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 PETITIONER ON REVIEW, STATE OF OREGON

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

Opinion Filed: September 26, 2012
Author of Opinion: Armstrong, P.J.
Before: Armstrong, P.J., Haselton, C.J., and Duncan, J.

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

Attorneys 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, Oregon 97301-4096
Telephone: (503) 378-4402
Email: Jeremy.C.Rice@doj.state.or.us
Attorneys for Petitioner on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Administrative Rules

Other Authorities

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

STATEMENT OF THE CASE

Questions Presented

Defendant was charged with attempted first-degree theft and third-degree theft, both normally misdemeanor offenses. Pursuant to ORS 161.566(1), however, the prosecutor reduced the charges to violations.

(a) ORS 153.076(1) requires that violation proceedings be tried "to the court," "without [a] jury." Does that statute apply to proceedings in which the prosecutor has elected to reduce a misdemeanor offense to a violation?

(b) Article I, section 11, of the Oregon Constitution, provides the right to a jury trial "in all criminal prosecutions." Is a defendant whose offense was reduced to a violation entitled to a jury trial under the Oregon Constitution?

Answers and Proposed Rules of Law

(a) ORS 153.076(1) applies to the prosecution of all violations, including those charged following a misdemeanor arrest but reduced by the prosecuting attorney pursuant to ORS 161.566. Thus, under the pertinent statutes, a jury trial is not available to an offender charged only with a violation-level offense.

(b) Article I, section 11 of the Oregon Constitution does not apply to "petty," non-criminal offenses. The potential penalty predominantly dictates whether an offense is "petty" or "criminal" in nature. A prosecution presenting

no risk of a severe punishment, such as imprisonment, is presumptively not a "criminal prosecution" subject to Article I, section 11. Although other considerations may dictate a different result in some cases, in most cases that do not present a risk of imprisonment or other severe penalty, a jury trial is not required.

Summary of Argument

Defendant was charged with two theft offenses. Pursuant to ORS 161.566, the prosecutor elected to treat both offenses as violations. Defendant claimed entitlement to a jury trial, but the trial court denied that request. The trial court's decision was correct because the pertinent statutes require a bench trial and because the Oregon Constitution does not require more.

ORS 153.076(1) requires that violation proceedings be tried "to the court," "without [a] jury." That statute applies to the prosecution of all violations, including those charged following a misdemeanor arrest but reduced by the prosecuting attorney pursuant to ORS 161.566. Thus, under the pertinent statutes, a jury trial is not available to an offender charged only with a violation-level offense.

Article I, section 11, of the Oregon Constitution, grants defendants a right to a jury trial in all "criminal prosecutions." But Oregon law has long recognized that that provision does not apply to the prosecution of "petty"

offenses. Courts applying that rule look for objective indicators of the seriousness with which society regards the offense. The most important indicator is the penalty authorized upon conviction. If a crime does not carry a criminal penalty—such as imprisonment or a severe fine—it is presumptively petty and Article I, section 11 does not apply.

Defendant was arrested on misdemeanor charges, but the prosecutor, pursuant to ORS 161.566, elected to "treat [the] misdemeanor [charges] as Class A violation[s]." In doing so, the prosecutor effectively "decriminalized" the offenses: the violations became punishable by no more than a fine; imprisonment was not authorized. Consequently, defendant's prosecution was presumptively non-criminal and Article I, section 11 did not apply.

In some cases, other factors may overcome and rebut that presumption. But none of those factors applies here. The fine at issue is reasonable and proportional. The statutory scheme indicates a legislative decision to remove minor, petty offenses from the purview of the criminal law. No collateral consequences arising from conviction indicate criminal treatment. And no other applicable procedures rebut the presumption that the violation proceeding is non-criminal. Essentially, because defendant's violation prosecution posed no risk of a criminal punishment, it was presumptively a non-criminal proceeding. Because no other circumstances related to the prosecution rebut that presumption, defendant was not entitled to a jury trial.

