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 No. 21CR40459 CA A179207 SC S071340

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Lane County
Honorable JAY A. MCALPIN, Judge

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

Continued....

ERNEST LANNET #013248
Chief Defender
Oregon Public Defense Commission
MARC D. BROWN #030825
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
marc.d.brown@opdc.state.or.us

Attorneys for Petitioner on Review

DAN RAYFIELD #064790
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
TIMOTHY A. SYLWESTER
#813914
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
timothy.sylwester@doj.oregon.gov

Attorneys for Respondent on Review

KELLY SIMON #154213
ACLU of Oregon, Inc.
P.O. Box 4058
Portland, Oregon 97240
Telephone: (503) 227-6929
Emaill: ksimon@aclu-or.org

Attorney for *Amius Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Administrative Rules

Other Authorities

BRIEF ON THE MERITS OF
RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION

The right to appeal is statutory. A defendant in a criminal case does not have an inherent right to pursue an appeal, even to assert a constitutional challenge to the sentence that was imposed. And when the legislature grants a defendant a right to appeal, it may impose limitations on what claims may be reviewed on appeal. This case involves one such limitation: ORS 138.105(8)(a)(A) precludes appellate review of a sentence that "is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission."

In this case, defendant pleaded guilty to a felony offense that the Commission's rules rank in crime-seriousness category 8, and his criminal-history score was an H. At sentencing, the court imposed a 20-month prison sentence, which is within the range of the presumptive sentence prescribed for gridblock 8-H. On appeal, defendant argues that his sentence is unconstitutionally disproportionate in violation of Article I, section 16, of the Oregon Constitution. The Court of Appeals affirmed on the ground that ORS 138.105(8)(a)(A) precludes review of that claim of error, because the sentence at issue is within the presumptive sentence prescribed by the Commission's rule. *State v. Fernandez*, 334 Or App 81, 87-88, 555 P3d 350,

rev allowed, 373 Or 121 (2024).

The single issue that is presented on review is whether an appellate court has authority to review defendant's constitutional challenge to the category 8 ranking of his conviction.[1] Defendant contends that ORS 138.105(8)(a)(A) does not preclude appellate review of his challenge. He is wrong: The Court of Appeals correctly analyzed the issue and concluded that his claim of error is not reviewable.

BACKGROUND

The facts that are pertinent to this appeal are procedural and are not in dispute. Defendant was charged with online sexual corruption of a child in the first degree, in violation of ORS 163.433, which is a class B felony. (App Br 1 & ER 1). He pleaded guilty to that charge. (App Br 1 & ER 12).

At sentencing, there was no dispute that defendant's conviction is ranked as a category 8 offense on the crime-seriousness scale, for purposes of sentencing under the sentencing guidelines. OAR 213-017-0004(12). And he

---

[1] In his petition for review, defendant also asked this court to review the merits of his constitutional challenge to the category 8 ranking. (Def Pet Rev 4-6). But this court's order allowing his petition granted review only on the reviewability issue. Consequently, defendant did not brief the merits of his claim in his brief on the merits, and this brief will follow suit and also will not address that issue.

did not dispute that his conviction falls into gridblock 8-H and that that gridblock prescribes a presumptive sentence of 19 to 20 months in prison. *See* OAR 213-004-0001. But he argued that that category 8 ranking is, on its face, unconstitutionally disproportionate punishment, in violation of Article I, section 16, of the Oregon Constitution. (App Br, ER 3-11; Tr 14-15). The sentencing court rejected that challenge, it placed defendant's conviction into gridblock 8-H, and it imposed a 20-month prison sentence, which is within the 19-to-20-month presumptive sentence that is prescribed by that gridblock. (Tr 16-17; App Br, ER 12-13).

On appeal, defendant assigned error to the sentence, and he reiterated his constitutional challenge to the category 8 ranking.[2] (App Br 5-15).

---

[2] The Court of Appeals summarized his challenge as follows:

> "On appeal, defendant contends that the sentencing court 'erred when it used crime seriousness category 8 to sentence' him. He does not dispute that the rules put him in category 8 but again argues that the resulting presumptive sentence is unconstitutional. Specifically, he argues that it violates vertical proportionality principles for online sexual corruption of a child to be classified in crime seriousness category 8, because other sexual offenses classified in category 8 are 'more serious' in that they involve physical contact, because the 'more serious' offenses of third-degree rape and third-degree sodomy are classified in crime seriousness category 6, and because the crimes of attempted third-degree rape and attempted third-degree sodomy, which defendant views as 'functionally equivalent' to his crime, are classified in crime seriousness category 4."

