. In 1989, as part of the sentencing guidelines bill, the legislature enacted *former* ORS 138.222(2)(a) that precluded appellate review of "any sentence that is within the presumptive sentence prescribed by the rules of the State Sentencing Guidelines Board." The text of that provision precludes appellate review of the discretionary decision of the sentencing court as to the sentence within the range for the prescribed grid block. In 2011 and 2012, the Court of Appeals reviewed a sentence imposed under the sentencing guidelines rules for unconstitutional disproportionality.

When the legislature imported the text of *former* ORS 138.222(2)(a) into ORS 138.105(8)(a)(A), it would have known that the Court of Appeals had recently reviewed a sentencing guidelines sentence for proportionality. Because the legislature made no mention of those cases, it can be assumed that the legislature did not intend to legislatively overturn them. Finally, the legislative history, while not particularly useful to answering this question, shows that in 1989, the Court of Appeals was concerned that the legislature would expand appellate review of sentences beyond where it was in 1989. At the 1989 hearings on the sentencing guidelines bill, the Court of Appeals did not ask the legislature to reduce its caseload only to not increase it. Thus, the text, context and legislative history of ORS 138.105 illustrates that the legislature did not intend to end the long-standing practice of appellate review of sentences under Article I, section 16.

In the alternative, if this court concludes that the legislature intended to strip the appellate courts of the authority to review a sentencing guidelines sentence for constitutional proportionality through its silence, then the exception found in ORS 138.105(8)(c)(A) provides the authority for appellate review. First, the text of ORS 138.105(8)(c)(A) provides the authority for an appellate court to review "whether a sentencing court erred * * * [i]n ranking the crime seriousness classification of the current crime." Thus, that provision is limited to legal errors made by the trial court. Article I, section 16, requires

the sentencing court to impose a proportionate sentence. Failure to do so is a legal error. The sentencing court also has a duty to rank the crime seriousness of the offense pursuant to the sentencing guidelines rules. However, when imposing the sentencing guidelines sentence creates an unconstitutionally disproportionate sentence, the duty to impose a proportionate sentence is paramount. Failure to do so is a legal error in the ranking of the crime seriousness classification. Again, the context shows that the legislature would have known that the Court of Appeals had recently exercised its authority to review a sentencing guidelines sentence for constitutional proportionality when it incorporated the text of *former* ORS 138.222(4)(c) into ORS 138.105(8)(c)(A). In doing so, the legislature voiced no intent to legislatively overturn those cases. As a result, the only conclusion is that the legislature agreed with the Court of Appeals analysis of ORS 138.222.

In the end, the appellate courts have reviewed sentences for constitutional proportionality under Article I, section 16, since 1864. Nothing indicates that the legislature intended to remove that authority either in 1989 or 2017.

ARGUMENT

I. Introduction

A criminal defendant does not have a constitutional right to an appeal. *State v. Cloutier*, 351 Or 68, 74, 261 P3d 1234 (2011). The right to appeal is statutory. *Id*. Conversely, once the legislature has created a statutory right to an appeal, the appellate court has the authority to review any issue arising in that appeal unless the legislature has expressly precluded review of a specific issue. The legislature has authorized appellate jurisdiction in criminal cases. ORS 138.020. The legislature has also expressly precluded review of specific issues arising in a criminal appeal. ORS 138.105 (relating to appeals by a defendant); ORS 138.115 (relating to appeals by the state). As explained below, the legislature has not expressly precluded appellate review of proportionality under Article I, section 16. As a result, the appellate courts have the authority to review the proportionality of a sentencing guidelines sentence.

As this court explained in great detail in *Cloutier*, the appellate courts have had the authority to review criminal sentences under Article I, section 16, since, at least, 1864. *See Cloutier*, 351 Or at 76-91. In a nutshell, at common law, appellate review of a criminal sentence did not exist. The Oregon Legislative Assembly "first conferred appellate jurisdiction to review a judgment entered in a criminal case in 1864. *Id*. at 76. In *State v. Lewis*, this

court held that the legislature, in 1864, implicitly conferred the authority of the appellate court to review a sentence imposed after a defendant pleaded guilty. 113 Or 359, 361, 230 P 543, *on reh'g* 113 Or 359, 232 P 1013 (1925). "The court explained that the effect of a guilty plea is to admit the facts as charged in the indictment, but that does not preclude a defendant who has so pleaded from advancing purely legal challenges to the lawfulness of the conviction or the sentence that resulted." *Cloutier*, 351 Or at 77. In so holding, the *Lewis* court noted that if "in pronouncing judgment, the court imposes a sentence in excess of that provided for by statute, a legal wrong results to the defendant, which, if it could not be corrected upon appeal, would leave the defendant remediless." *Lewis*, 113 Or at 362.

In 1945, the legislature enacted a new statute that made explicit the right of a defendant who pleaded guilty to appeal, but the statute limited review to the excessiveness of the sentence. *Cloutier*, 351 Or at 77. In *State v. Ridder*, this court explained that the effect of the 1945 statute was "to empower us to review the discretion of the Circuit Court in passing a sentence after a plea of guilty, and, if we are of the opinion that the punishment is excessive, unusual or cruel and *not proportionate to the offense*, to determine what punishment should have been imposed[.]" 185 Or 134, 137, 202 P2d 482 (1949) (emphasis added). Thus, the 1945 provision authorized the appellate court to review a

sentence arising from a guilty plea to determine whether the sentence was proportionate to the offense.

In 1953, the legislature revised the existing statutes. The legislature incorporated the text of the 1945 statute providing for review of a sentence arising from a guilty plea, essentially unchanged, into ORS 138.050. *Cloutier*, 351 Or at 79.

As part of a sentencing reform bill in 1977, the legislature amended ORS 138.050 to provide that a defendant who had pleaded guilty could appeal a judgment that "imposes a sentence that is cruel, unusual or excessive in light of the nature and background of the offender or the facts and circumstances of the offense." ORS 138.050 (1977). In *State v. Dinkel*, the Court of Appeals noted that ORS 138.050 (1977) expanded an appellate court's authority to review a sentence arising from a guilty plea. 34 Or App 375, 385, 579 P2d 245 (1978). This court later agreed that *former* ORS 138.050 (1977) expanded the authority of appellate courts to review whether a sentence is "excessive" based on the particulars of the case apart from constitutional limitations stemming from Article I, section 16. *State v. Biles*, 287 Or 63, 66-67, 597 P2d 808 (1979).