ARGUMENT

Defendant was charged with and convicted of committing two violation-level offenses. She requested a jury trial, but the trial court denied her request. As explained below, the trial court's decision was correct. The pertinent statutes require a bench trial in violation prosecutions and the Oregon Constitutional jury-trial guarantee does not apply. Consequently, this court should affirm the trial court's judgment.

A. Introduction and Background

Oregon law distinguishes between "crimes" and "violations." ORS 161.505 (an "offense" is either a "crime" or a "violation"). A violation is an offense punishable by a fine, but not a term of imprisonment. ORS 153.008. Misdemeanors and felonies are both "crimes." A misdemeanor is a crime punishable by no more than one year of imprisonment, ORS 161.545, and a felony is a crime punishable by more than one year of imprisonment, ORS 161.525. Thus, "violations" and "crimes" are distinct types of offenses, distinguished by the fact that crimes are punishable by imprisonment and violations are not. *See generally State v. Swanson*, 351 Or 286, 266 P3d 45 (2011) (explaining statutory differences between crimes and violations).

ORS 161.566 authorizes a prosecutor to "treat any misdemeanor as a Class A violation." ORS 161.566(1).[1] Thus, even if an offense is denominated a "misdemeanor" in the criminal code, a prosecutor, in her discretion, may elect to charge the offense as a violation instead.

A case proceeding on violation-level charges is different from a criminal proceeding. Defendants in violation proceedings do not receive a court-appointed attorney, and district attorneys are prohibited from appearing on behalf of the state. ORS 153.076(5) (no court-appointed attorney in violation proceedings); ORS 135.050 (court-appointed attorney available in "criminal" proceedings); ORS 153.076(6) (unless defendant retains counsel, district attorney prohibited from appearing in violation proceeding). Proof of guilt in a violation proceeding is by a preponderance of the evidence. ORS 153.076(2). And most significantly here, trial is "to the court," "without [a] jury." ORS 153.076(1).

In this case, defendant was arrested for shoplifting. At the time of her arraignment, the prosecutor filed a District Attorney's Information charging

---

[1] ORS 161.566 has been amended since the time of defendant's offense. Some of the pertinent changes are discussed below. The state has attached a copy of the statutes operative at the time of defendant's offense as an appendix to this brief. Unless otherwise specified, all citations to ORS 161.566 in this brief are to the 2009 version of the statute applicable at the time of defendant's offenses.

defendant with attempted first-degree theft, and third-degree theft, both normally misdemeanor offenses. *See* ORS 164.055(3) (defining first-degree theft as a Class C felony); ORS 161.405(2)(d) (attempting a Class C felony constitutes a Class A misdemeanor); ORS 164.043(2) (defining third-degree theft as a Class C misdemeanor). Pursuant to ORS 161.566, however, the prosecutor reduced both of those misdemeanor charges to violations and the Information was stamped with the designation "Reduced to Violation at Arraignment."

Nevertheless, defendant requested a jury trial. Consistent with the governing statutes, the trial court denied the motion and held a trial "to the court." *See* ORS 153.076(1). Ultimately, defendant was convicted and the court imposed a $300 fine on each count, without additional fees or assessments. (Tr 71; ER-2).

Defendant appealed and the Court of Appeals reversed. *State v. Fuller*, 252 Or App 391, 397-98, 287 P3d 1263 (2012). Relying on this court's decision in *Brown v. Multnomah County*, 280 Or 95, 100, 570 P2d 52 (1977), the Court of Appeals concluded that, despite the statutory requirement that trial be held to the court, Article I, section 11, of the Oregon Constitution, required a jury trial. Considering the type of offenses charged, the penalties available upon conviction, the collateral consequences arising from a conviction, the "punitive significance" of a conviction, and the pretrial procedures associated

with the proceeding, the court concluded that defendant's prosecution, despite involving only violation-level charges, qualified as a "criminal prosecution" for purposes of Article I, section 11.

This court should reverse the Court of Appeals' decision. The court was correct in concluding that the pertinent statutes require a bench trial. But the court erred in concluding that Article I, section 11 requires more.

