IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent Petitioner on Review, v. TAWANNA D. FULLER, aka Tawana Divier Fuller, Defendant-Appellant, Respondent on Review	)))))))))))	Multnomah County Circuit Court No. 100748130 CA A147724 SC S060808

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, TAWANNA FULLER

Review of the Decision of the Court of Appeals on Appeal from a judgment of the Circuit Court for Multnomah County, Honorable MICHAEL ZUSMAN, Judge

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Author of opinion: Armstrong, PJ
Before: Armstrong, PJ, Hasleton, CJ, and Duncan, J

KAREN J. MOCKRIN #102445
Karen J. Mockrin, Attorney at Law
2075 SW 1st Ave., Ste. 2J
Portland, OR 97201
Telephone: (503) 421-8169
Email: karen@northwestlawoffice.com

Attorney for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
JEREMY C. RICE #055416
Assistant Attorney General
1162 Court St. NE
Salem, OR 97301-4096
Telephone: (503) 378-4402
Email: Jeremy.C.Rice@doj.state.or.us

Attorneys for Petitioner on Review

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Summary of Argument

The issue in the instant case is, and always has been, whether a prosecution for theft in the third degree and attempted theft in the first degree is criminal in nature notwithstanding a district attorney's election to treat those misdemeanors as "violations." After being convicted at a bench trial on a preponderance of the evidence standard of proof, Defendant/Appellant – Respondent on Review – (hereinafter "Defendant") persuaded the Court of Appeals that she was wrongfully deprived of her constitutional rights a jury trial and a reasonable doubt standard of proof. This Court should affirm that decision. *State v. Fuller*, 252 Or App 391, 287 P3d 1263 (2012)

Defendant prevailed by convincing the Court of Appeals to analyze her trial under the five-factor test established by *Brown v. Multnomah County Dist. Ct.* 280 Or 95, 570 P2d 52 (1977) for determining whether a proceeding amounted to a "criminal prosecution" under Article I, Section 11 of the Oregon Constitution. Petitioner on Review, the state of Oregon (hereinafter "the State"), initially requested that this Court review the *Brown* analysis itself under the method of Constitutional interpretation established long after *Brown* in *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992), which mandates that original provisions of the Oregon Constitution be interpreted in light of their text and context, the case law that has interpreted them, and the historical

circumstances of their adoption. However, in its merits brief, the State abandons that argument, taking it off this Court's proverbial table, and concedes that *Brown* is good law.

The State's new argument is that one of the Brown factors – the potential penalty faced by a defendant – is so important that it virtually trumps all the other factors, and is presumptively conclusive in any proceeding that poses no risk to defendants of imprisonment, or at least fines so severe they approximate the severity of imprisonment. Despite having explicitly abandoned the *Priest* methodology, the State nonetheless seeks to bolster its reinterpretation of Brown through an analysis of the common law distinction between "petty" and "serious" offenses, early Oregon case law, and contemporary federal case law.

The State's arguments are fundamentally flawed. A close reading of *Brown* itself, as well as cases that it influenced, demonstrate clearly that the State's proposed presumption of non-criminality is fundamentally incompatible with the *Brown* case. *Brown* states explicitly that all of its factors are relevant, but none of its factors is conclusive. *Brown* also gives almost as much weight to the condemnatory and stigmatizing effects of a conviction as it does to the formal penalties imposed.

Moreover, whatever the early Oregon, and contemporary federal, jurisprudence cited by the State stand for, they in no way mandate that Oregon adopt its proposed presumption of non-criminality. It is not even clear the early Oregon case law was

animated by the "petty/serious" distinction in the manner the State contends, and to whatever extent it was, it does not give rise to to the presumption the State would like it to. While federal law is animated by the "petty/serious" distinction, and has adopted a presumption of non-criminality for interpreting the Sixth Amendment, its jurisprudence is simply incompatible with Oregon's. Finally, the Oregon Constitution, when properly interpreted, guarantees broader protections than the U.S. Constitution.

Ultimately, then, this case presents an opportunity for this Court not merely to affirm the Court of Appeals decision in *Fuller*, but to reaffirm, clarify and strengthen the *Brown* test. Indeed, an analysis of each of its factors demonstrate that a prosecution for theft is criminal in nature, and *Brown* is a watershed case in Oregon jurisprudential history that properly protects the rights of criminal defendants against the full force of the State.

ARGUMENT

Introduction.

The ultimate issue before this Court is whether a proceeding against a defendant for Attempted Theft in the First Degree and Theft in the Third Degree, is a "criminal prosecution." ORS 164.055(3); 161.405(d); 164.043(2). Although Oregon law defines both offenses as "misdemeanors," which are "crimes" that require jury trials, the controversy in this case stems from the election of the district attorney who prosecuted Defendant to treat her offenses as "violations," which are tried to the bench. ORS

161.515; 136.001(1); 161.566(1)-(2)[1]; 153.008(1)(d); 153.076(1).

Both the State and Defendant agree that, if Defendant's prosecution was indeed criminal in nature, she was wrongfully denied her Constitutional right to a trial by jury in which she is presumed innocent until proven guilty beyond a reasonable doubt.[2] The only point of contention between the parties is how to determine that a prosecution is a criminal one under the Oregon Constitution. Or Const Art I § 11 ("In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury[.]).

In resolving this issue, the Court of Appeals determined that a prosecution for theft, whether the offense is denominated a "crime" or a "violation," is a criminal prosecution under the Oregon Constitution. *State v. Fuller* , 252 Or App 391, 287 P3d 1263 (2012). The *Fuller* court correctly applied to the matter before it the five detailed and complex factors of analysis for determining criminality in nature established in *Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 570 P2d 52 (1977). The factors identified are:

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1 Defendant references here *former* ORS 161.566 of 2009, the statute applicable at the time of her trial. She acknowledges that the statute has been amended more than once since her trial, but any reference contained herein to ORS 161.566 refers to the 2009 version unless otherwise specified.