Fernandez, 334 Or App at 83.

In response, the state argued that appellate review of that claim of error is barred by ORS 138.105(8)(a)(A), because the 20-month sentence at issue is within the presumptive sentence that is prescribed by the sentencing guidelines.[3] (Resp Br 3-4). The Court of Appeals agreed with the state on that point, and it affirmed on that ground that defendant's claim of error is not reviewable:

> "Notwithstanding how he has framed his assignment of error, defendant is not really claiming that the sentencing court erred in ranking the crime seriousness classification of his crime of conviction. The only way that defendant could claim *misranking* by the sentencing court is if the rules provided for the sentencing court to use a lower crime seriousness ranking in these circumstances and the court failed to do so. We are unaware of any authority, however, that would have allowed the court to use a lower crime seriousness ranking than it did. What defendant is really challenging is not misranking by the sentencing court but, instead, the constitutionality of the Oregon Criminal Justice Commission's crime seriousness scale, specifically the rule classifying first-degree online sexual corruption of a child in crime seriousness category 8. That is not a challenge that comes within the scope of ORS 138.105(8)(c)(A).
>
> "For those reasons, we conclude that defendant's presumptive sentence under the felony sentencing guidelines is unreviewable under ORS 138.105(8)(a)(A)."

Fernandez, 334 Or App at 87-88 (italics in original).

---

[3] The state also argued, on the merits, that defendant is wrong when he asserts that the category 8 ranking, on its face, violates Article I, section 16. (Resp Br 5-20).

QUESTION PRESENTED AND PROPOSED RULE OF LAW

ORS 138.105(8)(a)(A) provides that an "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." Subsection (8)(c)(A) of the statute carves out an exception that allows an appellate court "to review whether the sentencing court erred: * * * [i]n ranking the crime seriousness classification of the current crime."

Question presented

When a sentencing court imposes sentence on a felony conviction by ranking that conviction in accordance with the rules of the sentencing guidelines and then imposes a sentence that is within the presumptive sentence that is prescribed by the applicable gridblock, does an appellate court have authority to consider a challenge to that sentence based on an argument that crime-seriousness ranking prescribed by the guidelines constitutes, on its face, disproportionate punishment in violation of Article I, section 16, of the Oregon Constitution?

Proposed rule of law

No. ORS 138.105(8)(a)(A) precludes review of a presumptive sentence, and the exception in subsection (8)(c)(A) does not apply to allow review of a constitutional challenge to the crime-seriousness ranking prescribed for that conviction by the sentencing guidelines.

SUMMARY OF ARGUMENT

When, as in this case, a sentencing court imposes sentence on a felony conviction by ranking that conviction in accordance with the rules of the sentencing guidelines and then imposing a sentence that is within the presumptive sentence that is prescribed by the applicable gridblock, ORS 138.105(1)(a)(A) precludes an appellate court from reviewing any challenge to the lawfulness of that sentence. That bar on appellate review precludes review of a claim that the crime-seriousness ranking that is prescribed by the guidelines constitutes, on its face, disproportionate punishment in violation of Article I, section 16.

ORS 138.105(8)(c)(A) generally allows an appellate court to review a claim that the sentencing erred "in ranking the crime seriousness classification of the current crime," but defendant does not dispute that the guidelines specifically rank his conviction only as a category 8 offense, and that is the ranking the sentencing court applied. His claim that the prescribed sentence based on that ranking is unconstitutionally disproportionate punishment is not a claim that falls within the narrow scope of that exception.

Defendant's argument that the 2017 Legislative Assembly, which enacted ORS 138.105, must have assumed that a claim of error such as his would be reviewable under that provision has no merit, because nothing in the

text, context, or legislative history of that statute supports that assertion. Consequently, the Court of Appeals correctly held that ORS 138.105(1)(a)(A) precluded it from reviewing defendant's claim of error.

ARGUMENT

Defendant concedes that he does not have a constitutional right to obtain appellate review of the claim of error that he asserts on appeal. (Def BOM 8). *See State v. Colgrove*, 370 Or 474, 497-99, 521 P3d 456 (2022) (upholding and applying bar on appellate review imposed by ORS 138.105); *State v. Cloutier*, 351 Or 68, 74, 261 P3d 1234 (2011) (upholding and applying bar on appellate review imposed by *former* ORS 138.050). He also correctly acknowledges that he is not entitled to appellate review of his claim of error merely because he asserts that the prescribed crime-seriousness ranking is unconstitutionally disproportionate. And he acknowledges that, because his appeal is based on ORS 138.035(1), whether his claim is reviewable on appeal is governed solely by ORS 138.105; he does not assert that any other statute or rule of law allows for appellate review of his claim of error even if ORS 138.105 does not. In short, this appeal presents only a question of statutory interpretation—the dispute here is only about the meaning of ORS 138.105(8).