B. In violation proceedings, the pertinent statutes mandate a trial to bench.

As an initial matter, defendant is not entitled to a jury trial under any statute. ORS 131.001(1) provides that defendants in "criminal" prosecutions "have the right to public trial by an impartial jury." However, as noted, ORS 153.076(1) provides that "violation proceedings shall be tried to the court sitting without jury."

ORS 153.076(1) applies here. Although defendant was initially arrested for committing a misdemeanor offense, the prosecutor elected to treat that offense as a violation. ORS 161.566(1). ORS 153.030(1) dictates that "[t]he procedures provided for in [ORS chapter 153] apply" to the prosecution of all violations, including those charged following a misdemeanor arrest but reduced by the prosecuting attorney pursuant to ORS 161.566. *See* ORS 153.030(1); ORS 153.008(1)(d) (defining types of violations subject to ORS chapter 153). Thus, because the prosecutor elected to treat defendant's offense as a violation

instead of as a crime, ORS chapter 153 controls and, more specifically, ORS 153.076(1) —a procedural provision of ORS chapter 153— requires a bench trial.

ORS 153.005(4) does not compel a different result. As noted, ORS 153.076 requires a bench trial in all "violation proceedings." ORS 153.005(4) defines a "violation proceeding" as a proceeding initiated "by issuance of a citation," which a "reduced" misdemeanor prosecution is not. As explained above, however, ORS 153.030 declares that chapter 153's procedures apply to *all* violations, including, explicitly, violations reduced from misdemeanors pursuant to ORS 161.566. That is, ORS 153.030 explicitly incorporates all of ORS chapter 153's procedures—including those found in ORS 153.076—into proceedings such as this that involve "reduced" misdemeanors. Thus, even if ORS 153.076 on its own does not apply to reduced misdemeanors, ORS 153.030 requires its application in this case.[2]

[2] In addition, other statutory context indicates that ORS Chapter 153's provisions apply to proceedings not initiated by issuance of a citation. *See, e.g.*, ORS 153.058 (initiation of violation proceeding by private party complaint). Overall, the text taken in context demonstrates that ORS 153.076 applies to reduced misdemeanors.

C. Article I, section 11, of the Oregon Constitution, provides for jury trials in "criminal prosecutions," and, consequently, does not apply in this non-criminal case.

Article I, section 11, of the Oregon Constitution, does not require more than the relevant statutes provide. That constitutional provision guarantees a jury trial in "criminal prosecutions." However, as this court has repeatedly explained, it does not apply to "petty," "minor" offenses. Offenses carrying no risk of incarceration, such as violations, are presumptively petty and, therefore, violation prosecutions do not qualify as "criminal prosecutions" under the Oregon Constitution.

Article I, section 11, of the Oregon Constitution, provides, in part:

> In 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; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor[.]

Thus, Article I, section 11's protections apply in all "criminal prosecutions."

Oregon law has long recognized, however, that prosecutions for petty offenses—those deemed "minor" or "trivial"—do not qualify as "criminal" proceedings, and, thus, do not warrant Article I, section 11 protection. *Cranor v. Albany*, 43 Or 144, 148, 71 P 1042 (1903); *see also City of Portland v. Erickson*, 39 Or 1, 62 P 753 (1900) (recognizing same); *Wong v. City of*

Astoria, 13 Or 538, 11 P 295 (1886) (same).[3] The decisions of other jurisdictions are to the same effect. *See, e.g.*, *Duncan v. Louisiana*, 391 US 145, 159, 88 S Ct 1444, 1452, 20 LEd 2d 491 (1968) ("There is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision."); *Byers v. Commonwealth*, 42 Pa 89, 6 Wr Pa 89 (1862) ("petty offences against statutes" do not require jury trial).

The question in this case then is whether petitioner's prosecution for a violation is a "criminal" prosecution, or whether, instead, it qualifies as a prosecution for a "minor" or "trivial" petty offense.

Courts seeking to identify whether an offense is "petty" or "criminal"—and thus whether a proceeding is a "criminal prosecution"—look for "objective indications of the seriousness with which society regards the offense." *Blanton v. North Las Vegas*, 489 US 538, 542, 109 S Ct 1289, 103 LEd 2d 550 (1989); *Brown*, 280 Or at 106-07. Although multiple factors may, in some cases, inform the question, the potential penalty assigned to the offense predominantly dictates the result.

