IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
COREY THOMAS COOK,
Defendent-Appellant.

Coos County Circuit Court
14CR2064; A159872

Richard L. Barron, Judge.

Argued and submitted May 8, 2018.

Anne Fujita Munsey, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Gregory A. Rios, Assistant Attorney General, argued the cause for respondent. On the brief were Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Susan Yorke, Assistant Attorney General.

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

JAMES, J.

Affirmed.

Lagesen, P. J., concurring.

JAMES, J.

Defendant appeals his conviction and sentence for first-degree sexual abuse, ORS 163.427, assigning error to the sentencing court's imposition of a mandatory 75-month sentence imposed pursuant to ORS 137.700 (Ballot Measure 11 (1994)) over his constitutional proportionality challenge relying on *State v. Rodriguez/Buck*, 347 Or 46, 217 P3d 659 (2009), and *State v. Ryan*, 361 Or 602, 396 P3d 867 (2017). In this case, the trial court found that defendant suffered from intellectual disability and considered that disability in relation to defendant's criminal culpability. However, the court specifically found that it could *not* consider the "the fact that [defendant] may be victimized in prison" as a result of that intellectual disability. Thus, this case presents a question going to the heart of what it means to consider intellectual disability in a proportionality challenge. If a trial court expressly finds that it cannot consider an intellectually disabled defendant's increased vulnerability within prison, has it truly "consider[ed] an offender's intellectual disability in comparing the gravity of the offense and the *severity of a mandatory prison sentence?*" *Ryan*, 361 at 620-21 (emphasis added). To put an even finer point on it, in considering intellectual disability in the context of the "severity" of a sentence, is a court limited to merely the quantitative severity of a sentence, *i.e.*, the length of incarceration, or is a court permitted to consider the qualitative nature of a sentence's severity as applied to an intellectually disabled defendant?

As we explain below, the issue raised by defendant is an interesting, and unresolved, issue of Oregon law. But, ultimately, we cannot reach a resolution here. Article VII (Amended), section 3, of the Oregon Constitution states that when we concludes, "after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial." Here, even assuming the trial court erred in failing to consider defendant's vulnerability

within the prison, on this record that error was harmless. Accordingly, we affirm.[1]

In considering a sentence proportionality challenge under Article I, section 16, "we review for legal error the trial court's conclusion that defendant's sentence was constitutional[.]" *Ryan*, 361 Or at 614. "In conducting that review, we are bound by any findings of historical fact that the trial court may have made, if they are supported by evidence in the record." *Id.* at 615. In this case, defendant pleaded guilty to sexual abuse in the first degree, ORS 163.427, acknowledging that he knowingly subjected a child under the age of 14 to sexual contact by touching her genital area with his mouth.

During sentencing, defendant presented evidence that his cognitive abilities were about that of a 10-year-old

---

[1] Defendant raises a second and separate argument that the trial court erred in its proportionality analysis by failing to consider the availability of treatment options outside of prison. How, if at all, treatment availability factors into the proportionality analysis is a question expressly left open by the Oregon Supreme Court in *Ryan*:

> "We briefly turn to defendant's more particularized treatment-based argument. Before the Court of Appeals, defendant argued that the trial court erred in failing to consider evidence of 'an available treatment option that would be more effective and appropriate because of defendant's condition,' but defendant did not explain how that argument comported with the *Rodriguez/Buck* framework. Later, as noted, in his opening brief before this court defendant argued that the availability of rehabilitative treatment as part of an alternative sentence was relevant to the gravity of his offense, but he has not sufficiently explained how that argument comports with the *Rodriguez/Buck* framework to permit a carefully considered analysis of it. Accordingly, we decline to address it, and we express no opinion as to whether and, if so, how consideration of treatment options for an intellectually disabled offender as part of an alternative sentence could be relevant to a proportionality challenge under Article I, section 16."