As will explained below, this court previously held that the identically worded statutory predecessor to ORS 138.105(8)(a)(A)—*viz.*, *former*

ORS 138.222(2)(a)—precluded appellate review of a challenge to a sentence when that sentence was within the presumptive sentence prescribed by the applicable gridblock. Defendant does not assert that either this court or the Oregon Court of Appeals ever has held that, where the court imposed the presumptive sentence, a claim of error of the type that he asserts in this appeal is reviewable on appeal notwithstanding ORS 138.105(8)(a)(A).[4]

In summary, the only issue before this court on review is narrow: Given that the sentencing court ranked defendant's conviction as a category 8 offense in accordance with the guidelines and then imposed a sentence on that conviction that is within the range of the presumptive sentence that is prescribed by the applicable gridblock, does ORS 138.105(1)(a)(A) preclude appellate review of defendant's claim that the category 8 ranking, on its face, violated Article I, section 16? In interpreting that provision, this court applies the method first set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and later modified by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). This court considers the text in context, giving relevant legislative history appropriate consideration.

---

[4] Defendant's argument before this court principally relies on a decision by the Court of Appeals in *State v. Simonson*, 243 Or App 535, 259 P3d 962 (2011), *rev den*, 353 Or 788 (2013). As will be explained below in part C., that decision does not support his argument.

A. The plain text of ORS 138.105(8)(a)(A) precludes appellate review of defendant's claim of error.

ORS 138.105 provides, in pertinent part:

> "(1) On appeal by a defendant, the appellate court has authority to review the judgment or order being appealed, subject to the provisions of this section.
>
> "(2) The appellate court has authority to review only questions of law appearing on the record.
>
> "(3) *Except as otherwise provided in this section*, the appellate court has authority to review any intermediate decision of the trial court.
>
> " * * * * *
>
> "(7) *Except as otherwise provided in subsections (8) and (9) of this section*, the appellate court has authority to review any sentence to determine whether the trial court failed to comply with requirements of law in imposing or failing to impose a sentence.
>
> "(8) 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:
>
> "(a) *The appellate court has no authority to review*:
>
> "(A) *A sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission*.
>
> " * * * * *
>
> "(c) *Notwithstanding paragraph (a) of this subsection, the appellate court has authority to review whether the sentencing court erred*:
>
> "(A) *In 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."

(Italics added).

Defendant contends that the claim of error that he asserts on appeal is of a type that an appellate court has authority to review in an appeal. He is correct insofar as he asserts that such a claim of error is one that *generally* falls within the scope of an appellate court's review authority under ORS 138.105(3) and (7). But each of those provisions contains an "except as otherwise provided" clause that expressly subjects review under that subsection to the specific limitations on appellate review that are imposed in subsections (8) and (9). And subsection (8)(a)(A) expressly provides that an appellate court "has *no authority* to review: [a] sentence that is within the presumptive sentence prescribed" by the guidelines. (Italics added). Plainly, that means that when the court imposed the presumptive sentence prescribed for that conviction by the guidelines, an appellate court cannot consider *any* challenge to that sentence. And that necessarily includes a claim that the court erred by not imposing some other sentence instead.[5]

---

[5] Defendant asserts that ORS 138.105(8)(a)(A) was intended merely to preclude review of a claim that the sentencing court erred by imposing a sentence at the upper range of the prescribed presumptive sentence. (Def BOM 16-17). That argument misreads the statute. If the sentencing court imposed a sentence that is *within* the presumptive range, then the statute precludes review of a claim that the court erred by not imposing instead a sentence that was

