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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 REPLY BRIEF

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

First, this Court should not dismiss jurisdiction due to mootness. The issue involved in Ms. Brown's case involves important constitutional implications, is a recurring issue, and is one that has been certified as a question of great public importance.

Second, Respondent's comparison to Michigan's statute is misplaced. This is due to the fact that the statute was found unconstitutional for the reasons Ms. Brown now argues before this Court.

Ms. Brown also respectfully disagrees that the statutory maximum for her offense was five years prison *even before* the judge considered additional findings. Respondent's argument requires us to ignore the statute, a statute that mandated Ms. Brown be sentenced to a nonstate prison sanction. Given that the statute clearly applied to her, the only way Ms. Brown would be exposed to a five-year prison sentence was *after* the judge made additional findings as to public dangerousness.

Respondent's arguments regarding the consideration of prior convictions is not persuasive. Here, the trial court considered other evidence and information beyond just Ms. Brown's prior convictions. In addition, whether an offender poses a danger to the public is a complex, factual determination that far exceeds the type

of legislatively-defined sentencing systems that increase punishment solely on the fact of prior criminal convictions.

Finally, the evidence in this case cannot be said to be so overwhelming that a rational jury would necessarily conclude that Ms. Brown presented a danger to the public. Because it is not clear beyond a reasonable doubt that rational juries would always conclude that Ms. Brown deserved state prison rather than a nonstate prison sanction, the constitutional error is not harmless.

ARGUMENT

IN REPLY: THIS COURT SHOULD NOT DISMISS JURISDICTION DUE TO MOOTNESS. THIS COURT SHOULD HOLD THAT SECTION 775.082(10) VIOLATES *APPRENDI* AND *BLAKELY* AND THAT THE RECORD CONTAINS NO BASIS TO FIND HARMLESS ERROR.

i. Mootness

Respondent first argues that, because Ms. Brown was released from custody, the issue is moot and this Court should dismiss review. (AB 6-7) This argument is unavailing. A similar argument was made recently before this Court in *Banks v. Jones*, 232 So. 3d 963 (Fla.2017). This Court held that "[w]hile the Department is correct that Banks, himself, does not have a current controversy, the First District's decision is broader than Banks' dispute." *Banks*, 232 So. 3d at 965. This Court declined the State's offer to discharge jurisdiction and determined that the resolution of the certified conflict was necessary for guidance to the trial and appellate courts. *Id*. This same logic applies in Ms. Brown's case.

The issue presented in Ms. Brown's case is also a recurring issue. *See*, *e.g.*, *Reed v. State*, 192 So. 3d 641 (Fla. 2d DCA 2016); *Casper v. State*, 187 So. 3d 255 (Fla. 1st DCA 2016); *Murphy v. State*, 161 So. 3d 1282 (Fla. 1st DCA 2015); *Murray v. State*, 133 So. 3d 557 (Fla. 1st DCA 2014); *Sprott v. State*, 99 So. 3d

634 (Fla. 1st DCA 2012); *Jones v. State*, 71 So. 3d 173 (Fla. 1st DCA 2011).

In addition, this issue is capable of repetition yet evades review due to the short sentences typically imposed. The expiration of a sentence has not prevented this Court from retaining jurisdiction to address the merits. *See N.W. v. State*, 767 So. 2d 446, 447 n.2 (Fla.2000) (retaining discretionary certified conflict jurisdiction after the appellant's community control expired because "this case presents controversy capable of repetition, yet evading review [and] should be considered on its merits." (citing *Kight v. Dugger*, 574 So. 2d 1066 (Fla.1990)).

Finally, after the issuance of the opinion in Ms. Brown's case, the First District Court of Appeal certified conflict with the instant case and *Porter v. State*, 110 So. 3d 962 (Fla. 4th DCA 2013), and also certified a question of great public importance. *Booker v. State*, 2018 WL 1833406, *14-15 (Fla. 1st DCA 2018). Therefore, the issue presented in Ms. Brown's case involves important constitutional implications, is a recurring issue, and is one that has been certified as a question of great public importance. This Court should not dismiss jurisdiction and should address the merits of the case.

ii. Respondent's reliance on Michigan precedent

Respondent incorrectly relies on *People v. Harper*, 739 N.W.2d 523 (Mich.2007) and its corresponding Michigan statute, MCL 769.34, to support their

argument that section 775.082(10) is constitutional. However, Respondent fails to acknowledge that the Michigan Supreme Court later held MCL 769.34 unconstitutional for the very reasons argued by Ms. Brown.

