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Appellate Court Records

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.	)	Supreme Court No. S060808 Court of Appeals No. A147724 Multnomah County Circuit Court No. 1007-48130

BRIEF ON THE MERITS OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF OREGON, INC.

On Petition for Review of the Decision of the Court of Appeals
On Appeal from a Judgment of the
Multnomah County Circuit Court
The Honorable Michael Zusman, Judge

Decision filed: September 26, 2012
Author of Opinion: Honorable Rex Armstrong
Joining in Opinion: Honorable Rick T. Haselton & Rebecca A. Duncan

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The question here is whether this case is a "criminal prosecution" within the meaning of Article I, section 11, of the Oregon Constitution. If it is, the parties agree, then defendant is entitled to a jury trial and the "beyond a reasonable doubt" standard of proof. If it is not, then those rights do not apply. The decision below held that this is a criminal prosecution and that those rights do apply. That result is correct and follows from *Brown v. Multnomah County Dist. Ct.*, 280 Or 95 (1977), which all parties agree sets the applicable standard. The American Civil Liberties Union of Oregon, Inc. (ACLU), urges this court to affirm the decision below. *State v. Fuller*, 252 Or App 391 (2012).

I. ORS 161.566 and the facts of this case

Defendant was arrested and incarcerated. She was then charged with third-degree theft and attempted first-degree theft, both misdemeanors. At arraignment, the state elected to treat those charges as violations pursuant to ORS 161.566(1). The court denied defendant's motions for trial by jury and the "beyond a reasonable doubt" standard of proof, and found that the state had proved its case by a preponderance of the evidence.

Under ORS 161.566(1), "a prosecuting attorney may elect to treat any misdemeanor as a Class A violation." The state merely needs to do so by the defendant's first appearance. *Id.* The violation is then prosecuted without a jury or appointed counsel, the standard of proof is by a preponderance of the evidence, and various other rights of criminal defendants disappear. All of

those changes save the state money. *See State v. Thomas*, 311 Or 182, 186 (1991) (recognizing that ORS 161.565, the predecessor of ORS 161.566, "was a cost-saving measure adopted to avoid the need to appoint counsel for indigent defendants"). The switch from misdemeanor to violation also benefits defendants because, unlike with misdemeanors, violation convictions cannot lead to incarceration.

But those benefits come at a cost to the defendant, who must give up significant procedural safeguards against erroneous conviction. *See State v. Harrell*, 353 Or 247, 261-62 (2013) ("As a general matter, the right to trial by jury in criminal matters is fundamental to the American system of justice."); *Miller v. Lampert*, 340 Or 1, 12 (2006) (the "right to counsel" is "a bedrock procedural element essential to fundamental fairness"); *Thomas*, 311 Or at 184 ("After a trial to the court, the trial judge, as factfinder, stated on the record that he would have found defendant not guilty had he required proof beyond a reasonable doubt but, because he used the standard of proof by a preponderance of the evidence, he found defendant guilty.").

A defendant might decide that the costs of violation treatment outweigh the benefits. This defendant so decided. But ORS 161.566 did not give her a say in the matter. The choice lies solely with the state. That is where Article I, section 11, comes in. The state has discretion in fashioning the law, but only insofar as it does not "depart[] from a constitutional standard, in this case

primarily the standards prescribed by article I, § 11." *Brown*, 280 Or at 101.

II. This case is a "criminal prosecution" under Article I, section 11.

Article I, section 11, provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed." The Due Process Clause of the Fourteenth Amendment also guarantees in such prosecutions that proof of guilt must be beyond a reasonable doubt. *Brown*, 280 Or at 99.

In *Brown*, this court considered five factors to determine whether or not a proceeding is a "criminal prosecution" under Article I, section 11. Those factors are (1) the type of offense; (2) the severity of the penalty for the offense; (3) the collateral consequences of a conviction; (4) the punitive significance associated with the offense: and (5) the applicability of pretrial practices ordinarily used in the enforcement of criminal laws. 280 Or at 102-08. "All [of those factors] are relevant, but none is conclusive." *Id.* at 102.[1]

Each of those factors supports the conclusion that this is a criminal prosecution. Below, the ACLU discusses each of the factors as defendant experienced them.