In 1985, the Court of Appeals asked the legislature to amend ORS 138.050 to narrow appellate court authority to review sentencing decisions. That bill proposed to remove any reference to authorizing an appeal when the sentence is excessive "in light of the nature and background of the offender or

the facts and circumstances of the offense." In its place, the bill proposed to substitute the authority to review a sentence only when it "exceeds the maximum sentence allowable by law or is unconstitutionally cruel and unusual." *Cloutier*, 351 Or at 84 (quoting HB 2126 (1985)). As this court explained, the text of the bill appeared to call for a return to the scope of appellate review found in the pre-1977 statute—that the appellate court's authority to review a sentence from a guilty plea would be limited to a determination whether the sentence exceeded the statutory maximum or was otherwise unconstitutionally cruel and unusual. In his testimony before the legislature, Chief Judge Joseph explained that the legislature should "'[p]lease keep in mind we still continue to review sentences for unconstitutional cruelty or unusualness, and we will examine sentences for lawfulness within the statutory limitations.'" *Id*. at 86 (quoting Tape Recording, House Committee on Judiciary, Subcommittee 1, HB 2126, Mar 4, 1985, Tape 171, Side A (statement of Chief Judge Joseph)).

In *State v. Loyer*, this court explained that ORS 138.050 (1985) narrowed the scope of review of a sentence from a guilty plea to whether the sentence exceeds the maximum sentence allowable by law or is unconstitutionally cruel and unusual. 303 Or 612, 617, 740 P2d 177 (1987). *Cf. State v. Baker*, 346 Or 1, 8-9, 202 P3d 174 (2009) ("[F]or the purposes of interpreting ORS 138.050(1) [(1985)], the statutory phrase 'unconstitutionally cruel and unusual' includes a

claim that a sentence is not proportioned to the offense in violation of Article I, section 16.").

In summary, at the time of the adoption of the sentencing guidelines in 1989, when a defendant pleaded guilty, the appellate courts had the authority to review the sentence to determine whether it exceeded the maximum allowable by law or was cruel and unusual. Aside from a brief expansion of the authority to review a sentence from 1977 to 1985, that authority remained essentially unchanged from 1864. In other words, at the time of the enactment of the sentencing guidelines, the appellate courts had, for 125 years, the authority to review a sentence to determine whether it exceeded the maximum allowable by law or was cruel and unusual.

In 1989, the legislature overhauled the state's sentencing laws and adopted the sentencing guidelines. *Cloutier*, 351 Or at 90. As part of that legislation, the legislature enacted *former* ORS 138.222, governing appeal and review of sentences imposed for felonies committed on or after the effective date of the sentencing guidelines. *Id*. That statute provided that appellate courts "may not review * * * any sentence that is within the presumptive sentence prescribed by the rules of the State Sentencing Guidelines Board." *Former* ORS 138.222(2)(a) (1989). However, the legislature authorized appellate court review of a claim that "[t]he sentencing court erred in ranking

the crime seriousness classification of the current crime[.]" Former ORS 138.222(4)(b).

In 2011, the Court of Appeals was presented with a proportionality challenge to a term of incarceration imposed under the sentencing guidelines rules. *State v. Simonson*, 243 Or App 535, 539, 259 P3d 962 (2011), *rev den*, 353 Or 788 (State's petition), *rev den*, 353 Or 788 (defendant's petition) (2013). Specifically, the defendant argued "that the trial court erred in assigning a crime seriousness score of '7' to each of defendant's convictions for sexual abuse in the second degree." *Id*. The defendant asserted that, although the sentencing guidelines rules classified that offense as a "7" on the crime seriousness scale, that classification created a disproportionate term of incarceration. *Id*. at 539-40. The Court of Appeals agreed. Writing for the court, Senior Judge Gillette explained that the crime seriousness classification of "7" for that offense "make[s] this a textbook example of the application of the principle of vertical proportionality" because "if defendant had had the same kind of sexual intercourse with still younger victims (aged 14 or 15), he could have been charged with third-degree rape, ORS 163.355, the crime seriousness score would have been a '6,' and defendant's presumptive sentences for them would have been less severe." *Id*. at 541. The following year, relying on *Simonson* the Court of Appeals found the presumptive guidelines sentence for sexual abuse in the second degree unconstitutionally disproportionate in two additional

cases. *State v. Decamp*, 252 Or App 177, 178-79, 285 P3d 1130 (2012), *rev den*, 353 Or 787 (State's petition) (2013); *State v. Burge*, 252 Or App 574, 575-76, 288 P3d 565 (2012), *rev den*, 353 Or 787 (State's petition) (2013).

Five years later, in 2017, the Legislative Assembly restructured the appealability and reviewability provisions of ORS chapter 138. In doing so, the legislature repealed *former* ORS 138.222 (2015). As part of those revisions, the legislature enacted ORS 138.105 governing reviewability for issues raised by a defendant. The text of *former* ORS 138.222(2)(a) became ORS 138.105(8)(a)(A) and the text of *former* ORS 138.222(4)(b) became ORS 138.105(8)(c)(A). ORS 138.105(8)(a)(A) provides:

> "Except as otherwise provided in subsection (9) of this section, for a sentence imposed on conviction of a felony committed on or after November 1, 1989 * * * [t]he appellate court has no authority to review * * * [a] sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission."

In turn, ORS 138.105(8)(c)(A) provides:

> "Notwithstanding paragraph (a) of this subsection, the appellate court has authority to review whether the sentencing court erred * * * [i]n ranking the crime seriousness classification of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes."

As explained below, the text, context, and legislative history of ORS 138.105(8)(a)(A) shows that the challenge here is not a challenge to "[a] sentence that is within the presumptive sentence" as those terms are used in that

subsection. In the alternative, if it is such a challenge merely because the disproportionate sentence is a presumptive sentence, then review is authorized under ORS 138.105(8)(c)(A) because the sentencing court committed legal error in ranking the crime seriousness classification for the current offense.