In the case relied on by Respondent, the Michigan Supreme Court found that the judicial fact-finding under their indeterminate sentencing scheme "never affects the statutory maximum sentence that was authorized by the jury verdict of guilty or the defendant's guilty plea." *Harper*, 739 N.W.2d at 532. Because the judicial fact-finding related to the *minimum* sentencing range, a defendant's constitutional rights were not violated. *Id*. at 533. (Emphasis added). The *Harper* Court relied on *People v. Drohan*, 715 N.W.2d 778 (2006) in concluding that their sentencing scheme was valid under *Blakely*. *Id*.

In 2015, the landscape changed in Michigan regarding this argument when the Supreme Court issued *People v. Lockridge*, 870 N.W.2d 502 (2015). The Court explained that their decision in *Drohan* was no longer valid due to the United States Supreme Court decision in *Alleyne v. United States*, 570 U.S. 99 (2013). *Lockridge*, 870 N.W.2d at 513. The Court further held that "[t]o the extent that *Drohan* asserted that our sentencing scheme is constitutional because the jury verdict always authorizes the maximum sentence provided by law, that analysis is no longer sufficient to complete the constitutional analysis in light of *Alleyne*[.]"

Id. Under *Alleyne*, which was an extension of the *Apprendi* rule, the Legislature may not require judicial fact-finding that results in a mandatory increase in *either* the minimum or maximum sentence beyond the range set by the jury verdict. *Id*. (Emphasis in original). The Court concluded that "a straightforward application of the language and holding in *Alleyne* leads to the conclusion that Michigan's sentencing guidelines scheme violates the Sixth Amendment." *Id*. at 513-14. Therefore, any weight given to Michigan decisions regarding this issue should be viewed as supporting Ms. Brown's arguments.

iii. Statutory maximum

Respondent's primary argument is that "the trial court's sentence did not exceed the statutory maximum" because "Florida law authorized a sentence of up to five years in prison based on the jury's verdict." According to Respondent, Ms. Brown's three-year sentence was within the permissible sentencing range for her offense and, therefore, no *Apprendi* violation occurred. (AB 9-10) This argument lacks merit and overlooks the clear language of section 775.082(10). The Fifth District Court of Appeal also overlooked this language by holding that "the jury's verdict authorized the trial court to sentence [Ms. Brown] to five years in state prison *before* the trial judge considered the additional findings contemplated by section 775.082(10)." *Brown v. State*, 233 So. 3d 1262, 1265 (Fla. 5th DCA 2018).

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. *Booker v. State*, 2018 WL 1833406, *3 (Fla. 1st DCA Apr. 18, 2018); *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also Blakely v. Washington*, 542 U.S. 296, 304 (2004) ("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 Supreme Court's unequivocal language in *Blakely* drew a clear-cut line as to what constitutes the relevant statutory maximum sentence for Sixth Amendment purposes: it is the maximum sentence that could be imposed "*solely on the basis of facts reflected in the jury verdict or admitted by the defendant*." *Id*. (quoting *Blakely*, 542 U.S. at 303). The Supreme Court italicized this language to make an enduring point: the statutory maximum sentence is determined solely upon jury-verdict facts (or those admitted to by the offender). *Id*. The Fifth District

Court of Appeal held, and Respondent agrees, that the jury's verdict rendered in Ms. Brown's case authorized a five-year prison sentence *even before* the trial judge considered the additional findings contemplated by the applicable statute. (Emphasis added). The Fifth DCA's holding is at odds with the language in *Apprendi* and *Blakely*. Those cases address the "prescribed" or "relevant" statutory maximum. While the maximum penalty for a third degree felony in Florida is five years prison, the Legislature created section 775.082(10) to apply to certain individuals. In effect, the statute created the "relevant" statutory maximum which mandated a nonstate prison sanction. No one disputes that Ms. Brown was one of the individuals specifically contemplated by the statute. The Legislature intended and clearly stated that every eligible offender with twenty-two sentence points or less faces only the lesser panoply of nonstate punishments, capped at up to one year in county jail.

The relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts (i.e., five years of state imprisonment based on additional judicial findings of potential future dangerousness), but the maximum he may impose without any additional findings (i.e., up to one year in county jail). *Booker*, 2018 WL 1833406 at *3. A jury verdict alone does not authorize an enhancement of an offender's sentence beyond a nonstate sanction.