2 *State v. Fuller*, the appellate ruling this Court is called upon to review, held that the right to a reasonable doubt standard of proof is "implicit" in the Oregon Constitution's requirement for "jury trials" in "criminal prosecutions." 252 Or App 391, n.4, 287 P3d 1263, n.4 (2012). Although the State apparently believes that the right to a reasonable doubt standard is guaranteed by the Fourteenth Amendment's due process clause, it nonetheless agrees that the right is guaranteed in criminal prosecutions. US Const Amend XIV.

- the "type of offense" charged; 280 Or at 102-03;
- the "penalty" a defendant faces; *Id.* at 103-05;
- the "collateral consequences" of a conviction; *Id.* at 105;
- the "punitive significance" of the judgment; *Id.* at 105-08; and
- the use of "arrest and detention" in enforcing the law. *Id.* at 108.

In setting forth these factors, the Court stated unequivocally, "All are relevant, but none is conclusive[.]" *Id.* at 102.

Despite these words, the State contends that *Fuller, supra,* was incorrectly decided because *Brown*, *supra*, actually gives rise to a presumption that a proceeding in which a defendant faces no possibility of imprisonment, or at least a proportionately severe fine, is non-criminal. According to the State, *Brown* holds that the "penalty" factor is so important that it virtually trumps all the other four. After attempting to bolster its interpretation by referring to the historical distinction between "petty" and "serious" offenses, early Oregon case law and current federal case law, the State acknowledges that the four remaining factors can theoretically rebut its proposed presumption, but then dismisses all of them as "unhelpful" – and not merely in the instant case, but in "most" cases. Essentially, the State urges this Court to hold that *Brown* establishes a virtual bright-line rule under which any exercise of executive discretion to treat a misdemeanor as a violation – no matter how serious the offense – would escape judicial review.

As Defendant argues at length below, the State's proposed interpretation of *Brown*,

supra, is untenable. It conflicts not only with the seminal case's own words, but with later case law that incorporated its test. *See e.g. State v. Selness/Miller*, 54 P3d 1025, 334 Or 151 (2002). Invocations of the "petty/serious" distinction, early Oregon law, and contemporary federal law cannot bolster the notion that *Brown* itself establishes the rule of law the State would like it to, and the State's arguments regarding those areas of jurisprudence are as flawed as its analysis of *Brown*.

In passing, Defendant must note that the State devoted a section of its brief to proving that Oregon's statutory scheme mandates that misdemeanors treated as violations proceed without the benefit of a jury trial. Since Defendant concedes that ORS 153.030(1) mandates that all violations be tried without a jury and by a preponderance of the evidence under ORS 153.076 (1)-(2), further exposition on the statutory scheme is not required. After all, this case has never concerned the statutory procedures for trying violations qua violations, but whether a misdemeanor defendant's Constitutional rights are forfeited merely because a district attorney elects to "treat" what would otherwise be a crime as a violation under ORS 161.566(1).[3]

Thus, Defendant urges this Court to reject the state's arguments and uphold the Court of Appeal's decision in *Fuller*, *supra*. An analysis of the *Brown* factors will demonstrate that a prosecution for theft is, indeed, criminal in nature. Theft will remain criminal in nature unless and until the legislature itself takes all the necessary steps to

3 Defendant acknowledges that ORS 153.008(1)(e) says that a misdemeanor treated as violation "is" a violation, but maintains that if ORS 161.566 is unconstitutional as applied to theft, so is ORS 153.008.

decriminalize the offense, not merely the procedures by which district attorneys may elect to try them. Moreover, Defendant urges this Court to take advantage of the opportunity this case provides to reaffirm *Brown v. Multnomah County*, *supra*, and to clarify the analysis and importance of each of its five factors.

I. Trials are not presumptively non-criminal merely because their defendants are not at risk of imprisonment or proportionately severe fines.

The State opens its argument by citing the definitional distinction between "crimes" and "violations" in the Oregon Revised Statutes. A crime is an offense "for which a sentence of imprisonment is authorized." ORS 161.515(1). (In particular, a "misdemeanor" is a crime for which up to one year of imprisonment is authorized. ORS 161.515(2); 161.545.) In contrast, a violation is an offense for which a pecuniary sentence, but not imprisonment is authorized. ORS 153.008(1)(b). However, while this distinction is the principle one between crimes and violations, this Court recognized as recently as 2011 that it was not the only one. *State v. Swanson*, 351 Or 286, 289, 291, 266 P.3d 45, 46, 47 (2011).

In declining to deem a violation to be a "lesser-included" crime for purposes of instructing a jury in an unquestionably criminal trial, the *Swanson* Court explained,

> To be sure, one distinguishing characteristic of a violation is the fact that only a fine, and not imprisonment, may be imposed for the offense. But the distinctive nature of a violation goes beyond that. Violations under our current criminal code are charges that have been "decriminalized." A determination of guilt for such an offense cannot carry criminal consequences *of any sort*, as the legislature has

> expressly declared: "Conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime." ORS 153.008(2). *For that reason*, prosecutions for violations are not subject to the constitutional procedural protections that are required for crimes. [emphasis added]

Swanson, 351 Or at 291-92. Thus, even outside the context of *Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 570 P2d 52 (1977), it would appear that this Court has already recognized that violations are not presumptively non-criminal solely because they pose no risk of imprisonment (or a proportionately severe fine). The mere absence of severity is not the reason violations proceedings are non-criminal in nature. For an offense to be decriminalized, a defendant charged with one must face no criminal consequences whatsoever.

Yet, the State contends that both historical and contemporary jurisprudence demonstrate that the law presumes that the "criminal prosecutions" mentioned in the Oregon Constitution do not encompass any proceeding that poses no risk of imprisonment or severe fines to a defendant, even if the legislature has expressly authorized imprisonment for the offense with which she is charged. Or Const Art I § 11; *See also* ORS 161.566; 161.515(2); 161.545. Before refuting the State's broad legal analysis, however, Defendant is compelled to focus this Court's attention on the *Brown* decision. After all, both Defendant and the State agree that *Brown*'s five-factor test is the appropriate one to apply to the instant case, but *Brown* itself cannot possibly stand for the presumption the State says it does.