II. ORS 138.105(8)(a)(A) does not preclude review because that provision is limited to challenges to whether the trial court abused its discretion by imposing a sentence at the upper end of the presumptive range.

The question here turns on the meaning of the phrase "a sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission" as it is used in ORS 138.105(8)(a)(A). Specifically, the question is whether the legislature intended to broadly prohibit an appellate court from reviewing any sentencing issue, including constitutional issues, that might arise from a sentence imposed under the sentencing guidelines rules or merely prohibit an appellate court from reviewing the discretionary decision by the trial court on whether to impose a higher incarceration term within the presumptive range under the sentencing guidelines rules.

Defining the metes and bounds of the limitations on appellate review requires this court to construe that phrase. "As with all questions of statutory construction, [this court's] 'paramount goal' is to discern the intent of the legislature[.]" *State v. Russen*, 369 Or 677, 684, 509 P3d 628 (2022). To determine the legislative intent, this court employs the analytical framework

described in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as modified in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Under that framework, this court focuses on the text and context of the statute, and any legislative history that "appears useful to the court's analysis." *Id*. at 172.

A. The text of ORS 138.105(8)(a)(A) does not preclude review of claims of disproportionality of a sentence imposed under the sentencing guidelines rules.

As noted above, ORS 138.105(8)(a)(A) provides, "Except as otherwise provided in subsection (9) of this section, for a sentence imposed on conviction of a felony committed on or after November 1, 1989 * * * [t]he appellate court has no authority to review * * * [a] sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission."

A superficial reading of that text could lead the reader to conclude that *any* issue raised relating to a sentence imposed under the sentencing guidelines is not reviewable by an appellate court. However, on closer inspection, the text is written narrowly or, in the alternative, is at least ambiguous. Instead of using the straightforward phrase "a presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission," the legislature chose to limit the reach of that provision by using the narrowing phrase "a sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission." Had the legislature used the former construction, that provision

would preclude review of any sentence imposed under the guidelines for any reason. But the legislature did not employ such broad wording. Instead, the legislature limited review under this provision to a sentence *within* the presumptive sentence. With that wording, the legislature appears to have limited review of issues related to the discretionary choice of the sentencing court as to where, within the presumptive sentencing range for a given grid block, it would choose. *Cf.* OAR 213-005-0001(1) ("If an offense is classified in a grid block above the dispositional line, the presumptive sentence shall be a term of imprisonment *within* the durational range of months stated in the grid block. The sentencing judge *should select the center of the range in the usual case and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure*.") (emphasis added).[2] For example, if the sentencing court correctly classified a defendant as a 7-B on the sentencing guidelines grid and then imposed a 30-month term of incarceration, the longest term within that grid block, an appellate court would not have the authority to review an argument that the trial court abused its discretion by imposing a prison term at the upper end of the range because the record did not present any aggravating factors. Thus, under that close reading of ORS

[2] The quoted rule has remained unchanged since adoption of the sentencing guidelines. *Former* OAR 253-05-001 (Sept 31, 1989).

138.105(8)(a)(A), when the issue is not the discretionary decision of the sentencing court as to a particular term of incarceration *within* the range, that provision does not preclude review. Stated another way, when the issue is the proportionality of the entire range based on the crime seriousness classification, that is not a challenge that a sentence is *within* the presumptive sentence that is prescribed by the sentencing guidelines rules.

The state may argue that the text of ORS 138.105(8)(a)(A) is written so as to distinguish between a sentence that is within the grid block range and a departure sentence. Under that argument, the statute divides sentencing guidelines sentences into two categories: a departure sentence and a sentence within the range of the grid block. The former is reviewable under ORS 138.105(8)(a)(A) and the latter is not. But that reading creates a redundancy in ORS 138.105(8) because subsection (8)(b) expressly provides for appellate review of departure sentences.

As a general rule, when an appellate court interprets a statute to determine what the legislature intended, "we attempt to do so in a manner that gives effect to all of the provisions of the statute where possible." *Matter of Comp. of Ward*, 369 Or 384, 398-99, 506 P3d 386 (2022) (citing *Crystal Communications, Inc. v. Dept. of Rev.*, 353 Or 300, 311, 297 P3d 1256 (2013)). Said another way, when construing a statute to determine the intent of the legislature, this court will generally attempt to avoid a statutory construction

that creates redundancy in the way that the statute is read. *See Blachana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 692, 318 P3d 735 (2014) ("[R]edundancy, of course, is a consequence that this court must avoid if possible."); *State v. Kellar*, 349 Or 626, 636, 247 P3d 1232 (2011) ("Defendant's interpretation results in a redundancy, something that we seek to avoid in interpreting statutes.").

Thus, such a reading of the statute would be odd and redundant in that it would first allow review of departure sentences under ORS 138.105(8)(a)(A) and then exempt review of departure sentences from the preclusion found in ORS 138.105(8)(a)(A). In other words, under that construction, ORS 138.105(8)(b) expressly authorizes review of departure sentences even though ORS 138.105(8)(a)(A) does not preclude review of departure sentences.

B. The context of ORS 138.105(8)(a)(A) clarifies any ambiguity and shows that the legislature did not intend to preclude review of the proportionality of a sentence imposed under the sentencing guidelines rules.

If this court concludes that ORS 138.105(8)(a)(A) is ambiguous, any ambiguity is resolved by the context of that provision. The text of a statute should not be read in isolation. The meaning of words—in a statute or anywhere else—always is informed by the context in which they are used. *See Vsetecka v. Safeway Stores, Inc*., 337 Or 502, 508, 98 P3d 1116 (2004) ("Viewed in isolation, that text provides support for employer's position.

Ordinarily, however, 'text should not be read in isolation but must be considered in context.'" (quoting *Stevens v. Czerniak*, 336 Or 392, 401, 84 P3d 140 (2004))). The context includes "essentially anything of which the legislature could have been aware at the time of a given enactment." Jack Landau, *Oregon Statutory Construction*, 97 Or L Rev 583, 638 (2019).

