Filing # 71422667 E-Filed 04/30/2018 02:37:13 PM

RECEIVED, 04/30/2018 02:38:27 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

LAVERNE BROWN,

Petitioner,

FSC Case No. SC18-323

vs.

STATE OF FLORIDA,

Respondent.

______________________________/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MATTHEW FUNDERBURK
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 103301
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
funderburk.matthew@pd7.org

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF CASE AND FACTS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
THE FIFTH DISTRICT COURT OF APPEAL ERRONEOUSLY INTERPRETED SECTION 775.082(10), FLORIDA STATUTES, AS ONE INVOLVING MANDATORY MITIGATION. BASED ON THAT INTERPRETATION, THE FIFTH DISTRICT COURT OF APPEAL ERRONEOUSLY HELD THAT THE PRINCIPLES ANNOUNCED IN *APPRENDI* AND *BLAKELY* DID NOT APPLY.	
CONCLUSION	16
CERTIFICATE OF FONT	17
DESIGNATION OF E-MAIL ADDRESS	17
CERTIFICATE OF SERVICE	17

TABLE OF CITATIONS

CASES CITED: PAGE NO.

Apprendi v. New Jersey,
530 U.S. 466 (2000). .... Passim

Blakely v. Washington,
542 U.S. 296 (2004). 2, 11, 12, 14

Booker v. State,
2018 WL 1833406 (Fla. 1st DCA Apr. 18, 2018). .... Passim

Brown v. State,
233 So. 3d 1262 (Fla. 5th DCA 2017)... Passim

Bryant v. State,
148 So. 3d 1251 (Fla.2014). 8

Porter v. State,
110 So. 3d 962 (Fla. 4th DCA 2013).. 15

Reed v. State,
192 So. 3d 641 (Fla. 2d DCA 2016). 8

Secong v. State,
225 So. 3d 909 (Fla. 3d DCA 2017). 9

OTHER AUTHORITIES CITED:

Section 775.082(3)(e), Florida Statutes. 9
Section 775.082(10), Florida Statutes.. Passim

STATEMENT OF CASE AND FACTS

The loss prevention officer at Walmart observed Laverne Brown pushing a stroller in the electronics department at around 11:00 o'clock at night. Ms. Brown selected a DVD player, placed it on top of the stroller, and then covered it with a bag. (T 41-43) She then entered the bathroom and the loss prevention officer followed. The officer entered the stall next to where Ms. Brown was and heard the sound of a box ripping and a plastic bag. (T 43-44) Ms. Brown left the bathroom and continued to walk around the store. Eventually, she exited Walmart and passed all points of sale. (T 48-49) Ms. Brown was stopped outside the store and a DVD player was located in a plastic bag in her possession. (T 49)

As a result, Ms. Brown was charged with petit theft (two prior convictions). (R 12) After a trial, the jury found Ms. Brown guilty of the charged offense. (R 33, 35; T 161) She scored 16.4 total sentence points. (R 73, 95) Defense counsel argued that Ms. Brown did not score a prison sentence and requested a period of incarceration of one year in county jail followed by probation. (R 95) The trial court orally found her to be a danger to the community. (R 101-04) Thereafter, she was sentenced to 3 years prison. (R 53, 57-59, 104)

Ms. Brown filed a motion to correct sentencing error based on the trial court's failure to provide written reasons in support of its finding that she was a

danger to the public. (R 109-11) The trial court granted the motion and provided written reasons. (R 118) Thereafter, Ms. Brown filed a second motion to correct sentencing error arguing that the danger to the public finding must be made by a jury. (R 152-55) Ms. Brown argued that because the judge made the finding and imposed a harsher sentence, it was a violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004). (R 153-54) The trial court denied the motion, pointing out that nothing in section 775.082(10) required a jury finding. (R 163-64)

Ms. Brown appealed to the Fifth District Court of Appeal (hereinafter, “Fifth DCA”) and argued, *inter alia*, that the trial court erred in finding that she was a danger to the public and sentencing her to prison, absent an admission or a jury finding. Because the statute allowed the trial court to impose an upward departure without a jury finding that Ms. Brown posed a danger to the public, it was a violation of the principles announced in *Apprendi* and *Blakely*.