Footnote continued…

The previous case law establishes that there are only two circumstances in which ORS 138.105(8)(a)(A) does not bar appellate review of a sentence even though the court imposed the "presumptive sentence," but neither of those exceptions applies in this case. *First*, if the sentence at issue was the "presumptive sentence" that was prescribed by a statute that is *outside* the guidelines, rather than the "presumptive sentence" that is prescribed *by* the guidelines, then ORS 138.105(8)(a)(A) does not apply to preclude appellate review. *See, e.g.*, *State v. Davidson*, 360 Or 370, 372, 380 P3d 963 (2016) (sentence at issue was the "presumptive sentence" prescribed by ORS 137.719(1)); *State v. Althouse*, 359 Or 668, 678, 375 P3d 475 (2016) (same). *Second*, even when the court imposed the presumptive sentence that is prescribed by the guidelines, ORS 138.105(8)(a)(A) does not preclude appellate review of a challenge to a portion of the disposition that is not the term-of-months sentence that was prescribed by the guidelines. *See*, *e.g.*, *State v. Vargas*, 271 Or App 675, 677-78, 352 P3d 743 (2015) (*former* ORS 138.222(2)(a) did not bar appellate review of defendant's claims that convictions must merge); *State v. Casiano*, 214 Or App 509, 515, 166 P3d 599 (2007) (*former* ORS 138.222(2)(a) does not preclude appellate review of

---

(…continued)
outside that range. For example, it precludes review of a claim that the court erred by not departing downward to impose a sentence that is less than the presumptive sentence.

"aspects of a presumptive sentence other than the length of the sentence as imposed."); *State v. Owen*, 142 Or App 314, 921 P2d 424 (1996) (even though sentencing court imposed presumptive prison sentence on defendant's conviction, *former* ORS 138.222(2)(a) does not preclude appellate review of claim that court imposed erroneous term of post-prison supervision). But neither of those exceptions applies here, because the 20-month sentence at issue is within the presumptive sentence that is prescribed by the guidelines, and defendant's challenge is directed only at that sentence.

This court has previously held that this limitation on appellate review means what it literally says: If the sentencing court imposed the presumptive sentence that was prescribed for that conviction by the sentencing guidelines, then the appellate court cannot review an appellant's challenge to the lawfulness of that sentence. *State ex rel. Huddleston v. Sawyer*, 324 Or 597, 606-07, 932 P2d 1145, *cert den*, 522 US 994 (1997) (applying *former* ORS 138.222(2)(a)). In that case, the defendant was convicted of second-degree manslaughter, the sentencing court declined to impose the 75-month minimum sentence that is mandated by ORS 137.700(2)(e), and it instead imposed the 20-month presumptive sentence prescribed by the guidelines. 324 Or at 599-600. The state challenged that ruling by filing a petition for writ of mandamus in this court, arguing that mandamus was available because it did not have an adequate remedy on direct appeal because *former*

ORS 138.222(2)(a) would have precluded any review on appeal of the sentence imposed. *Id.* at 600-01. This court agreed with the state, holding that mandamus was available because the state's challenge to the sentence would not be reviewable on direct appeal. *Id.* at 602-08. This court concluded:

> "The purpose of [*former*] ORS 138.222, as revealed by the legislative history, was to curtail 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 *not* imposing a different (higher or lower) sentence would matter.
>
> "After examining the text, context, and legislative history, we conclude that relator is seeking 'review' of [the defendant's] sentence, which is a 'sentence that is within the presumptive sentence prescribed by' the felony sentencing guidelines. Accordingly. The limitation on appellate review contained in [*former*] ORS 138.222(2)(a) applies."

324 Or at 697 (emphasis in original).[6]

Long ago, in *State v. Martin*, 320 Or 448, 887 P2d 782 (1994), this court addressed the question of how an appellate court is to proceed when the sentencing court imposed what it had determined was the correct presumptive

---

[6] In response to *Huddleston*, the legislature enacted *former* ORS 138.222(4)(c) (1997) (current ORS 138.115(6)(c)(C)) to allow appellate review of a claim that a sentencing court erred by "failing to impose a minimum sentence that is prescribed by ORS 137.700." Or Laws 1997, ch 852, § 9; *see State v. Dubois*, 152 Or App 515, 954 P2d 1264 (1998) (recognizing change in law). As to the issue for which this brief cites *Huddleston*, this court reaffirmed *Huddleston* in *Althouse*, 359 Or at 676-77.

sentence for the defendant's conviction, but the defendant then argued on appeal that the court erred because it used the *wrong gridblock*. In that case, the defendant argued on appeal that the sentencing court had miscalculated his criminal-history score and thereby had used the wrong gridblock when it imposed sentence on the second of his two convictions. *Id.*, 320 Or at 450. This court concluded that because *former* ORS 138.222(2)(a) precluded appellate review of a challenge to a sentence only if the sentencing court had used the correct gridblock, the appellate court necessarily had authority to review the defendant's claim at least to resolve whether the sentencing court had used the correct gridblock. *Id.* at 451. In that case, this court held that the sentencing court had used the correct gridblock and that, because the sentence at issue on appeal was presumptive sentences prescribed by *that* gridblock, the sentence at issue was not reviewable under *former* ORS 138.222(2)(a). 320 Or at 450-52. Likewise here: ORS 138.105 allowed the Court of Appeals to review defendant's claim of error at least to verify that the 20-month sentence at issue is within presumptive sentence that is prescribed for his conviction by the correct gridblock. Once the Court of Appeals determined that it was, that court then correctly held that ORS 138.105(8)(a)(A) precluded any further review of his challenge to that sentence. That comports with the procedure that this court prescribed in *Martin*.