That is because subsection (10) requires additional judge-made fact-finding about an offender's potential future dangerousness - upon which no jury ever passes - to make this enhancement. *Id*. To make this point, if the trial court sentenced Ms. Brown to three years prison *without* making the additional findings of potential future dangerousness; the judge would be reversed. Standing alone, a jury verdict authorizes at most a nonstate prison sanction capped at up to one year in county jail, which is the "relevant" statutory maximum for *Apprendi* purposes. *Id*.

iv. Consideration of prior convictions

Respondent further argues that "*Apprendi* does not preclude a sentencing court from considering the fact of a prior conviction." (AB 12) This statement, while correct, is irrelevant to Ms. Brown and is not determinative of the issue. Here, the trial court considered factors other than prior convictions in determining that Ms. Brown was a danger to the community, which included complaining of chest pains and blaming her father's illness after getting caught stealing.

Even if the trial court relied solely on prior convictions, the fact that *Apprendi* excludes from jury fact-finding the "fact of a prior conviction" does not save subsection (10)'s constitutionality. *Booker*, 2018 WL 1833406 at *9. First of all, the last sentence of subsection (10) is not a violent career criminal statute, a habitual offender statute, or the like that excepts it from *Apprendi*; instead, it

establishes a future dangerousness test based on additional factfinding by a judge. *Id*.

> It is one thing to enlarge a penalty where Congress or the State of Florida has made a prior conviction a central feature of a crime; it is another to allow a trial judge to engage in wide-ranging fact-finding - constitutionally entrusted to a jury - about an offender's potential for being a "danger to the public" to support an enhanced penalty. And it is yet another to allow prior convictions, which already underlie the arithmetic determination of points for sentencing scoresheet purposes in Florida, to be used duplicatively to increase a sentence without jury involvement.

Woods v. State, 214 So. 3d 803, 809 (Fla. 1st DCA 2017) (Makar, J., concurring in affirmance). Had the Legislature decided that the punishment for an offender like Ms. Brown could be increased based solely on the "fact of a prior conviction," it could have done so via a repeat/habitual offender or career criminal type of statute that *Apprendi* and *Blakely* allow. Legislatively-enhanced punishment for a repeat or habitual offender based on the historical fact of the offender's past convictions differs markedly from a judge - entirely independent of the jury - extrapolating beyond prior convictions and prognosticating about an offender's future dangerousness; doing so is a step beyond what *Apprendi* permits. *Booker*, 2018 WL 1833406 at *9.

Many factors other than the fact of prior convictions are germane in

determining future dangerousness.

> Adjudicating whether an offender "could present a danger to the public" absent a nonstate sanction involves a multitude of factors, only one of which is whether the offender has a criminal record for which a prior conviction is but a data point. Faced with substantial enhancement of his sentence, no defendant (through effective counsel) would limit the evidentiary review required under subsection (10) to only his prior convictions without presenting other evidence in mitigation.

Woods, 214 So. 3d at 808-09 (Makar, J., concurring in affirmance) (internal citation omitted). Whether an offender poses a "danger to the public" is a complex, factual determination that far exceeds the type of legislatively-defined sentencing systems that increase punishment solely on the fact of prior criminal convictions. *Booker*, 2018 WL 1833406 at *9.

v. Harmless error

Respondent concluded that any error in failing to submit the dangerousness determination to the jury was harmless. (AB 17) Petitioner respectfully disagrees.

As applied to Ms. Brown's sentencing, the harmless error test requires contemplating whether there is record evidence that could rationally lead a jury to conclude - contrary to the trial court - that Ms. Brown did *not* present a danger to the public if she were given a nonstate prison sanction, such as up to one year in

county jail plus probation or community control thereafter. If a "reasonable possibility" exists that the error affected the sentencing, such that it cannot be determined "beyond a reasonable doubt that the error did not affect" sentencing, the "error is by definition harmful." *Id*. at *11 (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla.1986)).

Here, the evidence cannot be said to be so overwhelming and compelling that a rational jury would necessarily conclude that Ms. Brown presented a danger to the public if subject to only a nonstate prison sanction of up to one year in the county jail coupled with significant community control and probation. It is possible that a jury would find that a pecuniary danger was not the type of danger contemplated by the statute. On the other hand, perhaps there is a jury that would find Ms. Brown posed a danger to the public that justified state prison, but the question is whether any rational jury might not. Because it is not clear beyond a reasonable doubt that rational juries would always conclude that Ms. Brown deserved state prison rather than a nonstate prison sanction, the constitutional error is not harmless.

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*. All findings related to future public dangerousness under the statute must be determined by the jury or be capable of determination from the jury's findings.

Respectfully submitted,

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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 Ms. Laverne Brown, 12440 Lake Ridge Circle, Clermont, FL 34711 on this 30th day of July, 2018.

/s/ *Matthew Funderburk*
MATTHEW FUNDERBURK