The Fifth DCA found no error and affirmed. *Brown v. State*, 233 So. 3d 1262, 1262 (Fla. 5th DCA 2017). In doing so, the Court held that section 775.082(10) was not an upward departure statute, but rather, provided for mandatory mitigation based on two criteria. *Id*. at 1263-64. The two sentences of the statute operated together to create an entitlement to mandatory mitigation for

those offenders who satisfied both criteria when: (1) he or she scored twenty-two points or fewer, unless (2) a nonstate prison sanction could present a danger to the public. *Id*. at 1264. Based on the classification of the statute as one involving mandatory mitigation, the Fifth DCA held that *Apprendi* was not implicated. *Id.* The Court noted that Ms. Brown's sentence was fully authorized by the jury's verdict and was therefore not above the statutory maximum. *Id.* The Court continued by holding that the jury's verdict authorized the trial court to sentence Ms. Brown to five years in state prison even before the trial judge considered the additional findings contemplated by section 775.082(10). *Id*. at 1265.

Ms. Brown filed her notice of intent to invoke jurisdiction on February 21, 2018, arguing that this Court should review the Fifth DCA's decision which expressly declared valid section 775.082(10), Florida Statutes and, in doing so, expressly construed the Sixth Amendment to the United States Constitution. This Court accepted jurisdiction on April 9, 2018.

SUMMARY OF ARGUMENT

The Fifth DCA's decision erroneously classified section 775.082(10) as a mandatory mitigation statute. The Fifth DCA's decision effectively created a presumption for a state prison sentence, unless the offender satisfied both prongs of a mandatory mitigation test. Nowhere in the statute are the words mandatory mitigation used, nor does the statute put the burden of proof on the defendant to establish a lack of future dangerousness. Likewise, nothing in the statute mitigates an offender's sentence; to the contrary, it creates a process exclusively for enhancing an offender's sentence from a mandatory nonstate sanction to a state sanction based solely on judge-made factual findings as to future dangerousness. In addition, the statute has been classified as an upward departure statute by this Court, along with the First, Second, and Third District Courts of Appeal.

Based on the improper classification of the statute, the Fifth DCA incorrectly held that *Apprendi* was not implicated, reasoning that the jury's verdict authorized the trial court to sentence Ms. Brown to five years in prison even before the trial judge considered the additional findings contemplated by the second sentence of the statute. A simple reading of the statute contradicts this holding. At the point the jury returned a verdict finding Ms. Brown guilty of petit theft, the only sentence available to the trial court without an additional finding

was a nonstate prison sanction. The holding in *Blakely* is clear: the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. Here, the judge enhanced Ms. Brown's sentence only after making additional findings. The verdict alone did not support those findings nor did Ms. Brown admit to being a danger to the public. As such, the statute dispenses with the fundamental role of the jury to decide facts which are used to enhance an offender's sentence. The statute violates the Sixth Amendment as interpreted by *Apprendi* and *Blakely*.

Ms. Brown respectfully requests that this Court quash the decisions of the Fifth District Court of Appeal in the instant case and the Fourth District Court of Appeal in *Porter*. As to future cases involving this issue, the remedy is straightforward. A jury must decide whether an offender constitutes a danger to the public.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRONEOUSLY INTERPRETED SECTION 775.082(10), FLORIDA STATUTES, AS ONE INVOLVING MANDATORY MITIGATION. BASED ON THAT INTERPRETATION, THE FIFTH DISTRICT COURT OF APPEAL ERRONEOUSLY HELD THAT THE PRINCIPLES ANNOUNCED IN *APPRENDI* AND *BLAKELY* DID NOT APPLY.