In summary, the sentencing court properly complied with the sentencing guidelines when it placed defendant's conviction into gridblock 8-H and then imposed a 20-month sentence, which is within the range of the presumptive sentence that is prescribed by that gridblock. Consequently, it necessarily follows from *Martin* and *State ex rel. Huddleston*, that ORS 138.105(8)(a)(A) bars any appellate review of defendant's challenge to that sentence.

B. ORS 138.105(8)(c)(A) does not allow appellate review of defendant's claim of error.

Defendant seeks to avoid that result by relying on the exception that is set out in ORS 138.105(8)(c)(A), which allows appellate review of a claim that the sentencing court erred "in ranking the crime seriousness classification of the current crime." (*See* Def BOM 36-43). He does not cite any previous decision in which this court or the Court of Appeals specifically construed that clause to apply to the type of claim of error that he raises in this appeal. As the Court of Appeals correctly noted, that exception, by its plain terms, does not apply here. *Fernandez*, 334 Or App at 86-87.

The previous case law establishes that that exception applies only in two circumstances: *First*, that exception applies when the defendant complains that the sentencing court erred by using a crime-seriousness ranking other than the one that is prescribed for the conviction at issue by OAR 213-004-0000—*i.e.*,

by using an *incorrect* ranking.[7] *Second*, that exception applies when the conviction is for an offense that is not specifically ranked in the guidelines, and the defendant complains that the sentencing court abused its discretion under OAR 213-004-0004 when it assigned a crime-seriousness ranking to the conviction.[8] *See, e.g.*, *State v. Rathbone II*, 110 Or App 419, 823 P2d 432 (1991), *rev den*, 313 Or 300 (1992) (defendant's challenge to his sentence was reviewable under *former* ORS 138.222(4)(b) (now ORS 138.105(8)(c)(A)), where he claimed that the sentencing court did not comply with the rules regarding ranking of unranked offenses when it put his racketeering conviction in crime seriousness category 9). Because defendant does not dispute that his crime of conviction is specifically ranked in the rules as a category 8 offense by OAR 213-017-0004(12), and the sentencing court used that specific ranking

---

[7] For example, the exception in ORS 138.105(8)(c)(A) applies if the defendant contends that the sentencing court misread or overlooked the rule that prescribed the crime-seriousness ranking for the offense at issue. But, more commonly, it applies when the offense is subcategorized on the crime-seriousness scale and there is a dispute regarding which subcategory category ranking applies. *See, e.g.*, *State v. Nelson*, 201 Or App 715, 120 P3d 538 (2005) (*per curiam*), *rev den*, 340 Or 34 (2006) (sentencing court erred in ranking defendant's conviction for assault in the first degree as a category 10 offense, because the indictment did not allege the offense-subcategory factor that the victim did not precipitate the assault).

[8] OAR 213-004-0004 provides, in pertinent part: "[W]hen a person is convicted of any other felony which is omitted from the Crime Seriousness Scale, the sentencing judge shall determine the appropriate crime category for the current crime of conviction and shall state on the record the reasons for the offense classification."

when it imposed sentence, his claim of error does not fall within the narrow exception that is set out in ORS 138.105(8)(c)(A).[9]

Neither ORS 138.105 nor the guidelines define the term "ranking," as it is used in ORS 138.105(8)(c)(A), which refers to an alleged error in "*ranking* the crime seriousness classification of the current crime." (Italics added). But the direct reference to "the crime-seriousness classification" and the fact that OAR 213-017-0000 sets out ten categories of offenses that are ranked from 1 to 10—from least serious to most serious—show that use of the term "ranking," in that context, means the assignment of the proper crime-seriousness category to the offense. That is consistent with how the guidelines use that term. For example, OAR 213-018-00058 subcategorizes the offense of second-degree sexual abuse as follows:

> "(1) CRIME CATEGORY 8: Sexual Abuse II under ORS 163.425(1)(a) *shall be ranked* at Crime Category 8 if the victim is incapable of consent due to being under 18 years of age, the offender is 21 years of age or older, and the offender was the victim's coach at any time prior to the commission of the offense.
>
> "(2) CRIME CATEGORY 7: Sexual Abuse II *shall be ranked* at Crime Category 7 if it cannot be ranked at Crime Category 8."