A. Both parties agree that the five-factor test established by *Brown v. Multnomah County Dist. Ct.* is the proper one to use when determining whether a proceeding is criminal in nature.

In petitioning for review of *State v. Fuller*, 252 Or App 391, 287 P3d 1263 (2012), the State originally argued that this Court must analyze the scope of the jury trial right under Article I, Section 11 using the methodology set forth in *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992); Or Const Art I § 11. *Priest* requires Oregon courts to interpret an original provision of the state Constitution by examining its text and context, the historical case law that construed it, and the historical circumstances of its adoption. 314 Or at 415-19. Naturally, having been rendered more than a decade earlier than *Priest*, *Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 570 P2d 52 (1977) did not employ *Priest*'s method. The implication of the State's petition, of course, is that this Court should depart from *Brown* altogether, and devise an entirely new test for determining the criminality of a prosecution.

However, in its merits brief, the State has expressly abandoned that argument. It states in no uncertain terms that a "*Priest* analysis is not required in this case" because more recent cases decided by this Court – *State v. Davis*, 350 Or 440, 256 P3d 1075 (2011) and *State v. Selness/Miller*, 54 P3d 1025, 334 Or 515 (2002) – have already examined the text and context of Article 1, Section 11 using the *Priest* method, and vindicated the Brown factors[4] for determining whether a proceeding is criminal in

4 *State v. Selness/Miller*, 54 P3d 1025, 334 Or 515 (2002) analyzed the

nature. Thus, both Defendant and the State agree that *Brown* is good law, and that its test is the appropriate one to employ to resolve the instant case.

Given the State's concession, this Court may, and should, decline to incorporate into its ruling the State's analysis of early Oregon case law as well as any argument that Article 1, Section 11's proper meaning is hinged to the common law that affects its federal analog, the Sixth Amendment. Or Const Art I § 11; US Const Amend VI. After all, this Court always has the "inherent authority to allow or deny any petition for review" under ORAP 9.07, and has, at least in the context of a writ of mandamus, declined to consider arguments proffered, but later abandoned. *See State v. Blok*, 352 Or. 394, 399-400, 287 P3d 1059, 1061-02 (2012). Moreover, if the *Brown* test for determining whether a prosecution is criminal in nature is sound in light of *Pierce*, *supra*, there is no legitimate reason to wade into historical waters to glean the scope of the term "criminal prosecutions," which triggers the rights to a jury trial and reasonable doubt standard of proof. That scope is defined by *Brown*, *supra*, and *Brown* does not employ a presumption of non-criminality for cases that cannot result in imprisonment or a fine that approximates imprisonment's severity.

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criminality of proceedings challenged under Article 1, Section 12 of the Constitution under which "no person shall be put in jeopardy twice for the same offense[.]" Or Const Art I §12. In so doing, *Selness* did not incorporate the "type of offense" factor into its analysis, not because it was inherently flawed, but because it was inappropriate in the former jeopardy context. 54 P3d at 1036. Indeed, the Court suggested that the "type of offense" factor is appropriate for analyzing Article 1, Section 11. *Id.;* Or Const Art I § 11.

B. Brown v. Multnomah County Dist. Ct. does not establish a presumption of non-criminality for trials that pose no risk of imprisonment or a proportionately severe fine.

By conceding that *Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 570 P2d 52 (1977) is sound in light of *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992), the State has argued itself into a peculiar semantic corner. Its merits brief evinces a desire to have this Court interpret Article I, Section 11 anew, through the lens of *Priest*, to establish a presumption of non-criminality for any trial whose defendant is not at risk of imprisonment or a fine that is comparable in severity. However, because it took the *Priest* analysis off this Court's proverbial table, the State instead argues not that *Brown* was inappropriately decided, but that *Brown* has actually stood for this presumption all along. This argument is untenable in light of *Brown*'s actual words and the absence of any such presumption in *State v. Selness/Miller*, 54 P3d 1025, 334 Or 515 (2002), which the State concedes vindicated the *Brown* test under *Pierce*.

1. The very language of *Brown v. Multnomah County Dist. Ct.* contradicts the State's suggested presumption of non-criminality.

In establishing its five factors for determining criminality in nature, *Brown v. Multnomah County Dist. Ct.* said explicitly, "There is no easy test for when the imposition of a sanction is a "criminal prosecution" within the meaning of the constitutional guarantees [of the Oregon state Constitution]." 280 Or 95,101-02, 570 P2d

52, 57 (1977). After examining the legislative history of the law before it, which marked an unsuccessful attempt to decriminalize first-time Driving Under the Influence of Intoxicants (DUII), the Court scolded the legislature for "relying on the single criterion on the $1,000 fine instead of imprisonment to accomplish [its] aim." 280 Or. At 107-08. Upon noting that a "number of indicia have been used to determine whether an ostensibly civil penalty proceeding remains a 'criminal prosecution' for constitutional purposes," the *Brown* Court admonished of these indicia, "All are relevant, but none is conclusive on what we believe is the ultimate determination." *Id.* at 102. These sentences alone militate against adopting the State's proposed test.

More specifically, *Brown*'s discussion of the "penalty" factor militates against interpreting the case as the State suggests. 280 Or at 103-05. The Court did write, "The prescribed penalty is *generally regarded*, as the single most important criterion, *at least when it involves imprisonment*. Indeed, 'decriminalization of one-time criminal offenses ordinarily assumes that the sanction of imprisonment must be abandoned" [emphasis added]. *Id.* at103. It also wrote that "a large fine may be as severe, in practical terms, as a short imprisonment[.]" *Id.* 104. To whatever extent these words generate a legal presumption, they generate the inverse presumption from the one the State infers. That is, the *Brown* Court arguably established a presumption that *the presence* of potential incarceration or proportionate fine renders a prosecution *presumptively criminal*.[5] But it

5 In *State v. Selness/Miller*, this Court went even further, and noted that the presence of potential imprisonment "automatically" renders a proceeding criminal in nature. 54 P3d 1025, 1037, 334 Or 515 (2002).

would mark an error in logic to infer therefrom that the absence of such potential severity renders a prosecution presumptively non-criminal.