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[1] "[T]his court's case law demonstrates that, even if an ostensibly civil proceeding can be characterized as a criminal prosecution under *Brown*, an applicable historical exception to Article I, section 11, can exempt such a proceeding from the safeguards set out in that provision." *Delgado v. Souders*, 334 Or 122, 139 (2002) (criminal contempt is such an exception). The state does not assert the existence of any such exception here.

A. The pretrial practices are criminal.

In *Brown*, this court held that trial for driving under the influence of intoxicants (DUII) was a "criminal prosecution," in part because "the Oregon Vehicle Code retains many of the pre-trial practices used in the enforcement of criminal laws." 280 Or at 108. By "practices," the court was referring not only to those parts of the process which post-date arraignment, but also to pre-arraignment events such as arrest and "the possible use of physical restraints, such as handcuffs, a search of the person, booking (including the taking of fingerprints or photographs), and detention in jail if not released by police officers, or at a later time by a magistrate" or "unless bail is made." *Id.* That process "comports with criminal rather than with civil procedure and is surely so perceived by the public." *Id.*

This factor weighs in defendant's favor, just as in *Brown*. As noted, defendant was arrested and incarcerated and charged with two misdemeanors. It was not until arraignment that the state elected to treat the misdemeanors as violations. It may be true that, after arraignment, this case was governed by civil, not criminal, procedure. But Article I, section 11, rights attach at arrest, *see State v. Davis*, 350 Or 440, 477 (2012) (so recognizing), and the arrest and attendant events here are sufficient to put this factor on defendant's side of the scale. *See Brown*, 280 Or at 108 (focusing on pre-arraignment procedures, not post-arraignment procedures); *State v. Selness*, 334 Or 515, 537 (2002) (same);

Easton v. Hurita, 290 Or 689, 694-98 (1981) (indicating that it would be unconstitutional to arrest and jail a person subject to bail for a traffic violation).

This court's focus on pre-arraignment procedure makes sense because criminal defendants' trial rights are mostly constitutional in origin, and criminal defendants enjoy limited rights between arraignment and trial. *See, e.g.*, *State v. West*, 250 Or App 196, 203 (2012) ("A criminal defendant's constitutional entitlement to discovery is limited * * *."). The state identifies only one post-arraignment procedural advantage for those facing violations rather than misdemeanors: failure to appear is not a crime, and a defendant cannot be arrested for it, if the defendant is charged with a mere violation. But that is cold comfort for a person who has already been arrested and suffered the emotional, social, and sometimes physical harm incident to arrest. *See Pierson v. Multnomah County*, 301 Or 48, 52 (1986) ("We realize that the trauma of an arrest and jail booking and the stigma that flows from an arrest are well known * * *.").

Notably, a person may be arrested for a misdemeanor, ORS 133.310(1)(b), and held in jail for 36 hours or more before arraignment, ORS 135.010, and for up to 180 days between arraignment and trial, ORS 136.290; ORS 136.295(4)(a). Not so with a violation. ORS 153.039(1). If the state had charged defendant with a violation from the beginning here, this factor would weigh in favor of the state.

B. Theft is a criminal type of offense.

The analysis of whether an offense is of a criminal or civil type focuses on whether it was a crime at common law (or for a long time thereafter) and whether it involves a *mens rea* element or is a strict liability offense. *Brown*, 280 Or at 102. *See also In re Harris*, 334 Or 353, 360-61 (2002) (violation of lawyer disciplinary rule was not criminal type of offense because bar disciplinary proceedings exist alongside criminal prosecutions).

Defendant was charged with third-degree theft, a Class C misdemeanor, ORS 164.043(2), and attempted first-degree theft, a Class A misdemeanor, ORS 164.055(3); ORS 161.405(2)(d). Those crimes involve the most culpable of all mental states: intent. *See* ORS 164.015 (theft requires an "intent to deprive another of property or to appropriate property" of another); ORS 161.405(1) ("A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime."). The *mens rea* element favors defendant. *See City of Portland v. Tuttle*, 295 Or 524, 530-31 (1983) (ostensible "violation" was a crime, in part because it required proof of "[t]he culpable mental state of 'knowledge'").