---

[9] The two exceptions just discussed are the two exceptions that were noted in the legislative history as justification for the adoption of that provision. (*See* Def BOM 39-41). Defendant does not cite anything in the legislative history that would support his assertion that drafters intended that that provision would allow review of a constitutional challenge to a crime-seriousness ranking prescribed by the guidelines.

(Italics added). In short, when ORS 138.105(8)(c)(A) refers to "ranking the crime seriousness classification of the current crime," it means the assignment, for that conviction, of the proper crime-seriousness category by application of the various categories that are defined in the guidelines.

When, as in this case, the offense of conviction is specifically ranked in the rules, nothing in the sentencing guidelines gives a sentencing court discretionary authority either to assign the conviction a different ranking or to disregard the prescribed ranking when it imposes sentence on that conviction. Nor does anything in the guidelines, or elsewhere in the statutory scheme, grant a court any authority to assign a different crime-seriousness ranking to a conviction based on its own determination that, for some reason, a different ranking would be more appropriate.[10] Simply put, when the guidelines prescribe a crime-seriousness ranking for a conviction, that ranking is *mandatory*, not discretionary or variable.

Defendant's challenge to his 20-month sentence based on his claim that his offense of conviction should not be sentenced using crime-seriousness category 8 is not a claim the court erred by not using the *correct*

---

[10] If a sentencing court concludes that the presumptive sentence prescribed by the applicable gridblock is not the appropriate disposition for that conviction, that is to be resolved through the *departure* process, not by an adjustment of the applicable gridblock.

crime-seriousness ranking, because he does not dispute that that is the ranking that is specifically prescribed by the guidelines. And his claim does not assert that the sentencing court erred by failing to invoke any authority that it had under either the guidelines or the statutory scheme to assign that conviction a different ranking, because the court had no such authority. Consequently, his claim is *not* really that the sentencing court erred "in ranking the crime seriousness classification of the current crime," as that phrase is used in ORS 138.105(8)(c)(A). Rather, as the Court of Appeals correctly concluded, his claim is a straightforward claim that the *20-month sentence* that was imposed is unlawful because it constitutes disproportionate punishment in violation of Article I, section 16.[11] *Fernandez*, 334 Or App at 87-88. But any review of *that* claim of error is barred by ORS 138.105(8)(a)(A), because that sentence is within presumptive sentence that is prescribed for the offense by

[11] It is important to emphasize that defendant, in this appeal, has not asserted that the 20-month sentence that was imposed is unconstitutionally disproportionate punishment *as applied* to him and his crime. Specifically, he does not attempt an argument under the proportionality principles that this court announced in *State v. Ryan*, 361 Or 602, 396 P3d 867 (2017) (considering such an-applied challenge), or *State v. Rodriguez/Buck*, 347 Or 46, 58, 217 P3d 659 (2009) (same). Rather, he has chosen to assert only a *facial* challenge to the crime-seriousness *ranking* of his conviction. As the Court of Appeals surmised, he has framed his challenge to the sentence that awkward manner to avoid the bar on appellate review that applies to straight-forward challenge to a presumptive sentence.

gridblock 8-H, and because that claim does not fall within the narrow exception defined by ORS 138.105(8)(c)(A).

C. The legislative history of ORS 138.105 does not suggest that the legislature intended that defendant's claim should be reviewable.

Defendant's argument before this court is premised primarily on his assertion that, historically, the appellate courts in Oregon have had authority to review a defendant's claim that the sentence imposed was unconstitutionally excessive, and he contends that the legislature did not intend that either its enactment of *former* ORS 138.222 in 1989 or its enactment of ORS 138.105 in 2017 would eliminate that authority. That argument has no merit.