Similarly, even if *Brown* had written, "The prescribed penalty is the single most important criterion," without modifying the sentence with the phrases, "generally regarded as" or "at least when it involves imprisonment," it would be faulty to conclude that *Brown* would therefore have meant to establish a presumption of non-criminality in the absence of severe punishment. Merely establishing that one factor weighs more than others is not the same as declaring it presumptively conclusive.

Besides, *Brown* cautioned jurists that it is not the penalty itself, but the "punitive use" of that penalty that determines whether a proceeding to impose it is criminal in nature. 280 Or at 103. Incarceration can be imposed in a civil proceeding if the use of incarceration is non-punitive, such as the involuntary commitment of "persons suffering from mental incapacity" or "infectious disease." *Id.* Conversely, the punitive use of a fine, not its mere amount, can render that fine criminal in nature, and fines must be adjudged in their "context." *Id.* at 103-05. In particular, how a fine affects "ordinary individuals," and whether a defendant is "indigent" affect the determination of whether a proceeding to impose one is criminal in nature. *Id.* at 105.

Finally, with respect to the "penalty" factor, *Brown* instructed that all potential penalties must be analyzed under two sub-factors: their "severity" and whether they are "infamous." *Id.* at 103. Thus, gleaning a presumption of non-criminality from the

severity of a penalty alone is unwarranted. Whether the penalty is "infamous," *Brown* explains, relates to the "punitive significance" factor, and thus to a penalty's tendency to brand a defendant a criminal in the eyes of society. *Id.*

Regarding the factor of "punitive significance," the Brown Court wrote,

> "What distinguishes a criminal from a civil sanction and all that distinguishes it," a leading scholar concluded, "is the judgment of community condemnation which accompanies and justifies its imposition." The stigma of that condemnation can accompany the imposition of a sanction whether it is imprisonment, a fine, or something else; and its presence in a judgment of conviction, *as much as the potential sanction itself*, makes the right to a jury peculiarly appropriate to a criminal prosecution. [emphasis added]

Brown, 280 Or. at 106. It is true that the *Brown* Court noted that determining the "punitive significance" of a proceeding or penalty was inevitably fraught with difficulty. *Id.* at 106. It is also true that the Court looked to relevant legislative history to guide it in its own determination. *Id.* at 107. However, in light of the above paragraph and the emphasis the Court placed on "community condemnation" in its ultimate ruling, the State's suggestion that the Court intended to relegate "punitive significance" to the status of mere rebuttal factor is absurd.

Likewise, nothing in *Brown* relegates the remaining factors to mere rebuttal status either. A conviction's "collateral consequences" are to be judged exactly as the "penalty factor," by analyzing their "punitive use." 280 Or. at 105. Moreover, the mere "arrest and detention," of a person (not the pre-trial practices later applied) alone "comports with criminal rather than with civil procedure and is surely so perceived by the public."

Id. at 108.

While the Court did call the "type of offense" factor "not very helpful," it cannot be overlooked that *Brown* involved an offense that the legislature had attempted to decriminalize individually, in its own right. *Id.* at 97. In that context, Court wrote, "On the whole, it is not very helpful to refer to the 'gravity' or the 'nature' of the offense as a criterion, since this is the legislative judgment which the state claims to have made in 'decriminalizing' it."

In stark contrast, under the legislative scheme in the instant case, the legislature's individual judgment about any offense it labels a misdemeanor is that the offense is a crime for which imprisonment is authorized. ORS 161.515(2); 161.545. Under ORS 161.566, which authorizes such crimes to be "treated" as violations, the legislature grants the prosecutor unfettered discretion to determine the type of offense in question. Thus, for purposes of reviewing the instant case, the "type of offense" is more important than even the *Brown* Court could have foreseen.

Ultimately, *Brown* simply does not establish the presumption of non-criminality the State says it does. On the contrary, it is fundamentally incompatible with that presumption, and all of its factors should be applied just as the Court of Appeals applied them in *State v. Fuller*, 252 Or App 391, 287 P3d 1263 (2012).

2. Selness/Miller, which validates the test established Brown v. Multnomah County Dist. Ct., does not employ a presumption of non-criminality.

In abandoning its argument that this Court should examine the constitutional term "criminal prosecutions" by using the methodology set forth in *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992), the State concedes that *State v. Selness/Miller*, 54 P3d 1025, 334 Or 515 (2002) "incorporated *Brown* into its *Priest* analysis of Article I, section 12." Or Const Art I § 12. Defendant does not disagree. *Selness* applied *Pierce* to conclude that the constitutional term "jeopardy" applied only to "criminal" proceedings, and ultimately employed the *Brown* factors to determine whether a proceeding were criminal. 54 P3d at 1031-38. In fact, *Selness* explicitly held that *Brown* "closely parallel[ed]" *City of Portland v. Erickson*, 39 Or 1, 62 P 753 (1900), one of the early Oregon cases the State uses in its merits brief. 54 P3d at 1034.

If the law operates as the State contends, one would reasonably expect to find the State's presumption of non-criminality affirmed at least somewhere in *Selness*. But it is nowhere to be found. Instead, *Selness* confirms that the "penalty" factor is to be assessed in terms of severity and infamy; 53 P3d at 1035; that fines can be either civil or criminal in nature "depending on the circumstances;" *Id;* that *Brown* "relied heavily on" the "punitive significance" factor; *Id;* and that "collateral consequences" were "relevant to determining whether [a] proceeding is criminal in nature;" *Id.* at 1036. Nowhere in its

application of the *Brown* factors, however, does *Selness* suggest that a proceeding is presumptively non-criminal if the potential penalties faced by defendants were insufficiently severe.