Prior versions of a statute provide context as to the meaning of a statute. *State v. Ziska*, 355 Or 799, 806, 334 P3d 964 (2014) ("Analysis of the context of a statute may include prior versions of the statute."). Additionally, an appellate court's prior construction of a statute or its predecessors provides context. *Blacknall v. Board of Parole*, 348 Or 131, 141-42, 229 P3d 595 (2010) ("As context, those [prior] cases may illuminate or explain the meaning of the statutory text."); *Mastriano v. Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007) ("[W]e generally presume that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes.").

As noted above, ORS 138.105 was part of a larger bill to reorganize ORS chapter 138. In doing so, the legislature reenacted the text of *former* ORS 138.222(2)(a) (2015) with one minor change. ORS 138.222(2)(a) precluded review of "*Any* sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission," and ORS 138.105(8)(a)(A) precludes review of "*A* sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice

Commission." However, nothing indicates that that change was intended to have a substantive effect. *See Report of the Direct Criminal Appeals Work Group on SB 896 (2017)*, Oregon Law Commission, 21 ("Subsection (8)(a) is intended to restate the limits on reviewability of sentences imposed on convictions for felonies committed after November 1, 1989 (that is, convictions subject to the Oregon Criminal Justice Commissioner's Sentencing Guidelines) currently set forth in [*former*] ORS 138.222(2)(a) through (c)").

Critically, when the legislature incorporated the text of *former* ORS 138.222(2)(a) (2015) into ORS 138.105(8)(a)(A), the Court of Appeals had exercised its authority to review sentences imposed under the sentencing guidelines rules for proportionality. *Simonson*, 243 Or App at 540-42; *Decamp*, 252 Or App at 178-79; *Burge*, 252 Or App at 575-76. In each of those cases, the defendant argued that the crime seriousness score of 7 for sexual abuse in the second degree created a vertically disproportionate sentence under Article I, section 16. *Simonson*, 243 Or App at 539-40. The Court of Appeals reviewed the sentences and found them to be disproportionate. *Simonson*, 243 Or App at 542; *Decamp*, 252 Or App at 179; *Burge*, 252 Or App at 576. Notably, no one

questioned the Court of Appeals authority to review the issue, and the Court of Appeals never addressed the question of reviewability.[3]

Thus, at the time the legislature was considering SB 896 (2017), three Court of Appeals decisions reviewed a sentence imposed under the sentencing guidelines rules for an Article I, section 16, violation. More importantly, nothing in those opinions indicate that the state challenged the authority of the Court of Appeals to review the issue. The materials presented to the legislature on that bill did not discuss those cases. For example, nothing informed the legislature that the intent of the work group was to legislatively overrule those three recent decisions. As a result, at the time the legislature enacted SB 896 (2017), and specifically the provision that became ORS 138.105(8)(a)(A), the legislature understood that, under the nearly identical text of ORS 138.222(2)(a), the appellate courts exercised review over the question of whether the application of the crime seriousness classification as found in the rules of the Oregon Criminal Justice Commission violated a defendant's Article

[3] In each of those cases, the state petitioned for review on the substantive question of whether the sentences were disproportionate but did not seek review of the Court of Appeals exercise of its authority to review that issue.

I, section 16, right to a proportionate sentence.[4] Although neither *Simonson*, *Decamp*, nor *Burge* is binding on this court, those cases provide insight into the state of the law at the time the legislature incorporated the text from *former* ORS 138.222(2)(a) (2015) into ORS 138.105(8)(a)(A). In other words, when the legislature enacted SB 896 (2017), it would have known that the former provision did not preclude reviewability of a sentence imposed under the guidelines rules when the challenge is an Article I, section 16, proportionality challenge. That context resolves any ambiguity in the text of ORS 138.105(8)(a)(A).

The state may argue that this court has already address this issue in *State v. Althouse*, 359 Or 668, 375 P3d 475 (2016) and *State ex rel Huddleston v. Sawyer*, 324 Or 597, 932 P2d 1145 (1997). Although those cases present a related question, they do not address the specific question here—whether ORS 138.105(8)(a)(A) (and *former* ORS 138.222(2)(a)) preclude review of a sentence within the guidelines range for constitutional proportionality.

---

[4] Because the Court of Appeals did not mention reviewability in *Simonson*, *Decamp*, or *Burge*, it is unclear whether that court determined that *former* ORS 138.222(2)(a) did not apply or that the exception found in *former* ORS 138.222(4)(a) applied. Presumably, if the Court of Appeals decided that it had authority to review the issue under the exception found in *former* ORS 138.222(4)(a), it would have explained that in the opinion.

In *Huddleston*, the question was, in part, whether the appellate court had the authority under ORS 138.222 to review a state's claim that the trial court erred in imposing the presumptive guidelines sentence after finding that the mandated sentence under ORS 137.700 was unconstitutional. *Id*. at 599-600. Ultimately, this court concluded that the appellate court did not have the authority to review the sentence. This court explained that,

> "The purpose of ORS 138.222, as revealed in the legislative history, was to curtain appellate review and reduce the number of appeals. With respect to those cases in which the trial court imposed a presumptive sentence on a conviction that was placed in the proper grid block, the stated intention was that appellate review would not be available. There was no suggestion that the reason for imposing the presumptive sentence, or the reason for *not* imposing a different (higher or lower) sentence, would matter."

Id. at 607. That conclusion, while seemingly sweeping, has limitations. First, the state was not arguing that the sentence imposed by the trial court violated Article I, section 16 (nor could it because the state does not have a right to a constitutionally proportionate sentence). Second, and critically, this court specified that the appellate court did not have the authority to review in "cases in which the trial court imposed a presumptive sentence on a conviction *that was placed in the proper grid block*." *Id*. (emphasis added). The "proper grid block" is a grid block that does not violate a defendant's constitutional right to a sentence that is proportionate to the offense. This court *did not hold* that the appellate court does not have the authority to review the sentence in cases in

which the trial court imposed a presumptive sentence on a conviction *placed in a grid block pursuant to the sentencing guidelines rules*. When a sentencing court imposes an unconstitutionally disproportionate sentence based on the sentencing guidelines rules, it has not placed the defendant in the *proper* grid block. Thus, *Huddleston* did not decide the question presented here.