The state does not quibble with defendant's summary of the applicable legal history leading to the enactment of *former* ORS 138.222. (Def BOM 8-15). But he does not cite anything in the legislative history of the enactment of that statute in 1989 (*see* Or Laws 1989, ch 790, § 21) that would support his assertion that the legislature did not intend that that provision would limit or eliminate appellate review of a claim like the one he asserts.[12] To the contrary,

---

[12] Defendant correctly notes pre-guidelines law broadly allowed for appellate review of claims that the sentence imposed was unconstitutionally disproportionate, and he contends that the enactment of *former* ORS 138.222 in 1989 was not intended to displace that authority. (Def BOM 26-34). But that assertion is incorrect: Appellate review of such a constitutional challenge to a sentence under the pre-guidelines law was based on *former* ORS 138.040 and *former* ORS 138.050, but those provisions were displaced in 1989 by *former* ORS 138.222 for guidelines offenses, and those provisions were repealed entirely in 2017, along with the enactment of ORS 138.105. Consequently,

Footnote continued…

this court's above-described decisions in *Martin* and *State ex rel. Huddleston*—which were decided not long after *former* ORS 138.222 was enacted—establish that this court had definitively construed *former* ORS 138.222(2)(a) as precluding appellate review of any challenge to a sentence when that sentence was within the presumptive sentence that is prescribed for that conviction by the guidelines.[13] That is, defendant's assertion that the legislature did not intend that its enactment of *former* ORS 138.222(2)(a) would limit an appellate court's authority to review claims of error like the one he asserts has no support in the text, context, or legislative history of the enactment that provision, and it also has no merit in this court's ensuing case law.

But defendant nonetheless argues that a decision by the Court of Appeals in 2011—*viz.*, *State v. Simonson*, 243 Or App 535, 259 P3d 962 (2011), *rev den*, 353 Or 788 (2013)—provides a basis for concluding that, when the appellate-review statutes were restructured in 2017 and current ORS 138.105 was enacted to replace *former* ORS 138.222, the legislature had *changed its mind* and decided to allow review of a claim such as he asserts in this appeal.

(…continued)
there is no existing statute apart from ORS 138.105 that would allow appellate review of defendant's constitutional challenge to the sentence.

[13] Similarly, about that same time, this court held in *State v. Adams*, 315 Or 359, 847 P2d 397 (1992), that *former* ORS 138.222(2)(d) (current ORS 138.105(9)) bars any appellate review of a sentence that was imposed pursuant to the defendant's stipulation.

He candidly acknowledges that there is nothing expressed in either the legislative history or the text of ORS 138.105(8) that would support that proposition. In fact, as he concedes, the relevant portions of the two provisions are worded almost identically, and the legislative history of the 2017 enactment shows that the intent of the drafters was to simply to restructure the provisions, not to make any substantive changes, at least with respect to this provision.[14] (Def BOM 20-21).

Moreover, the decision in *Simonson* does not support defendant's argument, because the opinion in that case did not address reviewability at all. To be sure, defendant is correct that the defendant in *Simonson* raised a claim of error that was similar to the claim that he raises in this appeal. In that case, the defendant was convicted on multiple counts of second-degree sexual abuse, and the sentencing court had ranked those convictions, in accordance with the guidelines, as category 7 offenses. But the defendant asserted that that *ranking* was unconstitutionally excessive—*i.e.*, that proportionality principles required that those convictions should have been ranked only as category 6 offenses. *Id.*, 243 Or App at 539-40. Defendant is correct that the Court of Appeals

---

[14] *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

Footnote continued…

considered that claim on the merits, agreed with the defendant, and reversed and remanded for resentencing. *Id.* at 541. But the problem for defendant is that the state did not argue in that appeal that any provision in *former* ORS 138.222(2) barred appellate review of the defendant's claim of error,[15] and the Court of Appeals did not address that reviewability question *sua sponte*.

Moreover, the opinion in *Simonson* does not even expressly state that the sentences at issue were the prescribed *presumptive* sentences for the defendant's convictions. Consequently, nothing on the face of that opinion, at least as it was published, suggests that the Court of Appeals actually had considered the question of reviewability and had concluded that *former* ORS 138.222(2)(a) did not preclude appellate review of that claim.[16] And that

---

(…continued)
Criminal Justice Commissioner's Sentencing Guidelines) currently set forth in [*former*] ORS 138.222(2)(a) through (c)").

[15] As defendant acknowledges (Def BOM 25-26), a review of the briefs that the state filed in the appeal in *Simonson* discloses that the state did not argue in its briefing that any provision in *former* ORS 138.222(2) barred appellate review of the defendant's claim of error. On the other hand, the state did not expressly concede that the claim of error was reviewable despite *former* ORS 138.222(2)(a).