Defendant's foregoing arguments sufficiently undermine the State's case. *Brown* should not be employed the way the State argues it should, and thus, *State v. Fuller*, 252 Or App 391, 287 P3d 1263 (2012) should be upheld. Of course, Defendant would be remiss if she did not address the State's other arguments.

C. The State's arguments vis-a-vis the "petty/serious" distinction, early Oregon case law and contemporary federal case law are flawed and unhelpful to its case.

The State contends that the Constitutional provision requiring jury trials in "criminal prosecutions" applies to serious offenses, but has never applied to "petty," "minor" or "trivial" offenses. Or Const Art I § 11. The historical distinction between serious and petty offenses was used at common law. S*ee e.g. Byers v. Commonwealth*, 42 Pa 89, 6 Wr Pa 89 (1862). Federal courts currently maintain that the distinction limits the right to a jury trial under the Sixth Amendment. US Const Amend VI; *See e.g. Baldwin v. New York*, 339 US 66, 90 S Ct 1886, 26 LEd 437 (1970); *Blanton v. City of North Las Vegas*, 489 US 538, 109 S Ct 1289, 103 Led2d 550 (1989). The State apparently urges this Court to employ the petty/serious distinction to deem "violations" presumptively petty, just as federal courts deem any offense that carries a sentence of six

months in prison or less presumptively petty. *Blanton*, 489 US at 543. However, it is unclear that the petty/serious distinction animated early Oregon case law with respect to Article 1, Section 11, and to whatever extent it was used, it did not give rise to the State's suggested presumption. Moreover, while antiquated federal law is arguably compatible with Oregon jurisprudence, current federal law is not, and this Court should decline to incorporate it into its decision in this case.

1. It is unclear that the petty/serious distinction animated early Oregon case law.

The State contends that Oregon has "long recognized" that "minor" or "trivial" offenses do not qualify as "criminal." In support of its contention, the State cites three early Oregon cases: *Cranor v. Albany*, 43 Or 144, 71 P 1042 (1903); *City of Portland v. Erickson*, 39 Or 1, 62 P 753 (1900); and *Wong v. City of Astoria*, 13 Or 538, 11 P 295 (1886). Curiously, only one of these cases, *Cranor*, actually mentions the distinction between petty, minor or trivial cases and serious ones. 43 Or at 148. Simply put, it is at best unclear that the State's contention is correct, and unlikely that early Oregon case law helps its case at all.

Wong involved a woman who was arrested and fined for violating a municipal ordinance that prohibited "bawdy-houses." *Wong*, 13 Or at 541. The Court denied defendant Wong's motion to be tried by a jury not because her offense was "petty," but because the ordinance she violated was purely regulatory in nature. 13 Or at 545-46.

Although defendant Wong faced potential imprisonment upon not paying her fine, the ordinance itself was primarily designed not to punish offenders, but to ensure that the city of Astoria could function, and to guard the safety of its residents. *Id.* Thus, a violation of it was "in no sense a trial for a crime *against the state."* [emphasis added] *Id* at 545. Violations of such ordinances were thus outside the purview of the common law right to a jury trial. *Id.*

Erickson likewise involved a defendant charged with violating a city ordinance, but one who was acquitted after a trial without a jury. 39 Or at 5-6. When the City of Portland appealed to retry the defendant, this Court refused to allow the second trial. *Id.* at 10. It reasoned that because the city sought to enforce its ordinance

> by resort to proceedings authorized and carried out *in all respects* as criminal cases are prosecuted – by complaint and warrant, - and where the court is empowered to inflict upon the accused not only a fine, which may be followed by imprisonment for its nonpayment, but also imprisonment aside from any pecuniary penalty or forfeiture, such proceeding becomes so far criminal in its nature . . . that a person acquitted thereof cannot be again put in jeopardy for the same offense. [emphasis added]

39 Or at 7. Because of its emphasis on many analytical factors for determining criminality in nature, such as whether the law were enforced by "complaint" or "indictment," whether the accused were subjected to "arrest" and "detention," and whether the accused faced imprisonment, *Erickson*, heavily influenced this Court's former jeopardy doctrine in *State v. Selness/Miller*, 54 P3d 1025, 334 Or 515 (2002). *Erickson*, 39 Or at 8. Moreover, to the extent that *Erickson* gives rise to a legal

presumption, it is the presumption that the *presence* of a potential incarceration renders a proceeding *presumptively criminal*, not that the absence of such renders one presumptively non-criminal. *See Id.* at 7.

Cranor also involved a defendant charged with violating a municipal ordinance that prohibited selling alcohol on Sundays. 43 Or at 144. Defendant Cranor was arrested under a warrant, and faced potential imprisonment upon conviction, whether or not he was fined. *Id.* at 144-45. In denying defendant Cranor's motion for a jury trial, this Court cited *Wong*, *supra*, but not *Erickson. Id.* at 148. The Court wrote,

> Constitutional provisions securing to litigants the right to a trial by jury are construed as preserving the right in substance as it existed at the time of their adoption, and in the class of cases to which it then applied. They are generally regarded as having no application to the prosecution of minor or trivial offenses *before justices and police magistrates*, as such offenses were summarily punished at common law. [emphasis added]

43 Or at 148. Whatever *Wong*, *Erickson* and *Cranor* mean when read in tandem, they hardly bolster the State's contention that modern violations are presumptively petty. If anything, they could mark out an "historical exception," under which a municipal ordinance designed to be purely regulatory in nature, and whose transgressions are tried in municipal or police courts, might be exempt from the test established for determining criminality under *Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 570 P2d 52 (1977). *See e.g. Delgado v. Souders,* 334 Or 122, 139, 46 P3d 729, 742 (2002); *State ex rel Dwyer v. Dwyer*, 299 Or 108, 698 P2d 957 (1985).