Similarly, *Althouse* does not resolve the issue here. First, *Althouse* relies, primarily, on *Huddleston*. 359 Or at 676. As explained above, *Huddleston* held that a sentence is not reviewable when it arises from the *proper* grid block. When the grid block creates an unconstitutionally disproportionate sentence, that is an *improper* grid block. Second, this court did not need to confront the issue presented here because it concluded that a sentence imposed pursuant to ORS 137.719(1) is not a sentence imposed under the rules of the sentencing guidelines. *Id*. at 678. In other words, this court did not get to the next question, the one presented here, whether a challenge to the constitutional proportionality of a sentence imposed under the sentencing guidelines rules is reviewable when the defendant claims that the sentence is disproportionate as a result of the crime seriousness classification.

Ultimately, *Huddleston* was controlling authority when the Court of Appeals concluded in *Simonson*, that it had the authority to review a sentence imposed under the sentencing guidelines rules. Nothing indicates that this court overruled *Simonson* when it decided *Althouse*. Regardless, in *Simonson*, the

state did not believe that *Huddleston* precluded appellate review of the identical issue presented here. The state did not cite to *Huddleston* in its Court of Appeals brief or in its petition for review to this court. Additionally, the SB 896 work group did not mention any conflict of law between *Simonson* and *Huddleston* or *Althouse* when it imported the text of *former* ORS 138.222(2)(a) into ORS 138.105(8)(a)(A). In the end, neither *Huddleston* nor *Althouse* reached the issue presented here (and in *Simonson*)—whether ORS 138.105(8)(a)(A) prohibits review of a sentence imposed under the sentencing guidelines rules when the argument is that the sentence is unconstitutionally disproportionate due to the crime seriousness score.

C. Neither the legislative history of ORS 138.105 nor ORS 138.222 undermines the reading of ORS 138.105(8)(a)(A) that review is not precluded when the issue is a proportionality challenge to a sentencing guidelines sentence based on the crime seriousness classification.

Finally, the legislative history of SB 896 (2017) is not particularly helpful. As noted, the text of ORS 138.105(8)(a)(A) was imported from *former* ORS 138.222(2)(a). In its written materials explaining SB 896, the work group explained,

> "Subsection (8)(a) is intended to restate the limits on reviewability of sentences imposed on convictions for felonies committed after November 1, 1989 (that is, convictions subject to the Oregon Criminal Justice Commissioner's Sentencing Guidelines) currently set forth in ORS 138.222(2)(a) through (c)."

Report of the Direct Criminal Appeals Work Group on SB 896 (2017), Oregon Law Commission, 21.

Likewise, the legislative history of *former* ORS 138.222 does not provide much help. As explained above, from 1864 until 1989, the appellate courts had the authority to review a sentence for violations of Article I, section 16. Aside from a brief period between 1977 and 1985, that authority remained unchanged. In 1977, the legislature expanded the appellate court's authority to review sentences. In 1985, at the request of the Court of Appeals, the legislature contracted that authority back to where it had been prior to the 1977 expansion.

During the 1985 hearings on HB 2126 (1985), Chief Judge Joseph explained that "the legislature should '[p]lease keep in mind we still continue to review sentences for unconstitutional cruelty or unusualness and we will examine sentences for lawfulness *within the statutory limits*.'" *Cloutier*, 351 Or at 86 (quoting Tape Recording, House Committee on Judiciary, Subcommittee 1, HB 2126, Mar 4, 1985, Tape 171, Side A (statement of Chief Judge Joseph) (emphasis in *Cloutier*). At a later meeting before the House Committee on Judiciary, then-Judge W. Michael Gillette similarly explained that the purpose of HB 2126 was "to have the law stay with [what the] present practice is before the Court of Appeals." Tape Recording, House Committee on Judiciary, Subcommittee 1, HB 2126, May 20, 1985, Tape 649, Side A (statement of Judge Gillette).

At a hearing on HB 2126 (1985) before the Senate Judiciary Committee, Judge Gillette stated that the purpose of HB 2126 "is designed to conform the language of the law with what is, by and large, the present practice in the Court of Appeals with respect to review of sentences." Minutes, Senate Judiciary Committee, June 11, 1985, 16 (statement of Judge Gillette). He explained that, under current appellate court practice, the court reviews criminal sentences in only three ways: first, "to determine if the sentence is unconstitutional because it is cruel and unusual"; second, to determine whether "it is illegal because it is in excess of the maximum sentence which may be imposed by law"; and third, to determine whether the sentence is "disproportionate" in the nonconstitutional sense that "it just isn't fair." *Id*. The bill, Judge Gillette said, was designed to eliminate the third of those practices. *Id*. The legislature enacted HB 2126 (1985) into law. *Cloutier*, 351 Or at 88.

The takeaway from the discussions surrounding HB 2126 (1985) is that its purpose was to restore appellate review of sentences to the pre-1977 changes. Prior to the 1977 changes, the practice of the appellate courts was to review a sentence for Article I, section 16, violations and whether it exceeded the maximum allowable by law. That is important because when the legislature enacted the sentencing guidelines provisions four years later, it was aware that the appellate courts had the authority to review a sentence for Article I, section 16, violations. Thus, the question becomes whether the legislative history of

the sentencing guidelines bills indicates an intent on the part of the legislature to remove that authority for a term of incarceration imposed under the sentencing guidelines rules.

The sentencing guidelines, including ORS 138.222, were developed by the Oregon Criminal Justice Council. Those proposed guidelines were presented to the State Sentencing Guidelines Board for review, revision, and ultimate adoption. *Sentencing Guidelines Implementation Manual*, 1.

The minutes and some materials from work sessions and public sessions of the Oregon Criminal Justice Council provide insight into the development of those guidelines.[5] Much of the discussions relating to appealability and reviewability involved the scope of review of departure sentences. The appellate review sections of the proposal were discussed by the Oregon Criminal Justice Council at a meeting on February 17, 1989. Minutes, Oregon Criminal Justice Council, Feb. 17, 1989, p 16.