361 Or at 622-23 (footnote omitted).

We decline to reach that argument on preservation grounds. During the sentencing hearing, the trial court articulated its understanding of proportionality and indicated that would approach the question first by considering whether the 75-month mandatory minimum sentence was constitutional. As it explained, only if the court found that the mandatory minimum sentence was inapplicable because it shocked the conscience could it then consider whether to impose optional probation under the guidelines. And only in making that latter determination could the court consider the availability of a bed in a residential treatment home for intellectually disabled sex offenders. Defendant did not object to that analytical framework, or otherwise alert the trial court that treatment availability was a necessary component to the constitutional proportionality determination.

child. One expert testified that that defendant was "very, very slow. [Defendant's] processing speed is at the [0.3] percentile, meaning 99.7 percent of people do better than him." In addition, defendant offered testimony that he suffered from fetal alcohol syndrome (FAS). Defendant presented evidence that one of the effects of FAS is an impairment of one's ability to read social cues. Defendant's expert explained:

> "[Those with FAS are] poor readers of social cues. And, as we know in prisons, one has to be very aware of social cues. *** [Defendant]'s going to have what's called bad papers, because he sexually abused a child. He's also intellectually impaired, socially dysfunctional. And, because of that he's going to be a target for predatory behavior."

When asked if that meant that defendant would be "[t]he prey," the expert responded, "Yeah. *He will be victimized*." (Emphasis added.)

Another expert testified that:

> "For people who are developmentally delayed, *they are far more likely to be victimized [in prison].* And, specifically, I would go back to yesterday where [defendant] demonstrated extreme naïveté about his fellow prisoners and how they would help him.
>
> "*****
>
> "That's very different than the prison culture that's going to see him as prey."

(Emphasis added.)

After testimony regarding defendant's cognitive abilities and the likelihood of victimization in a prison setting, the sentencing court made factual findings that defendant had a mental deficiency, had a diminished capacity, and suffered from FAS. The court found that it could take into consideration defendant's diminished capacity in assessing proportionality. However, as part of that consideration of intellectual disability, defendant argued that the sentencing court could consider defendant's vulnerability in the prison system. The sentencing court declined to do so, holding that it could *not* take into account defendant's potential for being

victimized in prison due to his intellectual disabilities. The sentencing court stated:

> "I generally accept the fact that he has a diminished capacity and *** it's probably as low as what the testimony shows it is. *What I don't think I can take into account is the fact that [defendant] may be victimized in prison*."

(Emphasis added.)

The sentencing court ultimately found that defendant was a high risk offender, that defendant's conduct was at the extreme end of sexual abuse in the first degree, had been opportunistic, and had occurred over a long period of time, and that defendant knew his actions were wrong when he was committing the abuse as evidenced by the fact that defendant plied the victim with treats to prevent her from disclosing the abuse. The sentencing court further found that defendant was able to distinguish between people he likes and dislikes, using the example of a letter from jail that defendant wrote to his family that requested his family crop a picture of his brother, the father of the victim, from a photo he wanted his family to send him. The court then considered the age of the victim and the victim's close family relationship to the defendant, the fact that the victim was permanently harmed, and noted that defendant had a prior juvenile adjudication for molesting a different young girl. The court also noted that defendant had pleaded down to sex abuse in the first degree from a charge of sodomy in the first degree, which carried a Measure 11 sentence of 300 months. Defendant was sentenced to 75 months of prison to be followed by post-prison supervision, the total duration of both not to exceed 10 years.

On appeal, defendant argues that that the sentencing court erred when it declined to consider defendant's vulnerability in prison in assessing sentence proportionality under Article I, section 16, and the Eighth Amendment to the United States Constitution. The state argues that the sentencing court did not err in refusing to consider defendant's vulnerability in prison because, in considering sentence proportionality, the severity of a penalty is assessed solely as to the length of the sentence, not conditions of confinement. Further, the state argues that the 75-month

sentence was constitutional. Finally, the state also argues that if the sentencing court did err in failing to consider defendant's vulnerability, the error was harmless.

Because defendant raises both a state and a federal constitutional challenge, we begin by briefly discussing the differences between the two. The Eighth Amendment, which applies to the states by virtue of the Fourteenth Amendment to the United States Constitution, *Robinson v. California*, 370 US 660, 675, 82 S Ct 1417, 8 L Ed 2d 758 (1962), provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Although the Eighth Amendment does not directly address proportionality, the United States Supreme Court has held that [t]he concept of "proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 US 48, 59, 130 S Ct 2011, 176 L Ed 2d 825 (2010).[2]

The nascent Eighth Amendment proportionality jurisprudence has denoted two individual qualities that warrant special proportionality concerns: youth, and intellectual disability. With respect to youth, the Supreme Court has held that "[t]he susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult." *Roper v. Simmons*, 543 US 551, 557, 125 S Ct 1183, 161 L Ed 2d 1

[2] The nature of the Eighth Amendment's proportionality protections has been a subject of considerable debate. In *Solem v. Helm*, 463 US 277, 284, 103 S Ct 3001, 77 L Ed 2d 637 (1983), the United States Supreme Court held that the cruel and unusual punishment clause of the Eighth Amendment prohibits "not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem* announced a proportionality analysis similar to Oregon's *Rodriguez/Buck* factors for reviewing a cruel and unusual punishment claim: (1) the gravity of the offense and the harshness of the penalty; (2) a comparison of the sentence imposed for more serious crimes in the same jurisdiction; and (3) a comparison of the sentences imposed for the same crime in other jurisdictions. *Solem*, 463 US at 290-92.