Even Defendant's foregoing interpretation is correct, it is of no advantage to the state, for regulatory municipal ordinances are not analogous to modern day violations. In fact, as this Court commented in *State v. Swanson*,

> [V]iolations under the current classification system, given their noncriminal nature and the different procedures that apply to them, had no counterpart under the Deady Code [Oregon's 19th-Century compilation of statutes]. [***] There was no concept of an offense that, due to its noncriminal nature, could be prosecuted *in any court in the state* without the procedures and protections constitutionally required in criminal cases. [emphasis added]

351 Or 286, 292, n.5, 266 P.3d 45, 48, n.5 (2011).

The State's argument is not aided by early Oregon case law. It is unclear that the petty/serious distinction animated early law, for its only mention is within the context of regulatory municipal ordinances, *Cranor,* 43 Or at 48, and even proceedings on those ordinances could be deemed criminal in nature if they were characterized by too many criminal procedures. *Erickson*, 39 Or at 7, 8. Early Oregon case law certainly does not validate the State's contention that modern day violations are presumptively "petty," and thus outside the protection of the Oregon Constitution. Or Const Art I § 11.

Again, the only proper means to determine the criminality of a prosecution is to apply the *Brown* factors one-by-one, as they were applied in *State v. Fuller*, 252 Or App 391, 287 P3d 1263 (2012).

2. This Court must decline to incorporate federal jurisprudence into its decision.

In its merits brief, the State frequently cites federal jurisprudence, which, for purposes of the Sixth Amendment, currently operates under the presumption that any proceeding in which a defendant faces a penalty of six months or less is petty, and may be tried without the benefit of a jury trial. *See Blanton v. City of North Las Vegas*, 489 US 538, 109 S Ct 1289, 103 Led2d 550 (1989); US Const Amend VI. While the State stops short of advocating the six-months-or-less presumption, it does seek to incorporate federal analysis into Oregon jurisprudence to establish its preferred presumption. However, it provides no justification for doing so.

Oregon case law might arguably have been compatible with earlier federal jurisprudence, which considered whether an offense were a crime at common law, and the nature of that offense itself, to determine whether it were protected by the Sixth Amendment's jury trial requirement. *Blanton,* 489 US at 541. However, in pursuit of what it considered more "objective" criteria to distinguish between petty and serious offenses, it began to focus more exclusively on the potential penalties, including imprisonment and other serious punishments. *See Duncan v. Louisiana*, 391 US 145, 88 S Ct 1444, 20 Led 2d 162 (1968); *Baldwin v. New York*, 339 US 66, 90 S Ct 1886, 26 LEd 437 (1970); *Frank v. United States*, 395 US 147, 89 S Ct 1503, 23 LEd 2d 162 (1969). Although at first it established a presumption that the presence of a potential

six-month prison term rendered a proceeding criminal in nature, it eventually established the inverse presumption that the absence of such severity rendered a proceeding non-criminal. Blanton, 489 US at 543.

The State offers no evidence that Oregon jurisprudence has followed a similar course. It only resorts to the dubious proposition that *Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 570 P2d 52 (1977) is itself compatible with the approach upon which the federal law ultimately settled. For myriad reasons argued *supra*, that position is untenable.

Moreover, there are independent reasons for this Court to reject the federal approach. First, one of the U.S. Supreme Court's rationales for adopting its presumptions of non-criminality was that six-month prison terms, "onerous though they may be [to defendants], may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications[.]" *Blanton*, 489 US at 543 (citing *Baldwin*, 399 US at 73.). That approach to jurisprudence has been explicitly condemned in Oregon. In *State v. Stoneman*, this Court held that it is "axiomatic that, among the various interests that the government of this state seeks to protect and promote, the interests represented by the state constitution are paramount to legislative ones. Consequently, a state legislative interest, no matter how important, cannot trump a state constitutional command." 323 Or 536, 539, 920 P2d 535 (1996).

Secondly, both the history of, and case law interpreting, Article 1, Section 11 of

the Oregon Constitution support the contention that its protections are broader than the those guaranteed by the Sixth Amendment to the U.S. Constitution. To the extent that this Court deems history relevant to the instant case, it is worth noting that while the delegates to Oregon's 1857 Constitutional Convention apparently debated little over the actual wording of Article I, they did debate about whether to have a Bill of Rights at all. Ralph J. Mooney, *Remembering 1857*, 87 Or Law Rev 731, 769 (2008).

One delegate, Delazon Smith, championed adopting the Bill of Rights of the Indiana Constitution, calling it "gold refined," and "up with the progress of the age." *Id.* He argued,

> [M]any changes have taken place since our fathers first formed constitutions. . . . I remember the time very well, when . . . *a poor man, because he hadn't a dollar in his pockets, was sent to the county jail*. And I remember a great many other things which people held entirely republican and right, which subsequent experience and the progress of the age taught us are blots upon our national escutcheon." [emphasis added]

Id. at 769-70. At the Convention, Indiana's Bill of Rights was incorporated virtually verbatim into Oregon's Constitution. *Id.* at 769.

Additionally, this Court has repeatedly held that, for purposes of interpreting Article 1, Section 11 under the *Priest*, *supra*, methodology, the goal is not to lock the meaning of the clause in the 19th Century, but to glean from the original meaning general principles that can be applied to modern circumstances. *See e.g. State v. Rogers*, 4 Pd 1261, 1129, 330 Or 282 (2000); *State v. Davis*, 350 Or 440, 446, 256 P3d 1075, 1078

(2011). Accordingly, the *Davis* Court upheld[6] an earlier line of case law under which the right to counsel guaranteed by Article 1, Sec. 11, attaches upon arrest despite Sixth Amendment jurisprudence to the contrary and the fact that rule appeared to conflict with Oregon the original understanding of the Constitution's text. 350 Or at 467, 477, 479; Or Const Art 1, § 11 ("In all criminal prosecutions, the accused shall have the right to . . . be heard by himself and counsel").

Rather than incorporate federal law to narrow the scope of the Oregon Constitution's protections, this Court should reject the State's presumption of non-criminality, and continue in its tradition of interpreting Article 1, Section 11 broadly to protect the rights of criminal defendants against the power of the State.

Ultimately this Court should reject the State's entire line of reasoning, uphold *State v. Fuller*, 252 Or App 391, 287 P3d 1263 (2012), and reaffirm all of the factors of the *Brown* test, *supra*.