That hearing began with Court of Appeals Chief Judge George Joseph addressing the council regarding the appellate review sections. In his address, Judge Joseph states specific objectives as a basis by which he analyzed the

---

[5] Five binders containing the minutes are in the office of the executive director of the Criminal Justice Commission and are available in electronic form from the Criminal Justice Commission. However, it appears that several boxes of materials from those meetings were destroyed in a flood several years ago.

Council's proposed appellate review section. Those objectives were: not increasing the caseload of the Court of Appeals as a result of the sentencing guidelines; statutory provisions must be provided to ensure that frivolous appeals are either not filed or may be summarily dismissed; the guidelines must not encourage the filing of criminal appeals by either the defendants or the state; sentencing procedures must be rationalized independently of the availability of appellate sentence review; a distinction must be made between issues which may be raised on review by defendants who plead guilty and those who are convicted after trial; no new appellate review procedures should be adopted without an understanding of the impacts on the cost of indigent defense and the workload of the attorney general's staff and public defense offices; and the statutes must preserve the principle that nothing may be reviewed by the appellate court that has not been raised at trial. *Id*. at 16. After reviewing the proposed appellate review statutes, Judge Joseph suggested that the proposal be revised to better reflect his objectives. *Id*. at 17. Hardy Myers, the chairperson of the Oregon Criminal Justice Council appointed a work group to revise the appellate review section to address Judge Joseph's concerns. *Id*.

Later in that meeting, Justice Robert Jones, a member of that work group, introduced the revised appellate review section. After discussing other aspects of the appellate review section, the group turned to the limits on appellate review:

> "**Paragraph (e).** Bob Jones noted that this paragraph precludes appellate review of any other issue related to sentences under Sentencing Guidelines Rules. He noted, however, that this paragraph does not eliminate review of other matters related to sentences which may come up outside the rules. Laird Kirkpatrick suggested that paragraph (e) could create some problems because certain issues related to the rules might raise issues which should be subject to appellate review. He cited consecutive sentences as an example. Hardy Myers agreed that [the] statute should clearly specify all issues for which appellate review is appropriate. Kathleen Bogan responded that paragraph (a) of subsection 3 would permit review of a claim that the court failed to comply with all 'requirements of law' instead of simply 'statutory requirements.' Beatty suggested changing the term 'statutory requirements' to 'requirements of law.'"

Id. at 28.[6]

Most important to the question here, during that meeting Justice Jones noted that the limitations placed on appellate review of presumptive sentences "does not eliminate review of other matters related to sentences which may come up outside the rules." *Id*.

Again, at that time, the appellate courts had the authority to review a sentence for proportionality under Article I, section 16. Such review is "outside the rules" in that it is not a challenge to the rules themselves, it is a challenge to the constitutionality of the sentence. Had the Council intended to eliminate

---

[6] "Bob Jones" appears to be Oregon Supreme Court Justice Robert Jones, a member of the Oregon Criminal Justice Council. Kathleen Bogan was the Executive Director of the Oregon Criminal Justice Council. "Beatty" appears to be Judge John Beatty, Jr., the vice-chairperson of the Oregon Criminal Justice Council.

reviewability under Article I, section 16, authority that had been in place for over 100 years, it can be assumed that such a change would be mentioned, at a minimum, and likely debated at some point. More specifically, it is likely that the Council members were aware of the then existing review authority of an appellate court—to review a sentence for a violation of Article I, section 16. No mention was made about limiting that authority. The primary concern of Chief Judge Joseph and others was not *increasing* the caseload of the Court of Appeals. No one mentioned an intent to *reduce* the caseload of the Court of Appeals through these changes.

Finally, although the legislative history of *former* ORS 128.222 is not technically legislative history of ORS 138.105, because the legislature adopted the text of *former* ORS 138.222(2)(a) as the text of ORS 138.105(8)(a)(A), defendant presents a brief overview of that history.[7]

What became ORS 138.222(2)(a) came before the 1989 Legislative Assembly as part of a larger bill that included the sentencing guidelines. That bill, Senate Bill 1073 (1989), was later incorporated into House Bill 2250 (1989). HB 2250, Staff Measure Summary, June 29, 1989 ("This bill is essentially the same bill as SB 1073 prior to getting to the house."). Much of

---

[7] It may be that the legislative history of *former* ORS 138.222 is better categorized as context rather than legislative history. Nevertheless, defendant includes it in the legislative history box.

the discussion on the reviewability provisions of those bills focused on the authority to review a departure sentence. The subsection at issue here was mentioned mostly in passing during the discussion of SB 1073. At the Senate Judiciary Committee hearing on April 3, 1989, the committee discussed the various sections of Senate Bill 1073 including section 21, the appellate review provision. Tape Recording, Senate Judiciary Committee, SB 1073, Apr 3, 1989, Tape 90, Side B (statement of Robert Durston, Guidelines Program Manager). While discussing Section 21, Robert Durston explained that if an error is made in the crime seriousness ranking or the criminal history score, that error may be grounds for appeal. As an example, he explained that an error might be a mistake in the subclassification. *Id*. Beyond that brief discussion, much of the focus of the discussion on the reviewability provisions focused on other subsections. Ultimately, the legislative history does not indicate that the legislature intended to further limit the authority of the appellate courts to review a sentence for a violation of Article I, section 16.

In summary, from at least 1864 onward, the appellate courts had the authority to review a sentence for proportionality under Article I, section 16. Nothing in the text, context, or legislative history of SB 896 (1989) mentions limiting review of proportionality challenges for sentences imposed under the sentencing guidelines rules. In 2017, the legislature revised ORS chapter 138. In doing so, the legislature incorporated the text of *former* ORS 138.222(2)(a)

into ORS 138.105(8)(a)(A). A few years earlier, the Court of Appeals had reviewed vertical proportionality challenges to sentences imposed under the sentencing guidelines rules. No mention was made of those cases by the work group or during the hearings on the bill.