The *Solem* decision was later called into doubt by *Harmelin v. Michigan*, 501 US 957, 111 S Ct 2680, 115 L Ed 2d 836 (1991). There, two justices concluded that the Eighth Amendment contains no proportionality guarantee (*id.* at 965 (opinion of Scalia, J., joined by Rehnquist, C. J.)), and three other justices concluded that the amendment forbids only those sentences that are "'grossly disproportionate' to the crime" (*id.* at 1001 (Kennedy, J., concurring)). Even those justices recognizing a guarantee of proportionality review stressed that outside the context of capital punishment, successful challenges to particular sentences are "exceedingly rare" because of the "relative lack of objective standards concerning terms of imprisonment." *Id*.

(2005). (Internal quotation marks omitted.) Consequently, "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham* 560 US at 76.

The Supreme Court's treatment of intellectual disability under the Eighth Amendment shows some indications that it mirrors the treatment of juveniles under the Eighth Amendment, although the intellectual disability line of cases is less developed. The Court has held, like in *Roper*, that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, [the intellectually disabled] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins v. Virginia*, 536 US 304, 306, 122 S Ct 2242, 153 L Ed 2d 335 (2002). As a result, the death penalty is categorically prohibited from imposition upon the intellectually disabled, as it is against juveniles. *Id*. The Court has never held that sentencing schemes that fail to consider intellectual disability are flawed, as it has for youth. However, the Oregon Supreme Court has noted that "The Supreme Court in *Atkins* repeatedly emphasized the relevance of intellectual disability in determining both the gravity of an offense and the severity of its penalty." *Ryan*, 361 Or at 620.

Turning to the proportionality inquiry under the state constitution, Article I, section 16, "closely parallels the Eighth Amendment." *Billings v. Gates*, 323 Or 167, 173, 916 P2d 291 (1996). However, unlike the Eighth Amendment, Article I, section 16, explicitly sets out the concept of proportionality:

> "Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, *but all penalties shall be proportioned to the offense*."

(Emphasis added.)

Thus, unlike the Eighth Amendment, where proportionality is an aspect of "cruel and unusual," Article I, section 16, divides the two into distinct concepts. In *State v. Wheeler*, 343 Or 652, 665-66, 175 P3d 438 (2007), the Oregon

Supreme Court detailed the history of Article I, section 16, noting that

> "[t]he framers combined the cruel and unusual punishment provision and the proportionality provision ***. As we have described above, those provisions have distinct histories and purposes—the proportionality provision has origins in Magna Carta and in Blackstone's argument in favor of punishments that were reasonably related to the severity of particular offenses, while the prohibition on cruel and unusual punishments was first articulated in the English Bill of Rights and focuses on prohibited methods of punishment. Those differences suggest that, when the drafters of the Oregon Constitution combined the two provisions with the word 'but' in Article I, section 16, they did not intend the proportionality provision to be an exception or qualification to the bar on cruel and unusual punishments. *See* 1 Noah Webster, *An American Dictionary of the English Language* 29 (1828) (giving 'excepting' as one meaning of 'but'). Rather, the sentence seems to use the word 'but' as the equivalent of 'and' and simply to combine in one sentence those two different rules for criminal penalties. *** In other words, the prohibition on cruel and unusual punishment and the requirement of proportionality appear to be independent constitutional commands, joined in one sentence because they both concern appropriate punishment for crimes."