II. This Court should affirm State v. Fuller, and, in so doing, reaffirm all five factors elaborated in Brown v. Multnomah County Dist. Ct.

In its merits brief, the State repeatedly asserts that the only purpose a jury serves is to prevent government oppression. Whatever the merits of this assertion, its corresponding contention – that no oppression can follow from the imposition of a penalty less severe than imprisonment – highlights the need for this Court to reaffirm all

6 Defendant concedes that although *State v. Davis* reaffirmed the line of case law that expanded the right to counsel, it declined to expand that right further as its defendant/appellate urged. 350 Or 440, 256 P3d 1075, (2011)

five of the factors for determining criminality in nature under *Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 570 P2d 52 (1977). After all, careful readers of *Brown* should discern a persistent theme running through those factors: that oppression can be imposed by a conviction alone, even arrest alone, by branding a defendant a criminal in the eyes of society. *See Brown*, *supra*.

Everything from the nature of the offense with which a citizen is accused and against which she must defend her good name, to the infamy of the potential penalty she faces, to the condemnatory significance of a conviction to her community, to the public perception of her arrest and detention suggests that it is the essence of *Brown* that the oppression endured from the informal consequences of a conviction stings just as much as that enured upon the imposition of formal ones. The government can fine or confine a citizen, but both the perceptions and prejudices of her society can force her to wear a "virtual scarlet letter."

Fuller, *supra*, was not wrongly decided; it considered each *Brown* factor with the seriousness it deserved, and correctly determined that a prosecution for theft, whether labeled a "violation" or a "crime" is a criminal prosecution. It should be affirmed, as should each *Brown* factor.

A. Theft is the "type of offense" that, when accused of it, an Oregonian has the Constitutional right to defend herself in front of a jury.

It is important to note form the outset of this section that the initial judgment of

the legislature about the nature of *any* misdemeanor is that it is a crime for which imprisonment is authorized. ORS 161.515(1)-(2); 161.545. The legislature makes no judgment about the criminality of any individual misdemeanor offense reduced to a violation under ORS 161.566. It leaves that responsibility solely in the hands of the prosecutor, without any input from defendants or the courts. While a district attorney can make judgments *about* the nature of an individual misdemeanor, her election to treat one one way or another under ORS 161.566 *cannot change the actual nature* of the offense she is judging. District Attorneys are not state legislatures, and they are not infallible. Thus, in the context of a misdemeanor-turned-violation, it is important for courts to review whether a district attorney selected an inappropriate "type of offense" for "decriminalization."

The misdemeanors to which ORS 161.566 may apply include such offenses as theft (ORS 164.015; 164.045(2); 164.043(2)), child endangerment (ORS 163.545(2); 163.575(2)); encouraging child sex abuse (ORS 163.687(2)); forgery (ORS 156.007(2); and the *attempt of any class C felony* (ORS 161.405). They also include possession of a slot machine (ORS 161.147); displaying nudity in an advertisement (ORS 167.090) and offensive littering (ORS 164.805). Because any reasonable person can perceive a gradation of seriousness of the nature of these offenses on first blush, it is difficult to understand the State's contention that *Fuller*, *supra*, which confined its analysis to theft offenses, stands for the proposition that no misdemeanor can be properly treated as a

violation. Nevertheless, a thorough jurisprudential understanding of the "type of offense" is required for proper judicial review.

The *Fuller* Court correctly noted that "'the prohibition against theft predates our constitutions and the common law,,' and a conviction for theft has always required proof of 'mens rea.'" 252 Or Ap at 397. Thereby it correctly applied the two sub-factors identified in *Brown* as militating in favor of determining that a "type of offense" is criminal in nature. *Brown,* 280 Or at 102.

This Court might also note that theft has been considered malum in se, as opposed to malum prohibitum, for millennia; is a crime of "moral turpitude;" and can be a "crime of dishonesty," all of which would also militate in favor determining that it is the "type of offense" that is criminal in nature. *See State v. Rocha,* 233 Or App 1, 225 P.3d 45 (2009); *In re Kimmell*, 332 Or 480, 31 P3d 414, 332 Ore. 480 (Or., 2001).

Finally, this Court should note that some misdemeanors are simply serious enough in their own right that courts should guard to the greatest extent possible against the possibility of erroneous convictions. The best way to do this, of course, is to instruct a jury to acquit a defendant if it has reasonable doubt about the prosecution's case. Some types of offenses are simply too serious in their own right to adjudge by a preponderance of the evidence standard. Theft is one of those offenses.

B. Any Oregonian facing a maximum criminal-level fine is enduring a criminal proceeding at which she has the Constitutional right to defend herself in front of a jury.

The *Brown* Court painstakingly explained that the "punitive use" of a fine, not merely the amount of a fine, determines whether a fine is criminal in nature. *Brown*, 280 at 103-05. In light of this concept, all one needs to know about the "penalty" factor in Defendant's case is that she faced, upon conviction of a violation, an imposition harshest possible fines on her underlying misdemeanor charges. 161.566(2)-(3). The legislature literally determined the maximum amounts with which it was appropriate to punish a misdemeanor, and authorized courts to impose those fines on defendants convicted of violations. Nothing is non-criminal about a penalty the legislature has explicitly adjudged to be criminal.

If the *Fuller* Court erred at all, it was in identifying $1,000.00 (in 1977 dollars) as the line at which a fine becomes criminal in nature, adjusting for inflation, and determining that a $6,500.00 fine was criminal in nature, while a $1,200.00 fine was not. 252 Or App 398. Such an analysis ignores the many complexities of *Brown*'s penalty factor.

C. It is difficult to overestimate the "punitive significance" of being officially branded a thief.

Under *Brown*, the test for whether a proceeding, penalty, conviction (and arguably

arrest) carries enough punitive significance to render it criminal nature turns on its level of "stigmatizing or condemnatory significance." 280 Or. 106. True, there is an "unavoidable" measure of difficulty in this test, "since the significance of a law may differ in the eyes of legislators, of defendants, and of the general public [and] their views can change with time[.]" *Id.* But the nature of the "punitive significance" test is no more difficult or less objective than determining whether a person acted "reasonably," one of the hallmark jurisprudential tests in American law also subject to shifting moods and perceptions.