[16] The state does not dispute that he sentences at issue in *Simonson* actually *were* the presumptive sentences using the prescribed category 7 ranking. But the essential point, for purposes here, is that the opinion did not expressly describe them as the presumptive sentences, and so someone casually reading the opinion would not have a basis for assuming that *former* ORS 138.222(2)(a) would have applied.

also is true for the two *per curiam* opinions that followed *Simonson*: Those opinions also reversed and remanded based on *Simonson* without addressing the reviewability of those claims. *State v. Decamp*, 252 Or App 177, 178-79, 285 P3d 1130 (2012), *rev den*, 353 Or 787 (2013); *State v. Burge*, 252 Or App 574, 575-76, 288 P3d 565 (2012), *rev den*, 353 Or 787 (2013).[17] Perhaps more to the point, the Court of Appeals did not *hold* in any of those decisions that the defendant's claim of error was reviewable despite *former* ORS 138.222(2)(a).

The necessary premise of defendant's argument before this court based on *Simonson* is that the drafters of ORS 138.105 and the legislators who ultimately approved it would have been aware that the Court of Appeals had *implicitly* construed *former* ORS 138.222(2)(a) as not precluding review of the type of challenge that that he asserts in this appeal and that they thus intended to *endorse* that *implicit* holding when they drafted and enacted ORS 138.105(8). He contends:

> "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*

[17] In neither of those cases did the state assert that *former* ORS 138.222(2)(a) precluded appellate review of the defendant's claim of error.

> *an Article I, section 16, proportionality challenge*. That context resolves any ambiguity in the text of ORS 138.105(8)(a)(A)."

(Def BOM 23; italics added).

But defendant's premise is untenable because: (1) nothing on the face of any of those decisions disclosed that the Court of Appeals actually had considered the question of reviewability under *former* ORS 138.222(2)(a) and had concluded held that that statute did not preclude appellate review of that claim; (2) nothing in any of those opinions even *suggested* that *former* ORS 138.222(2)(a) might have applied if the state had raised that objection; and (3) as defendant acknowledges (Def BOM 22), nothing in the legislative history of the 2017 enactment of ORS 138.105 provides any basis for assuming that the drafters and the legislators who approved it were even aware of those decisions, much less that they had even considered that issue.[18]

Defendant's reliance on *Simonson* is based only on his assertion that the decision in that case may inform the question of what *the legislature* may have

[18]Moreover, defendant does not explain why the legislature would have assumed that those decisions by the Court of Appeals would have been authoritative on this issue, particularly given that previous decisions by *this court* had squarely held that *former* ORS 138.222(2)(a) precluded any review of a challenge to a presumptive sentence.

intended when it enacted ORS 138.105 in 2017.[19] He correctly acknowledges that that decision is not binding on this court in this case. (Def BOM 23). Because there is no basis for concluding that the legislature in 2017 considered *Simonson* at all when it enacted ORS 138.105, that decision is not relevant to this court's resolution of what is or is not reviewable under ORS 138.105(8).

In summary, defendant fails to provide this court with any basis for assuming that either the drafters of ORS 138.105 or the legislators who approved it had considered the decision in *Simonson* when they enacted that provision. Moreover, because that decision did not address reviewability at all, it does not provide any basis for assuming that ORS 138.105(8) was enacted with an intent that it should applied broadly to allow review of the sort of challenge that defendant asserts in this case, even though such claim would have been unreviewable under *former* ORS 138.222(2)(a), as construed by this court in *State ex rel. Huddleston*. Therefore, this court should construe ORS 138.105(8)(a)(A) according to its plain terms and conclude, as the Court of Appeals did, that defendant's claim of error is unreviewable under that provision.

---

[19] Defendant does not assert that the state's failure to argue in on appeal in *Simonson* that *former* ORS 138.222(2)(a) barred appellate review of the defendant's claim somehow precludes the state from raising that objection now in this appeal. Consequently, this brief will not address that issue.

CONCLUSION

This court should affirm the judgment of the Court of Appeals and the trial court.

Respectfully submitted,

DAN RAYFIELD #064790
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General

/s/ Timothy A. Sylwester
TIMOTHY A. SYLWESTER #813914
Senior Assistant Attorney General
timothy.sylwester@doj.oregon.gov

Attorneys for Respondent on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 21, 2025, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Marc D. Brown, attorneys for petitioner on review, and Kelly Simon, attorney for *amicus curiae* ACLU of Oregon, Inc.,by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 6,474 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(3)(b).

/s/ Timothy A. Sylwester

TIMOTHY A. SYLWESTER #813914
Senior Assistant Attorney General
timothy.sylwester@doj.oregon.gov

Attorney for Respondent on Review
State of Oregon

TAS:bes/985863966