The proportionality clause of Article I, section 16, recognizes a limit on legislative power. Although the legislature sets criminal penalties, it cannot do so arbitrarily. The Oregon Constitution requires that it invest each legislatively enacted sentence with a rational basis. *Jensen v. Gladden*, 231 Or 141, 146, 372 P2d 183 (1962) ("It is the province of the legislature to establish the penalties for the violation of the various criminal statutes and if the penalties are founded upon an arguably rational basis we have no authority to hold that they are invalid."); *see State v. Isom*, 313 Or 391, 400, 837 P2d 491 (1992) ("The legislature has chosen to subject all such persons to the maximum potential penalty. Defendant's opinion makes sense, but so does that which we attribute to the legislature. There was a rational basis for the legislature to conclude that both classes of escapees are dangerous."). A proportionality inquiry under

Article I, section 16, whether framed as a facial challenge or an as-applied challenge, asks if the imposition of the sentence would "shock the moral sense" of reasonable people "as to what is right and proper under the circumstances." *Sustar v. County Court for Marion Co.*, 101 Or 657, 665, 201 P 445 (1921). Answering that "shocks the conscience" question begins with a search for legislative purpose—the rational legislative basis behind the statutory sentence.

An examination of legislative purpose—the rational basis connecting the legislatively enacted sentence to the social harm that the legislature sought to penalize—is itself closely governed by the other constitutional obligation imposed on the legislature when enacting penalties—Article I, section 15, of the Oregon Constitution. That provision sets the permissible legislative purposes, requiring that "[l]aws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation."

In *Rodriguez/Buck*, the court set out three nonexclusive factors for consideration in as-applied challenges under Article I, section 16:

> "(1) a comparison of the severity of the penalty and the gravity of the crime; (2) a comparison of the penalties imposed for other, related crimes; and (3) the criminal history of the defendant."

347 Or at 58.

The Supreme Court in *Rodriguez/Buck* explained:

> "In considering a defendant's claim that a penalty is constitutionally disproportionate as applied to that defendant, then, a court may consider, among other things, the specific circumstances and facts of the defendant's conduct that come within the statutory definition of the offense, as well as other case-specific factors, such as characteristics of the defendant and the victim, the harm to the victim, and the relationship between the defendant and the victim."

Id. at 62.

Rodriguez/Buck did not define the precise contours of what "severity of the penalty" entailed. However, the court

did note that "in contemporary criminal justice systems, including Oregon's, the *primary* determinant of the severity of a penalty is the amount of time that the wrongdoer must spend in prison or jail, if convicted of that offense." *Id.* at 60 (emphasis added). *Rodriguez/Buck*'s use of the phrase "primary determinant" left the door open for secondary, or non-primary, determinants of severity that were *not* simply "the amount of time that the wrongdoer must spend in prison or jail."

The Oregon Supreme Court applied that same principle to intellectual disability, and concluded in *Ryan* that

> "evidence of an offender's intellectual disability therefore is relevant to a proportionality determination where sentencing laws require the imposition of a term of imprisonment without consideration of such evidence. Accordingly, we conclude that, where the issue is presented, a sentencing court must consider an offender's intellectual disability in comparing the gravity of the offense and the severity of a mandatory prison sentence on such an offender in a proportionality analysis."

Ryan, 361 Or at 620-21. However, again, the court did not clarify whether severity was simply quantitative, or whether qualitative severity was a consideration.

With that background in mind, we turn to defendant's argument that the trial court erred in refusing to consider defendant's increased vulnerability in the prison system—*i.e.*, his qualitative experience. According to defendant, that qualitative experience is a necessary consideration in assessing the severity of a sentence. The state disagrees, arguing that the severity of a sentence is fundamentally a question of numbers, *i.e.*, the length of the term of incarceration, and not a defendant's qualitative experience of incarceration.

The answer to this question is not readily apparent. Ultimately, however, we are compelled to not weigh in on the issue. Defendant's argument before the trial court was premised on one essential fact: that defendant would be subjected to *greater* risk of abuse while incarcerated because of his intellectual disability, than if he were not incarcerated. A review of this record shows that, even though the trial

court held that it could not consider defendant's argument, it explicitly rejected that necessary factual predicate. In giving its ruling, the trial court stated:

> "All of us are subject to victimization. *** [T]he fact that [defendant] may be victimized—the prison *isn't any different than our society*. I can walk in the street and be shot down by some deranged person or by some person who just doesn't like me. All of us can be assaulted out in the community.
>
> "Our—our system says that the people who are in charge of housing the people that we incarcerate are to protect them. We know that can't be done because we know people are killed in prison and assaulted in prison just like they are killed and assaulted outside of prison. So, there's no guarantee that anybody is going to be safe at any time."

(Emphasis added.)