In addition, as the Court of Appeals recognized over twenty years ago:

> The prohibition against theft is a cultural value that predates our constitutions and the common law. The prohibition has been carried into statutory enactments to the extent that, in Oregon today, ORS chapter 164 contains at least nine statutory offenses

> that include the word "theft" in their definition. At common law and by statute, a prosecution for theft has always required proof of "*mens rea*," proof of guilt beyond a reasonable doubt and the right to a jury trial. Those factors weigh in favor of the argument that theft III, as a violation, retains its criminal characteristics.

State v. Thomas, 99 Or App 32, 35 (1989) (footnote omitted), *adh'd to on recons*, 101 Or App 551 (1990), *aff'd*, 311 Or at 182 (1991).

It also is significant in this regard that ORS 161.566(1) does not transform the proscribed conduct into violation-only conduct. The exact same conduct continues to give rise to criminal liability unless and until the prosecutor, unilaterally, elects "to treat" a particular defendant's crime as a violation. ORS 161.566(1). That is not a "fully carried out" decriminalization of theft; the unilateral election "did not free this offense from the punitive traits that characterize a criminal prosecution." *Brown*, 280 Or at 110.

C. The punitive significance of theft is criminal.

In analyzing the "punitive significance" factor, this court in *Brown* looked to both legislative intent and the stigma of condemnation that attends the offense. *Id.* at 105-08. As this court explained: "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." *Id.* at 106. This court held that a DUII prosecution was a criminal prosecution, in part because the

legislative history indicated "a legislative desire to 'decriminalize' the procedure rather than the offense." *Id.* at 108.

1. The legislature did not intend to decriminalize theft.

The legislative intent is the same here. The intent behind the theft statutes is to punish it. These offenses are crimes unless and until the prosecutor unilaterally elects to treat them as violations. ORS 161.566. Even if one were to look at the legislative intent behind ORS 161.566, it is to save money by skimping on process, not to decriminalize misdemeanors generally. *See Thomas*, 311 Or at 186 (ORS 161.565 "was a cost-saving measure adopted to avoid the need to appoint counsel for indigent defendants"). ORS 161.566 is another example of "a legislative desire to 'decriminalize' the procedure rather than the offense." *Brown*, 280 Or at 108.

Judge Edmonds correctly recognized as much twenty years ago:

> [T]he legislature is free to define what is criminal and what is not. But that is not what has happened when the legislature enacted ORS 161.565(2). No conduct that was once a crime is declared to be lawful. Rather, under the statute, a criminal charge commences as a criminal proceeding with all its punitive traits intact and purportedly changes in the midst of the process. If the prosecutor elects, the prosecution ends up being classified as a non-criminal proceeding, potentially resulting in a conviction for a "violation." The change in many ways is semantical, not substantive. A defendant can be arrested, must be arraigned, and can be required to post security for future court appearances before the prosecution elects to charge him with a violation. Even after the election, the charge is still prosecuted by the state who can call agents of the government who will accuse the defendant of conduct that would otherwise be considered criminal. The defendant who desires to be vindicated must appear and defend himself in an

> environment identical to what would have occurred had the prosecutor not made his election. * * *
>
> The subject matter of the trial is about conduct that most citizens would consider criminal when prosecuted by the government. For instance, Patty Thomas was charged with theft. Defendant is charged with attempted assault. The public's understanding of the implication of those charges comes from the fact that theft and assault were crimes at common law. There can be no doubt that the framers of section 11 contemplated that when the state prosecuted defendants for theft and assault, those prosecutions fell within the meaning of the phrase "in all criminal prosecutions" in section 11. That understanding will not be altered by changing the nomenclature describing the conviction. In sum, the only material difference between this proceeding and a criminal proceeding, when their punitive traits are evaluated, is in the nature of the sanction that can be imposed if conviction results.

State v. Rode, 118 Or App 665, 672-73 (dissent), *rev dismissed*, 318 Or 338 (1993) (footnote omitted). *See also id.* at 672 n1 ("Constitutionally, the legislature could decide that some or all forms of theft are no longer unlawful, but that is not what our legislature has done. Even the theft of $1 can constitute a class C misdemeanor. ORS 164.043.").