The Florida Legislature, faced with budgetary challenges in 2009, sought to reduce the burden of prison expense on the Department of Corrections by mandating that specified, non-violent offenders, who score under 22 points on their criminal scoresheet, be sentenced to nonstate sanctions – thereby shifting incarceration of these offenders to county jails for a maximum of up to one year. *Booker v. State*, 2018 WL 1833406, *2 (Fla. 1st DCA Apr. 18, 2018) (citing Ch. 2009-63, § 1, Laws of Fla.; Fla. S. Comm. On Crim. & Civil Just. Approp., CS for SB 1722 (2009) Staff Analysis 2-3, 7 (April 6, 2009)). It added section 775.082(10), consisting of the following two sentences:

> If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a

> nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

§ 775.082(10), Fla. Stat. The last sentence, which was used to enhance Ms. Brown's sentence to a state prison sanction, is the focus of the Sixth Amendment claim at issue.

"Given the 'historic link' between the necessity of a jury's verdict beyond a reasonable doubt and the sentence imposed, and the 'consistent limitation on judges' discretion to operate within the limits of the legal penalties provided,' the Supreme Court has noted the 'novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive *if punished according to the facts reflected in the jury verdict alone*.' " *Booker*, 2018 WL 1833406 at *2 (emphasis in original) (quoting *Apprendi*, 530 U.S. at 482-83).

On appeal, Ms. Brown argued that her prison sentence violated the Sixth Amendment, as interpreted by *Apprendi* and *Blakely*, because the trial court enhanced her sentence above the statutory maximum based upon the trial court's conclusion that she presented a danger to the public. Specifically, she argued that the first sentence of subsection (10) created a second, lower statutory maximum for qualifying offenders like her, and that the application of the second sentence

by the trial court, in the absence of a jury finding that she was a danger to the public, was an unconstitutional enhancement above that second statutory maximum. The Fifth District Court of Appeal found this argument to be without merit and affirmed Ms. Brown's prison sentence.

A. Section 775.082(10) is an upward departure statute

The Fifth DCA's classification of the statute as one involving mandatory mitigation is erroneous. First of all, "nothing in the statute 'mitigates' a defendant's sentence; instead, it creates a process solely and exclusively for *enhancing* a defendant's sentence from a mandatory nonstate sanction to a state sanction based exclusively on judge-made factual findings as to future dangerousness." *Booker*, 2018 WL 1833406 at *5 (emphasis in original). In *Booker*, the First District Court of Appeal noted that the State, at sentencing, sought what it agreed was an "upward departure" sentence. *Id*. at *6. The classification of the statute as one involving an upward departure is consistent with this Court, along with the First, Second, and Third District Courts of Appeal. *See Bryant v. State*, 148 So. 3d 1251, 1258 (Fla.2014) ("The practice of upward departure sentences was reinstated in 2009, when the Legislature enacted subsection (10) of section 775.082, Florida Statutes...."); *Reed v. State*, 192 So. 3d 641, 648 (Fla. 2d DCA 2016) ("A court's decision to impose an upward departure

under section 775.082(10) must do more than just describe the defendant's criminal conduct"); *Secong v. State*, 225 So. 3d 909, 911 (Fla. 3d DCA 2017) ("[W]e conclude that the trial court did not err by imposing an upward departure sentence in accordance with section 775.082(10)").

Florida's Criminal Punishment Code, enacted in the late 1990s:

> has, in almost every respect, eliminated the "upward departure" of the former determinate guidelines sentencing schemes and replaced it with an indeterminate sentencing scheme in which the judge is free to sentence up to the statutory maximum without having to provide written reasons for doing so. ... A statutory exception to indeterminate sentencing under the [Code] is found in section 775.082(10), Fla. Stat.

See 16 Fla. Prac., Sentencing § 6:48 (2017-2018 ed.); *see generally* Ch. 97-194, Laws of Florida (effective October 1, 1998).