Oregon's constitutional test for affirmance despite error—what we colloquially call "harmless error"—consists of "a single inquiry:" Is there little likelihood that the particular error affected the verdict? The correct focus of the inquiry regarding affirmance despite error is on the possible influence of the error on the verdict rendered, not whether this court, sitting as a factfinder, would regard the evidence of guilt as substantial and compelling." *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). In this case, for defendant to have prevailed below required the trial court to accept that defendant was at an increased risk of victimization, and the trial court did not find that fact credible.[3] We cannot conclude that the trial court's refusal to consider an argument based on a rejected necessary factual predicate likely affected the verdict in this case.

With respect to defendant's federal constitutional argument, the test for harm differs. *See, e.g.*, *State v. Bray*, 342 Or 711, 725, 160 P3d 983 (2007) ("A violation of a defendant's federal constitutional right is harmless only when a 'reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a

[3] Defendant does not argue that the record contains no evidence from which the trial court could make that factual determination, and we express no opinion on that factual determination by the trial court.

reasonable doubt.' *Delaware v. Van Arsdall*, 475 US 673, 681, 106 S Ct 1431, 89 L Ed 2d 674 (1986) (describing the test announced in *Chapman v. California*, 386 US 18, 87 S Ct 824, 17 L Ed 2d 705 (1967))"). However, before us, defendant did not respond to the state's harmless error argument at all, let alone articulate how the result might differ under the federal harmless error test as opposed to the state test. In light of the factual determinations made by the trial court, we conclude that the issue is harmless under both the state and federal standards.

Accordingly, we leave for another day the issue of whether consideration of the severity of a sentence for an intellectually disabled defendant requires consideration of that defendant's qualitative experiences while incarcerated.

Affirmed.

LAGESEN, P. J., concurring.

I concur in the majority opinion's disposition of this appeal, but not fully in its reasoning.[1] The majority ultimately concludes that any legal error in failing to consider defendant's increased victimization in prison because of his intellectual disability is harmless on this record, because the trial court made an actual finding that defendant is not at any such increased risk of victimization. I do not read the trial court's ruling to encompass that factual finding, so I would consider the merits of defendant's proportionality challenges under Article I, section 16, of the Oregon Constitution and the Eighth Amendment to the United States Constitution.

But in framing that legal question, I do not understand it to be quite as broad as the majority opinion suggests. I understand the question to be whether the trial court erred when it determined that the evidence that defendant's intellectual disability places him at an increased risk

[1] To the extent that the majority opinion concludes, ultimately, that defendant's sentence does not violate either Article I, section 16, of the Oregon Constitution or the Eighth Amendment to the United States Constitution, I agree with that conclusion. I also agree with the conclusion that defendant failed to preserve his contention that the trial court was required to consider the availability of treatment options in conducting its proportionality analysis. I also agree with the general overview of the law provided in the majority opinion.

of victimization by other inmates while incarcerated does not bear on the inquiry of whether defendant's 75-month sentence is unconstitutionally disproportionate under either Article I, section 16's proportionality clause, or the proportionality requirement that's been read into the Eighth Amendment. On that point, I would conclude that the trial court properly declined to take that evidence into account. That is because that evidence pertains to conditions of confinement that are not part of the sentence imposed by the trial court and are not, therefore, properly part of the calculus of whether that sentence is a proportionate "penalt[y]" for purposes of Article I, section 16, or a proportionate "punishment" for purposes of the Eighth Amendment. I therefore would affirm for that reason.

Defendant, who has an intellectual disability, orally sodomized his five-year-old niece. Admitting that conduct, he pleaded guilty to first-degree sexual abuse, a Measure 11 offense carrying a mandatory 75-month term of imprisonment. Rejecting defendant's contention that his intellectual disability made *any* term of imprisonment unconstitutionally disproportionate in violation of Article I, section 16, and the Eighth Amendment, the trial court sentenced defendant to the 75-month sentence required by Measure 11. In so doing, the court considered how defendant's intellectual disability affected his ability to understand the wrongfulness of his conduct and his judgment in general—concluding that defendant understood that his conduct was wrong and that he did not "lack judgment," despite his diminished capacity. However, the court declined to consider evidence that defendant's intellectual disability subjected him to an increased risk of victimization while incarcerated.