In *Brown*, this court identified five factors relevant to the determination:

---

[3] *See also Brown*, 280 Or 95, 100 ("It is beyond dispute that the legislature may define and enforce obligatory conduct by means other than the criminal law."); *State v. Selness*, 334 Or 515, 54 P3d 1025 (2002) (*in rem* forfeiture with civil, remedial purpose not a criminal punishment for purposes of Article I, section 12).

- The type of offense;
- The potential penalties arising from a conviction;
- The collateral consequences arising from a conviction;
- The "punitive significance" of a conviction; and
- The pretrial procedures associated with the proceeding.

But this court emphasized that those factors do not enjoy equal weight. Indeed, the jury trial right is a procedural protection intended to safeguard against government oppression. *Apodaca v. Oregon*, 406 US 404, 410, 92 S Ct 1628, 32 LEd 2d 184 (1972). When a proceeding presents no risk of such oppression—because the proceeding presents no risk of an oppressive outcome—the jury trial right is not implicated. Consequently, *Brown* emphasized that the potential penalty arising from a conviction is "the single most important criterion" for assessing whether a jury trial is required. 280 Or at 103. Other factors are less important. For example, consideration of the type of offense—its "gravity" or "nature"—is "not very helpful" in determining the seriousness with which society currently regards an offense and it bears little relationship to the underlying purpose of the jury. *Id.* Likewise, reliance on

"whether a judgment carries stigmatizing or condemnatory significance, has been criticized for its difficulty." *Id.* at 106.[4]

Brown is consistent, in that sense, with the approach taken by the United States Supreme Court. In *Frank v. United States*, 395 US 147, 149, 89 S Ct 1503, 1505, 23 LEd 2d 162 (1969), the Court explained that, generally, the penalty affixed to an offense is itself a "judgment about the seriousness of the offense." Consequently, under the Sixth Amendment, the potential penalty associated with an offense is the predominant consideration in determining whether an offense is petty or serious. *Blanton*, 489 US at 543. Other factors—such as the additional factors identified in *Brown*—may be relevant in some cases, but a proceeding that does not present any possibility of a criminal penalty is "presumptively" non-criminal. *Id.*

A correct understanding and application of Article I, section 11, and its interpretation in *Brown*, should lead to a similar result. As this court has explained, a "criminal prosecution" is, at its core, merely a "proceeding to

---

[4] The state notes that *Brown*, naturally, did not employ the constitutional interpretation methodology articulated years later in *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992). This court has, however, analyzed Article I, section 11 according to the *Priest* framework in recent years. *See State v. Davis*, 350 Or 440, 256 P3d 1075 (2011). And this court has incorporated *Brown* into its *Priest* analysis of Article I, section 12. *See State v. Selness*, 334 Or 515, 535, 54 P3d 1025 (2002). Given the analysis in those cases, a renewed *Priest* analysis is not required in this case.

impose a criminal punishment." *State v. Selness*, 334 Or 515, 535, 54 P3d 1025 (2002). And again, the purpose of the jury trial right is to prevent the unjust imposition of such a punishment. *Apodaca*, 406 US at 410. Thus, a case that does not present the possibility of a criminal punishment should be deemed, at least presumptively, to not implicate the jury-trial right. Although other factors may be relevant in some cases, in *most* cases they are not helpful, and certainly not significant enough to override the absence of a criminal punishment. In short, only in the face of significant other "objective indicators" should a proceeding lacking a criminal punishment be deemed a criminal prosecution.