2. Theft carries a profound social stigma.

Judge Edmonds also recognized the profound social stigma that accompanies a charge and conviction for theft: "So long as the legislature declares all thefts to be unlawful, the public perception that a crime has been committed will exist * * *." *Id.* at 672 n1. Judge Edmonds continued:

> Conceivably, [defendant's] employment, her standing and reputation in the community and her record as a law abiding citizen all were jeopardized because the Theft III charge was brought against her. If she had been convicted, the onus of that

> conviction would trail after her for the rest of her life whether the conviction was termed a conviction for "Theft III," a "violation," or "Theft III," a "misdemeanor." Every employment application, credit request, insurance form, or other ordinary life activity would be potentially impacted by what had occurred as the result of the complaint of one person in her past.

Id. at 671-72 (dissent).

A theft prosecution is not a purely regulatory matter, such that the attendant stigma is outweighed by a non-punitive purpose. *Cf. Harris*, 334 Or at 363 ("We agree that disbarment carries a stigma, particularly within the legal profession, but we note that that stigma is an unavoidable consequence of the means by which this court is able to protect the public from harm and preserve the integrity of the judicial system."). Nor is the stigma a "vague public condemnation" equally associated with "indisputably civil" proceedings. *Selness*, 334 Or at 539. It is instead a profound "stigma of the individual that marks a [theft] proceeding as criminal in nature in the constitutional sense." *Id.*

Conviction is not all that matters here. Significant stigma flows from arrest alone. *See Pierson*, 301 Or at 52 ("We realize that the trauma of an arrest and jail booking and the stigma that flows from an arrest are well known * * *."). Arrest records are available for employers, landlords, licensing agencies, and others to review. *See* ORS 181.560 (providing for release of arrest records to those who ask). When the Department of State Police releases a person's arrest record, that record includes not only the date of the arrest but also the "offense for which arrest was made," ORS 181.560(1)(b)(B), which in

this case was misdemeanor theft.

92% of employers subject their job candidates to criminal background checks. Equal Employment Opportunity Commission, EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, at pt. III.B (April 25, 2012) ("EEOC Guidelines"), *available at* www.eeoc.gov/laws/guidance/arrest_conviction.cfm. Landlords often do so with potential tenants. *See Landers v. Chicago Housing Auth.*, 936 NE2d 735 (Ill Ct App 2010) (landlord denied applicant housing because of his arrest record). An applicant for admission to the state bar must answer this question: "Including any matters that may have been expunged, except expunged juvenile matters, have you ever been cited, *arrested*, charged or convicted of a criminal offense?" Oregon State Bar, Application for Admission to Practice Law in the State of Oregon, p. 10 (July 2013), *available at* www.osbar.org/_docs/admissions/ExamApplication.pdf (emphasis added). If the answer is "yes," the applicant must then identify "each citation, charge, *arrest* or conviction, whether stemming from the same facts or not." *Id.* at p. 11 (emphasis added).

This information is sought because of the stigma of arrests, despite the rule that arrests are not proof of criminal conduct and the presumption that one is innocent until proven guilty. Recognizing this stigma, ORS 137.225(1)(b) provides for expungement of arrest records. Nonetheless, arrest records often

"include inaccuracies" and "continue to be reported even if expunged or sealed." EEOC Guidelines at pt. V.B.2. That is one reason why at least 13 states prohibit employers from reviewing job applicants' arrest records. *Id.* at pt. V.B.2. Oregon is not one of those states, however. Oregon law merely provides that, when the state gives out arrest records, it must inform the arrestee that "discrimination by an employer on the basis of arrest records alone may violate federal civil rights law." ORS 181.557(1)(b)(B); ORS 181.560(1)(a)(C).