Based on the text, context, and legislative history, the limitations on appellate review of "[a] sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission," is intended to limit review of the trial court's discretionary decision to impose an incarceration term at the high end or low end of the sentencing range within the grid block. In the alternative, nothing indicates that the legislature intended to limit the authority to review terms of incarceration imposed under the sentencing guidelines rules for Article I, section 16, violations. Thus, ORS 138.105(8)(a)(A) does not preclude appellate review of sentencing issues under Article I, section 16, of the Oregon Constitution.

III. If ORS 138.105(8)(a)(A) does preclude review, the exception in ORS 138.105(8)(c)(A) authorizes Article I, section 16, review as a legal error based on the crime seriousness ranking.

If this court determines that the legislature ended appellate review of Article I, section 16, violations for sentences imposed under the sentencing guidelines rules either in 2017 or 1989, the exception to the limitation on appellate review in ORS 138.105(8)(c)(A) provides authority to review an

Article I, section 16, proportionality issue when it involves the crime seriousness ranking.

A. The text of ORS 138.105(8)(c)(A) provides the authority to review a sentence imposed under the sentencing guidelines rules for constitutional proportionality.

ORS 138.105(8)(c)(A) provides:

> "Notwithstanding paragraph (a) of this subsection, the appellate court has authority to review whether the sentencing court erred * * * [i]n ranking the crime seriousness classification of the current crime[.]."

The text of that provision is not ambiguous. By using the term "erred," the legislature has excluded appellate review of any discretionary decisions by the sentencing court under the sentencing guidelines rules. Thus, the exception is limited to the appellate court's authority to review legal errors related to the crime seriousness classification. When a sentencing court imposes a sentence that violates the proportionality clause of Article I, section 16, it commits a legal error. *See, e.g., State v. Davidson*, 360 Or 370, 390-91, 380 P3d 963 (2016) (a sentencing court commits legal error when it imposes a disproportionate sentence).

When the crime seriousness classification for an offense is the cause of the disproportionate sentence, as it was in *Simonson*, *Decamp*, and *Burge*, that constitutes a legal error in ranking the crime seriousness of the current crime because the trial court has a legal obligation to impose a sentence that is

proportionate to the offense. In other words, a sentencing court commits a legal error when it imposes an unconstitutionally disproportionate sentence.

The sentencing court also has a legal duty, arising from statute and administrative rules, to accurately rank the crime seriousness classification of an offense. However, the constitutional duty is paramount. The sentencing court has a legal obligation to rank the crime seriousness in a manner that does not impose an unconstitutionality disproportionate sentence. As a result, when the sentencing court must choose between imposing a sentence that is proportionate to the offense or imposing the crime seriousness classification from the sentencing guidelines rules, the court must rank the offense in a way that imposes a sentence that is proportionate to the offense. To do otherwise constitutes a legal error. Therefore, when a trial court chooses to rank the crime seriousness pursuant to the rules and that ranking creates a constitutionally disproportionate sentence, the trial court has made a legal error in the ranking of the crime seriousness classification of the current crime. Under ORS 138.105(8)(c)(A), that error is reviewable.

B. The context of ORS 138.105(8)(c)(A) supports the plain-text reading of that provision.

The context supports that reading of ORS 138.105(8)(c)(A). As noted above, prior versions of a statute provide context as to the meaning of a statute. *Ziska*, 355 Or at 806. First, as explained above, when the legislature enacted

that provision, it incorporated the text from *former* ORS 138.222(4)(b) (2015). At that point in time, the Court of Appeals had exercised its authority to review a sentence imposed under the sentencing guidelines rules for Article I, section 16, proportionality. It is unclear whether the Court of Appeals decided that such a sentence was not "a sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission" or whether the error in those cases involved the ranking of the crime seriousness classification. The Court of Appeals appears to have assumed reviewability and the state did not argue that the issue was not reviewable. However, the Court of Appeals had the authority to review the sentences imposed in those cases for proportionality either under ORS 138.222(2)(a) or ORS 138.222(4)(b). Either way, at the time the legislature enacted ORS 138.105(8)(c)(A), it would have been aware that in *Simonson*, *Decamp*, and *Burge*, the Court of Appeals had reviewed the proportionality of a sentence imposed under the sentencing guidelines rules. It is unlikely that the legislature would have intend to legislatively overrule three recent Court of Appeals decision in 2017 by adopting the identical text of the statute under which the Court of Appeals had recently found it had the authority to review the constitutional proportionality of

a sentence imposed under the sentencing guidelines rules.[8] Indeed, the Oregon Law Commission report did not mention those cases nor is there any evidence that that group ever discussed those recent decisions. Without a mention of those cases in the report or later hearings on SB 896 (2017), it must be assumed that the legislature had no intention to legislatively overrule *Simonson*, *Decamp*, or *Burge*.

Additional context comes in the form of the Sentencing Guidelines Implementation Manual, the legislative materials from the enactment of the sentencing guidelines in 1989, and the materials from the Oregon Criminal Justice Council.

The Sentencing Guidelines Implementation Manual does not provide helpful context for the question at issue. Although the manual refers to *former* ORS 138.222(4)(b), the commentary and explanation is wholly focused on an appellate court's authority to review an error in the criminal history score. *Sentencing Guidelines Implementation Manual*, 163.

---

[8] It might be that the Court of Appeals did not consider the question of reviewability because it may not have been raised by either party but that does not change the fact that when the legislature enacted SB 896 (2017), the Court of Appeals had recently exercised its authority to review a sentence imposed under the sentencing guidelines for proportionality under Article I, section 16.