In addition, as the dissent in *Brown* noted, the majority simply rewrote the statute by stating "an offender is entitled to mandatory mitigation when (1) he or she scores twenty-two points or fewer, unless (2) a nonstate prison sanction could present a danger to the public." *Brown*, 233 So. 3d at 1267 (Cohen, C.J., dissenting). This literally turns the statute on its head. The statute does not state that a defendant is subject to the provisions of section 775.082(3)(e) unless the court finds that he or she does not present a danger to the public. *Id.* The majority

effectively created a presumption for a state prison sentence, unless the offender satisfied both prongs of its "mandatory mitigation" test. Nowhere in the statute are the words "mandatory mitigation" used, nor does the statute put the burden of proof on the defendant to establish a lack of future dangerousness. *Id.*

As confirmed by this Court, section 775.082(10) is an upward departure statute. The problem is that the Legislature, by making an offender's potential future dangerousness a sentencing factor solely for the judge's determination, has removed the jury entirely from the fact-finding process upon which an enhanced sentence is based. "It is precisely in these circumstances, where a potentially lengthy judicial sentencing enhancement is unmoored from a jury's verdict, that the Sixth Amendment must intercede." *Booker*, 2018 WL 1833406 at *7.

B. Application of *Apprendi* and *Blakely*

The Fifth DCA reasoned that *Apprendi* was not implicated because Ms. Brown's sentence "was fully authorized by the jury's verdict and [was] therefore not above the statutory maximum." *Brown*, 233 So. 3d at 1264. This is incorrect. The central point of *Apprendi* and *Blakely* is that any fact in a judicial proceeding – excepting the fact of a prior conviction – that is used to increase a penalty for a crime beyond the relevant statutory maximum is unconstitutional because a jury, and not a judge, is entrusted with that responsibility under the Sixth Amendment.

See Apprendi, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases a penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also Blakely*, 542 U.S. at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' ... and the judge exceeds his proper authority.") (citation omitted).

The Fifth DCA further concluded that the jury's verdict authorized the trial court to sentence Ms. Brown to five years prison even before the trial court considered the additional findings contemplated by section 775.082(10). *Brown*, 233 So. 3d at 1265. This is also incorrect. It is irreconcilable how a jury's finding of guilt as to petit theft authorized anything other than a nonstate prison sanction, especially given the fact that future dangerousness was not an element of the jury's verdict. An examination of *Blakely* best illustrates the flaw in the Fifth DCA's reasoning.

In *Blakely*, the defendant's charge constituted a "class B" felony under Washington law, which was punishable by up to 10 years in prison. *Blakely*, 542 U.S. at 299. However, Washington's Sentencing Reform Act further limited the sentencing range for certain crimes. *Id.* Blakely's charge was subject to a

sentencing "standard range" of 49 to 53 months. *Id.* The sentencing reform act, similar to section 775.082(10), allowed a trial court to impose a greater sentence if the court found compelling reasons, which were required to be based on "factors other than those which are used in computing the standard range sentence for the offense." *Id.* The trial court imposed a 90-month sentence, outside the standard range set forth in the act, by finding that Blakely acted with "deliberate cruelty," one of the statutorily enumerated grounds for departure. *Id*. at 300.

Notably, in *Blakely*, Justice Antonin Scalia rejected the precise argument that the Fifth DCA relied upon to justify affirmance in Ms. Brown's case. There, the government argued that the statutory maximum was not the 53 months provided for in the sentencing reform act but was, instead, the 10-year maximum for class-B felonies. Justice Scalia wrote:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.... In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

Id. at 303-04.

Here, section 775.082(10) expressly prohibited a state prison sentence in

Ms. Brown's case unless and until there was an additional finding that she constituted a danger to the public. The jury only found that Ms. Brown stole from Walmart. No more, no less. Ms. Brown did not admit nor did a jury determine that she constituted a danger to the public. Therefore, the jury's verdict alone did not allow the trial court to sentence Ms. Brown to a prison sentence.