The government is not the only depository of arrest records. Numerous counties put their arrest records online, complete with mug shot and identifying information, where anyone can download them.[2] The City of Portland's Facebook page also contains mug shots and other information about people who have been arrested. www.facebook.com/portlandpolice. This, in turn, breeds websites such as www.pdxmugshots.com and www.bustedmugshots.com. A Google images search readily reveals this defendant's mug shot at www.pdxmugshots.com/mug/tawanna-d-fuller. Beneath defendant's picture is a description of one crime she was charged with: "THEFT III (C-Misdemeanor)." The webpage permits the user to click the names of other arrestees whose mug shots are apparently next to defendant's in the site's database; those pictures are of people who have been arrested for assault,

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[2] *See, e.g.*, www.e-airs.org/eAirsInternet/InmateInformationList.aspx (Lane County); www.co.marion.or.us/SO/Institutions/inmateoffender (Marion County); www.mcso.us/PAID (Multnomah County).

strangulation, burglary, and possession of cocaine and heroin. Some websites charge a fee to remove mug shots. HB 3467 (2013), recently passed by the House, would force those websites to do so for free if a misdemeanor was reduced to a violation. But defendant would not have to worry about any of this if she had been charged with a violation from the start. If that had occurred, she would simply have been issued a citation and could not have been arrested. ORS 153.005(4); ORS 153.039(1).

For all of the foregoing reasons, the stigma associated with theft weighs in favor of the conclusion that even "violation theft" is a criminal prosecution.

D. The penalties associated with theft are criminal.

"The prescribed penalty is generally regarded as the single most important criterion, at least when it involves imprisonment." *Brown*, 280 Or at 103. Potential "'imprisonment' cannot be used as a 'punishment' for a civil offense," yet "the absence of potential imprisonment does not conclusively prove a punishment non-criminal." *Id.* "[A] large fine may be as severe, in practical terms, as a short imprisonment, and so strikingly severe as to carry the same punitive significance." *Id.* at 104. In *Brown*, the maximum fine for DUII was $1,000, and this court held that that amount, "if not in itself a criminal rather than civil penalty, must be at the margin of legislative discretion. At the least it is strong evidence of the punitive significance that the legislature meant to give this fine." *Id.* at 105.

Brown was decided in 1977. $1,000 then amounts to approximately $3,800 today.[3] There is no reason to think that amount is not still "at the margin of legislative discretion." It still amounts to about one-third of the annual income of a person living at the poverty line.[4] And about the same percentage of people live at or below the poverty line today as in 1977,[5] giving stability to the margin adopted in *Brown*. For 1.3 million Oregonians today, a $3,800 fine is two months' worth of wages – not discretionary income.

ORS 161.566(2) (2009) provided: "The maximum fine that a court may impose upon conviction of a violation under this section may not exceed the amount provided in ORS 161.635 for the class of misdemeanor receiving violation treatment." ORS 161.635(1)(a) sets $6,250 as the maximum fine for a Class A misdemeanor (such as the attempted first-degree theft with which defendant was originally charged). ORS 161.635(1)(c) sets $1,250 as the maximum fine for a Class C misdemeanor (such as the third-degree theft charge).[6]

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[3] www.bls.gov/data/inflation_calculator.htm.

[4] The poverty threshold in 1977 was $3,267 for a household of one man under age 65; that threshold is $11,945 today for a similar household. www.census.gov/hhes/www/poverty/data/threshld/index.html.

[5] In 1977, that description fit 11.6% of the population; it now fits 15% of the population. www.census.gov/hhes/www/poverty/data/historical/hstpov5.xls. Then as now, about one-third of the population earned an income twice the poverty line; for those people, the *Brown* margin would cost them one-sixth of their annual income. Approximately 3.9 million people live in Oregon. www.quickfacts.census.gov/qfd/states/41000.html.

[6] Effective March 27, 2012, the maximum fine for a Class A violation is

The $6,250 fine that defendant faced for a theft "violation" is far beyond the $3,800 fine that is "at the margin of legislative discretion." *Brown*, 280 Or at 105. "At the least it is strong evidence of the punitive significance that the legislature meant to give this fine." *Id.* The $1,250 fine is admittedly below the margin that this court recognized in *Brown*. Nonetheless, it represents over a month's worth of wages for a person living at the poverty line. For such a person, the fine "may be as severe, in practical terms, as a short imprisonment, and so strikingly severe as to carry the same punitive significance." *Id.* at 104.