The above analysis invites the question, of course, of what constitutes a "criminal" penalty. It is unlikely that the framers would have understood that term to indicate anything short of *incarceration*. Historically, only the possibility of imprisonment was enough to trigger the right to a jury trial. *See City of Portland v. Erickson*, 39 Or 1, 62 P 753 (1900) (imprisonment marks the difference between a prosecution for a criminal offense and a prosecution for a minor offense); *Wong v. City of Astoria*, 13 Or 538, 11 P 295 (1886) (same). Indeed, as the Supreme Court has explained, most fines "cannot approximate in severity the loss of liberty that a prison term entails." *Blanton*, 489 US at 542. *Brown* may be read as suggesting a similar view. Although *Brown* refused to adopt a *per se* rule defining imprisonment as the line between criminal and non-criminal offenses in all cases, this court suggested that only "large fines" that

are "strikingly severe" are truly comparable to imprisonment in their "punitive significance." 280 Or at 103-04.

Thus, generally, imprisonment is the penalty that, when presented as a possible punishment for an offense, gives rise to a right to a jury trial. This court's cases recognize as well that a severe fine—for example, a fine that is disproportionate to comparable fines for criminal offenses—has the same effect. But the absence of those penalties shows the opposite. The decision to punish an offense through only a proportioned, reasonable fine, and to explicitly remove the risk of imprisonment as a potential penalty indicates that the prosecution is for a petty offense. Because such a prosecution presents little risk of government overreaching or oppression, Article I, section 11's procedural protections are not necessary.

In light of those principles, the appropriate analysis to determine whether a jury trial is required for a particular offense should occur in two steps. First, the court determines whether the proceeding carries the potential for a criminal penalty, such as imprisonment or a severe fine. If not, then the proceeding is presumptively not a "criminal prosecution" for which a jury is required. Second, the defendant may rebut that presumption by reference to *Brown*'s other factors. If those factors indicate that the proceeding is nevertheless "criminal," then a jury trial is required.

D. In *State v. Fuller,* the Court of Appeals erroneously concluded that a jury is required for virtually all misdemeanors reduced to violations.

In *State v. Fuller*, the Court of Appeals applied *Brown* to defendant's violation-level theft prosecution and concluded that a jury trial was required. The court's analysis was erroneous in two ways that warrant discussion and correction: (1) the court gave equal weight to all of *Brown*'s several factors; and (2) the court purported to discern from ORS 161.566 a legislative determination that all misdemeanors warrant criminal treatment.

First, the court weighed all of *Brown*'s factors equally. For example, the court paid as much attention to the "type of offense" as it did to the potential punishment. That analysis is incorrect. For the reasons discussed above, analysis of the potential penalty should predominantly dictate whether an offense is petty or serious. Other factors are—in most cases and, as explained more fully below, in this case—not helpful.

Second, and significantly, the court placed heavy emphasis on the fact that, under ORS 161.566, defendant's charges began as misdemeanors before being reduced to violations. The court explained, correctly, that under ORS 161.566, a misdemeanor offense is, by "default," a criminal offense. 252 Or App at 397. The court understood that scheme as indicating a legislative determination that all misdemeanors—in the abstract—constitute "antisocial behavior serious enough to warrant criminal prosecution." *Id.* But the court's

assessment is not correct. In fact, the legislative scheme shows just the opposite.

The legislature created the "violation" label for minor offenses in the 1971 criminal code. The Code's commentary explains that the express purpose of classifying some offenses as violations was to recognize and acknowledge that some offenses are simply not significant enough to warrant "criminal" treatment. Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report §§ 65-73, 71 (July 1970). Consequently, several minor offenses are denominated as violations. *See, e.g.*, ORS 475.864(3) (possession of less than one ounce of marijuana). In addition, ORS 161.566 provides that, with some exceptions, "a prosecuting attorney may elect to treat any misdemeanor as a Class A violation."

Contrary to the Court of Appeals' conclusion, ORS 161.566 does not indicate a legislative determination that all misdemeanors constitute "antisocial behavior serious enough to warrant criminal prosecution." Instead, the opposite is true. ORS 161.566 indicates a recognition that many offenses, even though normally classified as misdemeanors, are not serious enough to warrant "criminal" treatment. Many offenses are neither serious nor petty in the abstract, but instead may appear serious or petty in light of the circumstances surrounding the case. In allowing prosecutors to treat an offense as either a misdemeanor or a violation, ORS 161.566 recognizes that fact.