The view that a jury's verdict alone – no matter the elements of the charged offense – authorizes a state prison sentence up to a maximum of five years overlooks the clear language of Supreme Court precedent. *Booker*, 2018 WL 1833406 at *4. The current statutory framework must be analyzed as it is, not as it existed prior to subsection (10)'s addition. Viewed this way, a jury verdict alone *would have permitted* up to a five-year sentence under the statutory framework that existed *before* subsection (10) was added in 2009. *Id.* (emphasis in original). The penalty for a third-degree felony was capped at a state prison sanction of five years, which was the relevant statutory maximum for *Apprendi* purposes at that time. Subsection (10) markedly changed the status quo, however, by shifting incarcerative sentences of this broad category of felons to county jails, mandating that a trial judge "must sentence the offender to a nonstate prison sanction." *Id.* A jury's verdict in the era before enactment of subsection (10) may have authorized up to five years in prison, but that same verdict post-enactment does not, without

additional fact-finding by trial judges as to offenders' future dangerousness. *Id.*

As to Ms. Brown, the Sixth Amendment breach becomes evident because subsection (10) permitted the trial judge to "inflict[ ] punishment that the jury's verdict alone does not allow" via factual findings on future dangerousness that are not "essential to the punishment" of the underlying offense. *Id*. at *5 (quoting *Blakely*, 542 U.S. at 296). What happened to Ms. Brown is no different from what happened in *Apprendi*, where the defendant's sentence was enhanced after an evidentiary hearing and based solely on independent judicial factfinding under a preponderance of the evidence standard that Apprendi acted with racial bias. *Id.* (citing *Apprendi*, 530 U.S. at 471). Similarly, Blakely's sentence was enhanced based on judicial fact-finding that he acted with "deliberate cruelty" in the commission of his crime. *Id.* (citing *Blakely*, 542 U.S. at 298). That Ms. Brown's sentence was enhanced on a judicial finding of future dangerousness – rather than on racial bias or as being deliberate cruelty as in *Apprendi* and *Blakely*, respectively – matters not because in each situation the punishment inflicted is based on facts a jury's verdict alone would not allow. *Id.*

Applied here, section 775.082(10)'s substitution of the judge – and the elimination of the jury – as the fact-finder for enhanced sentencing based on future potential dangerousness – violates *Apprendi*'s bright line rule. *See Apprendi*, 530

U.S. at 490 ("[I]t is unconstitutional for the legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."). Unfortunately, only the Legislature, not this Court, has the power to rewrite the statute to conform to the Sixth Amendment. Although this Court cannot rewrite the statute, it can create a remedy to allow the statute to remain constitutional.

C. Remedy

This Court should quash the decision of the Fifth District Court of Appeal in *Brown* and the decision of the Fourth District Court of Appeal in *Porter v. State*, 110 So. 3d 962 (Fla. 4th DCA 2013). This Court should adopt the reasoning of the First District Court of Appeal in *Booker* as to the merits.

Moving forward, the issue becomes how can section 775.082(10) be implemented to conform to the Sixth Amendment. The answer is straightforward: future public dangerousness must be determined by the jury, be capable of determination from the jury's findings, or be admitted by the defendant. The mechanics are not complicated; the bifurcation of trials is not a new concept to trial courts.

CONCLUSION

WHEREFORE, Ms. Brown respectfully requests this Court quash the decision of the Fifth District Court of Appeal and the Fourth District Court of Appeal in *Porter*. Moving forward, all findings related to future public dangerousness must be determined by a jury.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Matthew Funderburk

MATTHEW FUNDERBURK
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0103301
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
funderburk.matthew@pd7.org

COUNSEL FOR PETITIONER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE the following e-mail addresses for purpose of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and funderburk.matthew@pd7.org (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically to the Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, at www.myflcourtaccess.com; delivered electronically to the Office of the Attorney General, 444 Seabreeze Boulevard, fifth floor, Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com; and a true and correct copy thereof delivered by mail to Laverne Brown, 12440 Lake Ridge Circle, Clermont, FL 34711 on this 30th day of April, 2018.

Matthew Funderburk
MATTHEW FUNDERBURK