The punitive significance of the fine is not only tangible, it also is part of the legislative scheme. ORS 161.566(2) (2009) equates the maximum fine for a violation with the maximum fine for a misdemeanor. That "express correlation" is "significant," *Fuller*, 252 Or App at 398, because it shows that, in the legislature' view, the violation is just as serious as the crime. (We are talking about the exact same conduct, after all.) This is not a case where the fine serves a regulatory purpose beyond punishment. *Cf. Selness*, 334 Or at 358-59 (forfeiture process serves "several remedial purposes" and "ensure[s] that forfeitures are not excessive in relation to those purposes"); *Harris*, 334 Or at 361-62 (costs award in bar disciplinary proceeding "is not a penalty assessed to punish the lawyer for past violations or deter future violations"; it "connotes only that a party did not prevail").

$2,000. 2012 Or Laws, ch 82, § 2; ORS 153.018(2)(a).

E. The collateral consequences factor is neutral.

The collateral consequences factor "refer[s] to additional burdens and losses that flow automatically from a judgment in a proceeding and that amount to 'another form of punishment.'" *Selness*, 334 Or at 535. If the burden or loss instead serves a "regulatory" purpose, then it is not criminal. *Brown*, 280 Or at 105 (license suspension regulatory, not punitive). *See also Selness*, 334 Or at 539 (same for forfeiture); *Harris*, 334 Or at 362 (same for loss of professional license).

Under ORS 153.008(2), "[c]onviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime." That may be true in many respects. It is not clear, however, that a conviction for "violation theft" would not be treated as a crime of moral turpitude under federal immigration laws, subjecting a defendant to deportation. *See United States v. Esparza-Ponce*, 193 F3d 1133, 1136 (9th Cir 1999) ("It has been long acknowledged by this Court and every other circuit that has addressed the issue that crimes of theft, however they may be technically translated into domestic penal provisions, are presumed to involve moral turpitude.") (quoting *Chiaramonte v. INS*, 626 F2d 1093, 1097 (2d Cir 1980)); *id.* ("Theft has always been held to involve moral turpitude, regardless of the sentence imposed or the amount stolen.") (quoting *Soetarto v. INS*, 516 F2d 778, 780 (7th Cir 1975)). This factor is neutral in the analysis.

F. Analysis of the *Brown* factors

As indicated above, four of the five *Brown* factors indicate that defendant's prosecution for second-degree criminal trespass is a "criminal prosecution" within the meaning of Article I, section 11. The fifth factor is neutral. Thus, the Court of Appeals correctly held that defendant is entitled to a jury trial and the "beyond a reasonable doubt" standard of proof.

The state argues that the absence of imprisonment as a potential punishment for a violation should create a presumption that this is no criminal prosecution. That is similar to what the state argued in *Brown*. 280 Or at 103 ("[T]he state's main argument is that the line between traffic infractions and traffic crimes can be defended by [the penalty] criterion alone."). This court rejected that argument, explaining that, while "'imprisonment' cannot be used as a 'punishment' for a civil offense," "the absence of potential imprisonment does not conclusively prove a punishment non-criminal." *Id.* *See also id.* ("The prescribed penalty is generally regarded as the single most important criterion, *at least when it involves imprisonment.*") (emphasis added). This court went on to highlight that *all* of the five criteria "are relevant, but none is conclusive on what we believe is the ultimate determination." *Id.* at 102. This court has consistently adhered to that view in the years since. *See, e.g.*, *Pendleton v. Standerfer*, 297 Or 725, 729 (1984) (noting that, while the federal right to counsel in misdemeanor cases "extends only to those cases in which

actual imprisonment is imposed," "Article I, section 11 is not so limited" and the *Brown* factors "will determine whether the procedure is criminal"); *Selness*, 334 Or at 358-59 (engaging in *Brown* analysis where imprisonment was not a potential penalty); *Harris*, 334 Or at 361-62 (same).