Prior to 1999, *former* ORS 161.565(2) provided that a misdemeanor offense "shall proceed as a violation unless the district attorney affirmatively states that the case shall proceed as a misdemeanor." The statute now reverses the sequence; it provides that the offense charged is a misdemeanor unless the election is made to reduce it to a violation. And the legislative history of the 1999 amendment—the amendment creating the current system—reveals that the change in sequence was motivated by nothing more than a desire to simplify and streamline the applicable procedures.[5] The current law has the same purpose and effect as the former: to allow prosecutors to "decriminalize" minor offenses not warranting criminal treatment.

In sum, the procedure by which a misdemeanor becomes a violation simply does not matter. ORS 161.566 recognizes that an offense may be serious or petty depending on the circumstances of the case, and that if petty, an offense does not warrant criminal treatment. In giving prosecutors discretion to treat misdemeanors as violations, the legislature has authorized their

---

[5] The staff summaries of the 1999 amendments are set out in an appendix to this brief. They reflect a focus on procedure, rather than substance. The staff summaries recognize that classes of non-criminal offenses "have existed * * * since Oregon's earliest history." (App-6). They explain that the purpose of the 1999 amendments was to "consolidate[] substantive and procedural provisions into a single ORS chapter," establish "uniform categories and fine amounts," and adopt a form of citation for violations. (App-5-10). Nothing in the legislative history suggests a substantive determination about the seriousness of misdemeanor offenses.

decriminalization. Once decriminalized, they are no longer criminal offenses for purposes of Article I, section 11.

E. Defendant's prosecution for violation-level theft charges was not a "criminal prosecution" for purposes of Article I, section 11.

Applying the concepts established above leads to the conclusion that defendant's prosecution for violation-level theft offenses was not a "criminal prosecution" for purposes of Article I, section 11. Consequently, this court should reverse the Court of Appeals.

First, by electing to treat defendant's thefts as violations, the prosecutor effectively decriminalized the offenses. Treating the offenses as violations removed the risk of incarceration as a penalty, thereby creating a presumption that the proceeding is non-criminal.

None of *Brown*'s other factors requires a different conclusion. The maximum fine for defendant's offenses is $6,250. That potential fine is, admittedly, somewhat significant, but it is not shocking or disproportionate. And it is not so severe as to approximate the loss of liberty created by imprisonment. At the least, the fact that the legislature authorized *only* a $6,250 fine—and did not authorize imprisonment as a punishment—indicates a

legislative determination that the offenses at issue are not so serious that they should be deemed "criminal" offenses for purposes of Article I, section 11.[6]

Further, a violation conviction does not carry any collateral consequences associated with conviction of a crime. *See* ORS 153.008(2) ("Conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime."). Similarly, violations are not counted as part of a person's criminal history, nor are they "person offenses," under the sentencing guidelines. *See* OAR 213-004-0007.

The "stigma" associated with a violation conviction—even a violation conviction following a misdemeanor arrest—is minimal. Because ORS 161.566 authorizes the violation treatment of those offenses that the state

---

[6] The state notes that ORS 161.566 has been amended since the time of defendant's offense. Under the former statutory scheme (applicable in this case), the maximum fine for a reduced misdemeanor was tied to the underlying misdemeanor. *See former* ORS 161.566(2) ("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."). Thus, because defendant's underlying attempted first-degree theft charge would have been a Class A misdemeanor if charged as such, the fine for the violation-level theft was $6,250. *See* ORS 161.635.

Under the current version of ORS 161.566, the applicable fine would be lower. ORS 161.566 now provides a uniform fine schedule for all reduced misdemeanors, regardless of the fine that would apply to the underlying misdemeanor. *See* ORS 161.566(2) (effective March 27, 2012). That new schedule provides for a minimum fine of $435, and a maximum fine of $2,000. *Id.*

deems minor and of little significance, the prosecutorial election to treat defendant's conduct as a mere violation effectively de-stigmatized the offense.