More importantly, it is far less difficult to perceive that theft charges and convictions are accompanied by serious social stigma and condemnation. As noted *supra*, the offense of theft predates the common law, and it is difficult to conceive of a society that could avoid a descent into chaos without establishing some kind of property laws, and criminalizing those who transgress them. In our society in particular, it is common knowledge that being branded a thief will negatively impact a person's ability to maintain gainful employment, receive credit, be insured against liabilities, find a place to live, and even maintain the trust and approval of family and friends.

Nonetheless, the State maintains that a prosecutorial election not to treat an instance of theft as a misdemeanor effectively destigmatizes the offense. It would appear that the State drastically overestimates the ability of a local district attorney to impact the hearts and minds of the community of Oregon about an act merely by

renaming it. The State offers no evidence that the general public would regard a violation theft as different from a misdemeanor theft, nor any rational reason that it should.

Indeed, it is difficult to underestimate the stigma and condemnation that accompanies being branded a thief, and, given the importance the factor plays in determining criminality in nature, it should not be overlooked. Indeed, it should be given special consideration in light of the fact that Defendant was charged not merely with Third Degree Theft, but Attempted First Degree Theft – the worst kind of theft by statutory definition.

D. Anyone who has been subject to "arrest and detention" has, by law, been ensnared in a criminal prosecution.

In holding that the right to counsel under Article 1, Section 11 of the Oregon Constitution attaches upon arrest, this Court wrote in *State v. Spencer*,

> A person taken into formal custody by the police on a potentially criminal charge is confronted with the full legal power of the state, regardless of whether a formal charge has been filed. Where such custody is complete, neither the lack of a selected charge, nor the possibility that the police will think better of the entire matter changes the fact that the arrested person is, at that moment, ensnared in a "criminal prosecution."

305 Or 59, 73, 750 P.2d 147 (1988). This statement comports with the actual *Brown* factor for determining criminality in nature – "arrest and detention." No pretrial practices the state decides to employ after it arraigns and releases a defendant can affect the reality that she was likely already subjected to the use of handcuffs and other

physical restraints, a search of her person, booking, fingerprinting, mugshots and temporary incarceration. *See Brown*, 280 at 108. Nor should it be of any comfort to a person subjected to such measures that, if she fails to appear for court after her release, that she may be summarily convicted without any trial at all. ORS 151.566(3).

In light of the criminal nature of arrest and detention alone, it is important to note the statutory scheme that allows misdemeanors to be treated as violations will almost always begin as criminal proceedings. After all, "A peace officer may arrest a person for a crime at any hour of any day or night." ORS 133.235(1). Under ORS 133.235(2), a peace officer may do so wherever that peace officer is employed "regardless of the situs of the offense." Under ORS 133.235(4), a peace officer may "use physical force" in so doing, and under ORS 133.235(5), may even "enter premises in which the officer has probable cause to believe the person to be arrested to be present.".

In other words, because the legislature's initial judgment about misdemeanors are that they are crimes, under ORS 133.235 §§ (1), (2), (4) and (5), misdemeanor suspects face forcible arrest at almost any time and any place. In stark contrast, "A person may not be arrested for a violation except" under very specific conditions. ORS 133.235(7); ORS 153.039(1); ORS 810.410(1)(g).

Defendant in the instant case was arrested and briefly incarcerated. As such her case began as a criminal proceeding, and nothing that transpired thereafter effectively decriminalized it.

E. Defendant has not changed her position that she faced no "collateral consequences" from her conviction.

Collateral consequences are "additional burdens and losses that flow automatically from a judgment." *State v. Selness/Miller* 54 P3d 1025, 1036, 334 Or 515 (2002). Defendant must concede that, due to ORS 153.008(2)'s express declaration that no such legal disabilities will so flow, the "collateral consequences" factor is perhaps the only *Brown* factor over which the prosecutor has perfect control.

Defense's concession, however, also serves to highlight a fundamental problem with the misdemeanor-turned-violation scheme: While it is not controversial that the legislature is empowered to decriminalize any offense is wants to, it is largely untenable that it can do so successfully by pretending to endow district attorneys with this legislative power.

CONCLUSION

This Court should affirm *State v. Fuller*, 252 Or App 391, 287 P3d 1263 (2012), if for no other reason, because the State's main argument against it is untenable. The *Brown* decision does not give rise to a legislative presumption of non-criminality in all proceedings that lack the potential to impose a penalty as severe as imprisonment. Moreover, properly analyzing the *Brown* factors leads to the conclusion that Defendant did indeed endure a criminal prosecution for theft. This Court should affirm the the Court of Appeals ruling in *State v. Fuller.*

Respectfully submitted,

/s/ Karen J. Mockrin
KAREN J. MOCKRIN, #102445
karen@northwestlawoffice.com

Attorney for Respondent on Review
Tawanna Fuller

CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on May 8, 2013, I directed the response Brief on the Merits of Respondent on Review, Tawanna Fuller, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system. I further certify that, in filing the Brief on the Merits of Respondent on Review, I served that brief upon Assistant Attorney General Jeremy C. Rice, Attorney for Petitioner on Review, by causing the electronic filing system to forward the electronically filed Brief to him and his office: Jeremy C. Rice, Assistant Attorney General, Department of Justice 1162 Court St. NE, Salem, OR 97301

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(d); and (2) the word count of this brief, as described in ORAP 5.05(2)(a) is 8,774 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 its footnotes as required by ORAP 5.05(2)(b).

/s/ Karen J. Mockrin
KAREN J. MOCKRIN #102445
Attorney at Law
2075 SW 1st Ave., Ste. 2J
Portland, OR 97201
Telephone: (503) 421-8169
Email: karen@northwestlawoffice.com

Attorney for Respondent on Review
Tawanna Fuller