III. The effect of ORS 161.566 must be analyzed as to each offense.

There is a theme running through the state's brief urging this court to hold broadly that no misdemeanor treated as a violation under ORS 161.566 can ever be a "criminal prosecution" under Article I, section 11. That theme is incorrect. This court has already held that ORS 161.566 is not a "decriminalization" of all misdemeanors. *See Thomas*, 311 Or at 186 n5 ("Neither did the legislature in this instance attempt permanently to 'decriminalize' all charges of theft or all misdemeanor charges.").

Legislative changes since *Thomas* have further undermined the state's theme. In *Thomas*, this court held that the statutory scheme *retained* for violations the "beyond a reasonable doubt" standard of proof. *Id.* at 185-86. Based on the retention of that criminal procedure, this court distinguished *Brown*, saying: "This is not a case where the legislature sought to 'decriminalize the procedure rather than the offense.'" *Id.* at 186 n5 (quoting *Brown*, 280 Or at 108) (some quotation marks omitted). After *Thomas*, the legislature amended the statutory scheme such that now the state bears only "the burden of proving the charged violation by a preponderance of the

evidence." ORS 153.076(3). In other words, the state has "decriminalized" the procedure; *Brown* is no longer distinguishable.

To be sure, this court stated in *State v. Swanson*, 351 Or 286, 291-92 (2011), that "[v]iolations under our current criminal code are charges that have been 'decriminalized'" and "are not subject to the constitutional procedural protections that are required for crimes." But this court made those statements in the context of discussing a pure violation, careless driving. ORS 811.135. *Swanson*, unlike *Thomas*, did not involve misdemeanors that have been treated as violations under ORS 161.566. *Swanson*'s statements are therefore *dictum* as applied to this case. At any rate, *Swanson* cited *Brown* approvingly as a case "discussing constitutional implications of decriminalizing traffic infractions." 351 Or at 291. *Brown* set forth the test for determining "whether an ostensibly civil penalty proceeding remains a 'criminal prosecution' for constitutional purposes." 280 Or at 102.

IV. *Brown* sets the applicable standard.

A. All parties agree that *Brown* sets the applicable standard.

In its petition for review, the state urged this court to reconsider and modify *Brown*. The state abandoned that position in its merits brief, however. *See* p. 12 n4 (admitting that, because this court has "analyzed Article I, section 11 according to the *Priest* framework in recent years," and *Brown* has become embedded in this court's Article I, section 12, analysis as well, "a renewed

Priest analysis is not required in this case") (citing *Priest v. Pearce*, 314 Or 411 (1992)). The state now believes that *Brown* is consistent with the understanding of Article I, section 11, that it favors. *Id.* at p. 12. The state merely asserts that the Court of Appeals misread *Brown*. *Id.* at p. 15.

The state's change in position is a sufficient reason for this court to dismiss the petition for review. *See State v. Blok*, 352 Or 394 (2012). In *Blok*, a criminal defendant sought mandamus, arguing that the trial court could not forbid him from having contact with his father as a condition of pretrial release. *Id.* at 395. This court issued an alternative writ of mandamus to consider that argument, which the defendant subsequently briefed. *Id.* at 398-99. At oral argument, however, the defendant "essentially abandoned that position" and adopted a different one: that the trial court could impose the no-contact provision only in certain circumstances which were not present in that case. *Id.* at 399. Based on the defendant's change in position, this court dismissed the writ. *Id.* at 400. As this court explained:

> This court's exercise of its mandamus power is discretionary. We issued the alternative writ to consider the legal question that relator asserted in his petition and, later, in his brief * * *. Relator now has conceded that [issue] and has shifted his focus to [a different issue]. Because that is not the legal question that was presented in the petition or briefed in this court, we exercise our discretion to dismiss the alternative writ.

Id. (citations omitted).

As with mandamus, this court has "discretion to consider questions on

review." *Schwarz v. Philip Morris Inc.*, 348 Or 442, 455 (2010). *See also* ORAP 9.07 ("The court retains the inherent authority to allow or deny any petition for review."). Given the state's change in position, this court should, as in *Blok*, dismiss the state's petition or, alternatively, adhere to *Brown*.