Finally, the pre-trial procedures associated with defendant's case do not indicate a "criminal" proceeding. It is true that defendant was arrested prior to her arraignment. But that is not the only relevant pre-trial procedure applicable in this case. Once a case is designated as a violation, the applicable pre-trial procedures become notably less "criminal." For example, once an action is classified as a violation, the offender cannot be arrested, even for failure to appear. Rather, the court may enter a default judgment or issue a show cause order to obtain the appearance of the accused. *See* ORS 161.566(3); ORS 153.064(2). Further, failure to appear on a violation is *not* a crime, unlike failing to appear on a misdemeanor or felony. *See* ORS 162.195, ORS 162.205. Instead, if the defendant fails to appear for proceedings on the violation, the court may enter a default judgment with a fine. ORS 161.566(3). Thus, viewed in their totality, the applicable pre-trial procedures do not rebut the presumption that defendant's violation prosecution is a non-criminal proceeding.

Nothing in *Brown* compels a different result. In *Brown*, this court viewed a $1,000 fine (in 1977 dollars) for DUII as "strong evidence" of the legislature's punitive intent. But this court's analysis did not stop there. This court reviewed legislative history that strongly demonstrated the legislature's intent to retain the punitive significance of a DUII conviction. From that

history, this court concluded that the legislature intended to decriminalize the procedures applicable in a DUII prosecution, but not to decriminalize the offense itself.

Here, the opposite is true. Even if the potential $6,250 fine available in this case is evidence of punitive intent, the legislative scheme indicates a recognition that some offenses normally denominated as misdemeanors are minor enough to be decriminalized. In *Brown*, evidence of punitive intent was confirmed by legislative history. Here, the legislative scheme and its history reveal a contrary intent: ORS 161.566 recognizes the petty nature of many misdemeanor offenses and allows for decriminalization of those offenses as a result. Consequently, defendant was not entitled to a jury trial.[7]

---

[7] To the extent that defendant also claims entitlement to court-appointed counsel and a right to be proven guilty "beyond a reasonable doubt," her claim fails for the same reasons that her jury-trial claim fails. As with the jury-trial right, Article I, section 11's right "to be heard by * * * counsel" applies only in "criminal prosecutions." Similarly, ORS 135.050 provides a statutory right to court-appointed counsel, but only in criminal trials. And the Sixth Amendment right to court-appointed counsel extends only to proceedings in which actual imprisonment is imposed. *Scott v. Illinois*, 440 US 367, 99 S Ct 1158, 59 LEd 2d 383 (1979), *adhered to by Nichols v. United States*, 511 US 738, 114 S Ct 1921, 128 LEd 2d 745 (1994).

The right to be proven guilty beyond a reasonable doubt is a function of federal due process, and it too applies only in criminal prosecutions. *See In re Winship*, 397 US 358, 90 S Ct 1068, 25 LEd 2d 368 (1970) ("beyond a reasonable doubt" standard applies to criminal prosecutions). Similarly, ORS 136.415 provides a statutory right to proof beyond a reasonable doubt, but only in "criminal actions."

CONCLUSION

The trial court did not err in denying defendant's request for a jury trial. Defendant faced only violation-level charges and ORS 153.076 requires that violation proceedings be tried to the court, without a jury. Further Article I, section 11, of the Oregon Constitution requires jury trials only in "criminal" prosecutions, which violation proceedings are not. Consequently, defendant was not entitled to a jury trial either as a matter of statutory or constitutional law. This court should affirm the trial court's judgment.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Jeremy C. Rice
JEREMY C. RICE #055416
Assistant Attorney General
Jeremy.C.Rice@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

JCR:kak/4066618

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 19, 2013, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system. I further certify that on March 19, 2013 I directed the Brief on the Merits of Petitioner on Review, State of Oregon to be served upon Karen J. Mockrin, attorney for respondent on review, by mailing two copies, with postage prepaid, in an envelope addressed to:

Karen J. Mockrin
Karen J. Mockrin Atty at Law
2075 SW 1st Ave Ste 2J
Portland, Oregon 97201
Email: karen@northwestlawoffice.com

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)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 4915 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Jeremy C. Rice

JEREMY C. RICE #055416
Assistant Attorney General
Jeremy.C.Rice@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

JCR:kak/4066618