In the committee hearings on the sentencing guidelines, the discussion on appellate review focused primarily on the standard of review for departure sentences. However, in the February 17, 1989, session of the Oregon Criminal Justice Council, group discussed classification errors:

> "Laird Kirkpatrick referred back to Section 2, Subsection (3) and asked whether someone sentenced erroneously due to an improper criminal history classification would have access to appellate review. He also wondered how errors in crime seriousness classifications would be handled. Bob Jones said that although the appellate court will not review for arithmetic or clerical errors, they will consider appeals based on errors in criminal history and crime seriousness classifications.
>
> "Hardy Myers noted his understanding that with the exception of an erroneous sentence caused by an arithmetic or clerical error, any sentence which is not the correct presumptive guidelines sentence may be appealed under Section 2, Subsection (3)(a) (i.e., that the court failed to comply with the requirements of law in imposing the sentence). Kirkpatrick asked whether the scope of Section 2, subsection (3)(b) could be clarified by dropping the language 'of an unranked crime' in paragraph (b). He suggested that paragraph (b) be amended to read: 'the sentencing court erred in ranking the crime seriousness classification or in determining the appropriate criminal history.'
>
> "Bob Jones suggested that Kirkpatrick's objectives might be better addressed if a new paragraph (b) be inserted as suggested by Kirkpatrick with the present paragraph (b) being changed to paragraph (c). Kirkpatrick concurred in this recommendation.
>
> "**Motion:** Bob Jones moved that a new paragraph (b) be added to read: 'the sentencing court erred in ranking the crime seriousness classification of the current offense or criminal history.' Laird Kirkpatrick seconded the motion. The motion was approved without dissent."

Minutes, Oregon Criminal Justice Council, Feb. 17, 1989, p. 31. That text is what eventually found its way to the legislature in HB 1073.

The discussion of the reviewability provision at issue here provides insight into the intent of the Council in drafting the provisions that eventually became the reviewability provision of ORS 138.222(4)(b) and, later, ORS 138.105(8)(c)(A). First, Justice Robert Jones noted that the limitations placed on appellate review of presumptive sentences "does not eliminate review of other matters related to sentences which may come up outside the rules." After a short discussion, Kathleen Bogan suggested that subsection (3)(a) be changed from authorizing review of a claim that the court failed to comply with *statutory requirements* to authorizing review of a claim that the court failed to comply with all *requirements of law*. Judge Beatty proposed that change which the Council ultimately adopted. That shows a concern that the way the proposal was originally drafted limited review to statutory violations. As a result of Justice Jones's concern that the proposed text would not permit review of issues that arise outside the rules, the Council changed the text from "statutory requirement" to "requirement of law." That shows a clear intent to allow review of issues beyond mere statutory violations. In other words, the change in that text shows an intent to continue to authorize review of constitutional challenges.

Second, when Laird Kirkpatrick wondered how errors in crime seriousness classification would be handled, Justice Jones responded that the appellate court would not review the sentence for arithmetic or clerical errors, the appellate courts would be authorized to consider appeals based on errors in the crime seriousness classification. That shows an intent to divide legal challenges to a presumptive guidelines sentence into two categories: arithmetic/clerical errors and errors arising from the crime seriousness classification/criminal history score. The former would not be reviewable on appeal, but the latter would be reviewable. As explained above, a "legal error" includes a claim that the guidelines sentence imposed an unconstitutionally disproportionate sentence.

Third, in response to Laird Kirkpatrick's concerns, the Council changed the text of Subsection (3)(b) by adding, "the sentencing court erred in ranking the crime seriousness classification of the current offense or criminal history." That text has remained unchanged since 1989.

That context provides that when the legislature enacted SB 896 (2017), the Court of Appeals had recently reviewed sentencing guidelines sentences for constitutional proportionality based on the crime seriousness score. In those cases, the state did not argue that the issue was not reviewable. The legislative record on SB 896 contains no reference to those cases. From that context, it is clear that the legislature knew that the Court of Appeals believed it had the

authority to review such a sentence and had no intent to limit that authority. Furthermore, when the Council drafted the sentencing guidelines provisions, including the section that eventually became ORS 138.222(4)(b), it intended to preserve the authority for the appellate courts to review a claim of disproportionality based on the crime seriousness classification.

C. The legislative history is limited on this issue but does not detract from the text and context.

Finally, as noted above, the legislative history of SB 896 (2017) is not particularly insightful regarding the subsection at issue. But, at the risk of overemphasizing an important point, the legislative history contains no mention of the recent Court of Appeals decision in which that court reviewed a sentence imposed under the guidelines for disproportionality based on the crime seriousness classification. If the legislature had intended to legislatively overturn those decisions, it is likely that the legislative history would contain some indication of that intent. For example, in *SAIF Corp. v. Drews*, the issue before this court in a worker's compensation case was which employer was responsible for a claimant's injury. 318 Or 1, 3, 860 P2d 254 (1993). On review to this court, *SAIF* argued that the Court of Appeals ignored a 1990 statutory change. In attempting to discern the legislative intent, this court observed that during a hearing on that statutory change, a legislator stated, "Do you hear that, judges on the Court of Appeals, members of the Board, when you

read the transcript of this hearing? This does away with what they've been saying, which is if the subsequent employment contributed however slightly to the causation of the disabling condition[.]" *Id*. at 8.

Defendant acknowledges that this court is reluctant to place any weight on the silence of the legislature on a particular point. *See State v. Carlton,* 361 Or 29, 43, 388 P3d 1093 (2017) ("[S]ilence in the legislative history * * * does not inform our inquiry."). However, the alternative is to conclude that the legislature removed the authority of the appellate court to review a sentence for proportionality under Article I, section 16, after the appellate court have exercised that authority since 1864 and legislatively overturned three recent Court of Appeals opinions with nary a mention of its intention to do so.

In the end, the text, context, and legislative history of ORS 138.105(8)(a)(A) and ORS 138.105(8)(c)(A) shows that the legislature did not intend to remove the authority of an appellate court to review a sentencing guidelines sentence for proportionality under Article I, section 16. The appellate courts have the authority to review a term of incarceration imposed under the sentencing guidelines rules for proportionality under Article I, section 16.

CONCLUSION

For the foregoing reasons, defendant asks this court to remand to the Court of Appeals to exercise its authority to review his claim that his guidelines sentence is unconstitutionally disproportionate as a result of the crime seriousness classification for the offense of online corruption of a child.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OREGON PUBLIC DEFENSE COMMISSION

ESigned

_____
MARC D. BROWN OSB #030825
SENIOR DEPUTY DEFENDER
Marc.D.Brown@opdc.state.or.us

Attorneys for Defendant-Appellant
Adrian Fernandez