On appeal, defendant contends that was error. Defendant's theory is that the conditions of his confinement, including the risk of harm posed by other inmates as a result of defendant's intellectual disability, are part of the "penalty" imposed by the trial court for purposes of the proportionality clause of Article I, section 16, and part of the "punishment" imposed for purposes of an Eighth Amendment proportionality analysis. He argues: "The severity of a prison sentence includes prison conditions and how a person will be

treated in that environment. A defendant's vulnerability in prison is directly related to that." And he asserts: "Because of the punishment imposed on him by his fellow inmates, sending defendant to prison for 75 months is a much more severe penalty than sending an average adult to prison for the equivalent amount of time."

In my view, defendant's theory is contrary to Oregon and federal law in several respects, and I would reject it for that reason.

First, under Oregon law, a sentencing court does not—and cannot—impose conditions of confinement. ORS 137.010(7); *State v. Potter*, 108 Or App 480, 481, 816 P2d 661 (1991) ("Defendant is correct that the trial court has no authority to impose conditions of incarceration or parole."). In other words, a defendant's eventual conditions of confinement are not encompassed within the sentence imposed by a trial court. For that reason, they are not, in my view, properly part of any assessment whether the sentence imposed by a trial court comports with Article I, section 16, or the Eighth Amendment. Perhaps that is why I've been unable to locate a single case that includes conditions of confinement in the assessment of whether a sentence imposed is disproportionate.

Second, to the extent that it is appropriate to consider conditions of confinement in evaluating proportionality at the time of sentencing, it seems to me that the proper approach would be to look to the statutory and constitutional standards governing those conditions and to assess the proportionality of a term of incarceration based on the premise that those standards will be met. That is, the question should be whether the sentence imposed, if executed in compliance with the law governing conditions of confinement, is disproportionate. And the law—the Eighth Amendment, no less—imposes on the Department of Corrections the obligation to take reasonable steps to ensure that the conditions in which defendant is incarcerated are safe ones. *Farmer v. Brennan*, 511 US 825, 832-33, 114 S Ct 1970, 128 L Ed 2d 811 (1994). More to the point, "prison officials have a duty to protect prisoners from violence at the hands of other prisoners." *Id.* at 833 (internal quotation marks and ellipses omitted).

Oregon statutes likewise impose upon prison officials an obligation to protect inmates from injury: "The person of an inmate sentenced to imprisonment in the Department of Corrections Institution is under the protection of the law and the inmate shall not be injured except as authorized by law." ORS 421.105(2). If that is the proper focus of proportionality analysis at the time of sentencing—whether the sentence imposed when carried out in accordance with governing law is disproportionate—defendant's evidence about the risk of harm he may face in prison does not bear on the analysis.[2]

Third, in view of the foregoing law, even if I'm wrong that evidence of potential risks posed by conditions of confinement does not bear on proportionality analysis under the state and federal constitutions, in my view, the evidence nonetheless would have to show, at a minimum, that the officials will be unable to meet their constitutional and statutory obligations to confine the person in question under conditions designed to ensure the person's safety. In plainer terms, it would have to show, in effect, that it is a foregone conclusion that the Department of Corrections cannot provide conditions of confinement that comport with legal standards, thereby making it appropriate to take those legally deficient conditions into account when assessing proportionality at the time of sentencing, even though the sentencing court, itself, does not impose the conditions of confinement. The evidence presented by defendant does not tend to suggest that it is a foregone conclusion that the Department of Corrections cannot fulfill its legal obligations to protect defendant from harm during his sentence. Thus,

[2] That is not to say that it was not important for defendant to present that evidence at sentencing. Although a trial court lacks the authority to *impose* conditions of confinement, it does have the authority to *recommend* conditions of confinement. *Potter*, 108 Or App at 481. In the case of an intellectually disabled person such as defendant, such recommendations could provide the Department of Corrections with useful assistance in meeting its obligations to keep that defendant safe from other inmates while incarcerated by identifying the risks posed by the person's intellectual disability. And, of course, if the Department of Corrections fails to meet its obligations to an intellectually disabled inmate in conditions designed to discharge its obligation to protect the inmate from other inmates, the inmate may be entitled to habeas relief to secure removal from unconstitutionally unsafe conditions. *See, e.g.*, *Barrett v. Peters*, 360 Or 445, 449, 383 P3d 813 (2016) (explaining the function of habeas corpus in remedying unconstitutional conditions of confinement).

even if evidence of conditions of confinement can bear on proportionality analysis in some circumstances, the trial court did not err when it concluded that the evidence presented by defendant did not bear on the inquiry under the circumstances of this case.