B. *Brown* is the correct standard.

Brown has become a bedrock of Oregon constitutional law. This court has cited it approvingly dozens of times and has followed its test in applying Article I, Section 11. *See, e.g.*, *Harris*, 334 at 360-63; *State ex rel. Redden v. Discount Fabrics, Inc.*, 289 Or 375 (1980).

This court has even done so in the context of a historical analysis of Article I, section 11. *State ex rel. Juvenile Dep't v.* 317 Or 560 (1993). was a juvenile proceeding in which the court's jurisdiction was dependent on its finding that the youth had violated the law. *Id.* at 563. The youth argued that Article I, section 11, conferred a right to a jury trial as to that determination. To answer that question, this court conducted a historical analysis of Article I, section 11, asking "whether, in 1859, when the Oregon constitutional guarantee of a jury trial 'in all criminal prosecutions' was adopted, a person in the child's position would have been entitled to a jury trial." *Id.* at 566.

The answer to that question would be yes, this court explained, if the juvenile proceeding had "the characteristics of a criminal prosecution." *Id.* at

572. *Cf. Brown*, 280 Or at 98 ("[T]he right to a jury trial extends to all offenses if they have the character of criminal prosecutions."). This court discussed characteristics such as the severity of the penalty at issue; the punitive significance associated with the proceeding; and pretrial enforcement procedures such as confinement, mug shot, and fingerprinting. 317 Or at 572-73. This court also considered the collateral consequences of the proceeding, although it did not discuss that factor. *State v. Stewart*, 321 Or 1, 10 n7 (1995) (so recognizing). The "type of offense" factor was irrelevant because a juvenile adjudication was not a conviction of an offense. 317 Or at 569 n9. Those are all of the *Brown* factors.

The fact that considered each of the *Brown* factors in its historical Article I, section 11, analysis is significant: It negates the state's argument in its petition for review here that the *Brown* analysis differs from the historical analysis.[7]

This court also has held that the *Brown* factors are applicable to other constitutional provisions under a historical analysis. *See Selness*, 334 Or at 536 (adopting *Brown* factors as relevant under Article I, section 12 (double

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[7] Interestingly, although this court considered all of the *Brown* factors in it did not mention that it was doing so. Instead, this court cited to *Brown* only to explain that "the criteria relevant to the *Brown* analysis are *offense-specific*, and do not apply to the present challenge." 317 Or at 565 n3 (emphasis added). By that, this court meant that the *Brown* analysis applies only to the review of offenses (crimes and violations). Juvenile proceedings do not provide for conviction of offenses, as noted above.

jeopardy)); *State v. MacNab*, 334 Or 469 (2002) (applying *Brown*'s "punitive significance" factor to Article I, Section 21 (*ex post facto* clause)). *Brown* itself mentioned some of the cases the state relies on for its proffered version of historical analysis. 280 Or at 98 n2. And, while the state asserted in its petition for review that the *Brown* test is too vague and subjective, that test is no more vague or subjective than other tests this court has adopted following a historical analysis. *See, e.g., State v. Wheeler*, 343 Or 652 (2007) (adopting a "shock the moral sense" standard for Article I, section 16 (disproportionate punishment)).

For all of the foregoing reasons, this court should adhere to the *Brown* test under Article I, section 11.

V. Conclusion

Adherence to constitutional standards may provide a disincentive for reduction of charges under ORS 161.566, leading to busier dockets and a costlier criminal justice system. But those pragmatic concerns are not properly part of the analysis. "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.*" *State v. Stoneman*, 323 Or 536, 539 (1996) (emphasis added). "Constitutional guarantees have more substance than that," *Brown*, 280 Or at 102, and the relevant guarantees protect defendants, not the

state.

The state also posits a false dichotomy. The state has other options: it could fully decriminalize the offenses of which defendant was charged by making them pure violations. Or the state could, perhaps, return to the regime that prevailed before 1999 (when the election went from violation to misdemeanor). The state could also reduce the potential fine. But the state cannot continue arresting people for stigmatizing misdemeanors, threatening them with significant fines, and unilaterally slapping the label "violation" on the proceedings and pretending they are not criminal prosecutions under Article I, section 11. The ACLU urges this Court to affirm the decision below.

DATED: May 7, 2013.

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