STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2017AP2445 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

MARSHAWN TERELL JOHNSON,

Defendant-Appellant

On appeal from the Circuit Court for Douglas County,

The Honorable Kelly J. Thimm, presiding

REPLY BRIEF OF THE DEFENDANT-APPELLANT MARSHAWN TERELL JOHNSON

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A. The State's arguments are flawed by miscomprehensions regarding the nature of precedent, confusing the *obiter dictum* with the *ratio decidenti*, and failing to recognize that Johnson's case is *res integra*.

The State asserts that "Johnson's reading of *Buckner* and *Duarte* is mistaken because in both cases, the courts rejected the defendants' arguments not only because "the trial court did not actually rely upon the fact that the defendants were from a particular place" (Johnson's Br. 16), but also because there was no legal basis for their argument." (State's Br. 7). It is the State which is misreading both *Buckner*[1] and *Duarte*.[2] Specifically, the State has conflated the *ratio decidenti* of these cases with the *obiter dictum.*

The *ratio decidenti* is the "the ground or reason of decision. The point in the case which determines the judgment." Black's Law Dictionary 5th ed., p. 1135 (1979). *Obiter dictum*, on the other hand, are:

> Words of an opinion entirely unnecessary for the decision of the case, ... A remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.

Black's Law Dictionary 5th ed., p. 967 (1979) (citation omitted). And see, *State ex rel. Schultz v. Bruendl*, 168 Wis.2d 101, 112, 483 N.W.2d 238 (1992) ("Language broader than necessary to determine the issue before the court is dicta."); *Judd v. Town of Fox Lake*, 28 Wis. 583, 588 (1871) ("... no case calls for any expression of opinion beyond the facts contained in the record, and that all beyond, whether said *arguendo* or by way of illustration, is not authority"); and *State v. Koput*, 142 Wis.2d 370, fn. 12, 418 N.W.2d 804 (1988) (observing that the Court of Appeals is not obliged to treat every statement of the Wisconsin Supreme Court as *ratio*

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[1] *Buckner v. State*, 56 Wis.2d 539, 202 N.W.2d 406 (1972).
[2] *State v. Duarte*, 2014 WI App 71, 354 Wis.2d 623, 848 N.W.2d 904

decidenti, and that it is not inappropriate for the Court of Appeals to disregard statements of the Court which are *obiter dictum*).

In *Buckner*, the Court held that "[w]e are satisfied from the quoted portion of the record that the trial court was making a general protestation against the rise in callousness for human life" and that "[t]he record does not sustain the charge that the trial court imposed its sentence on this particular defendant because he was from a particular place—Chicago." *Buckner*, 56 Wis.2d at 551-52. That was the *ratio decidenti* of the decision. Any statements in that decision which suggests that treating the defendant's residency in a different state as an aggravating does not implicate the Privileges and Immunities Clause, is merely *obiter dictum*. Similarly, in *Duarte* the Court held that Duarte "... failed to demonstrate that the sentence was actually based on Duarte not being a Brown County native." Duarte, 2014 WI App 71, ¶ 6. That was the *ratio decidenti* of the decision. In both *Buckner* and *Duarte*, the Court of Appeals did not find violations of the Privileges and Immunities Clause, because the trial court did not actually rely upon the fact that the defendants were from a particular place. That is not the situation in Johnson's case.

Similarly, the State's assertion that there is no "relevant legal authority" to Johnson's claim is based upon another misunderstanding of the nature of precedent. (State's Br. 6-7). The Privileges and Immunities Clause is a "relevant legal authority." The fact that there are no reported cases dealing with a situation in which a sentencing court actually treated the defendant's residency in another state as an aggravating factor, merely means that this case is *res integra*, a case of first impression. *Res integra* is "a point not covered by the authority of a decided case, so that a judge may decide it upon principle alone. And entire thing." Black's Law Dictionary 7th ed., p. 1311 (1999). This Court can, and should, decide this case upon constitutional principles, not because there is an absence of prior case precedent on the subject. As the late Justice Scalia wrote, *stare decisis* is simply "... a doctrine whose function `is to make us say that what is false under

proper analysis must nonetheless be held to be true, all in the interest of stability." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Text*, p. 413 (2012), *citing* himself. The lack of the prior precedent does not prevent this Court from reaching a decision in a case of first impression.[3] The State's conception of precedent is much akin to that of the index card wielding juris that Justice Cardozo mocked almost a hundred years ago:

> Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.

Benjamin Cardozo, The Nature of the Judicial Process, p. 20-21 (1921).

B. The State's reliance on the cases of *United States v. Munoz* and *United States v. Bredimus* are inapt, as those cases did not even implicate the Privileges and Immunities Clause.

The State cites the case of *United States v. Munoz*, 974 F.2d 493 (4th Cir. 1992), as authority for the proposition that treating a defendant's coming from a different state as an aggravating factor in sentencing does not offend the Privileges and Immunities Clause of the United States Constitution. *Munoz*, however, did not even involve a United States citizen, much less a citizen or resident of another state. *Id.* at 494. Munoz was a Columbian national, and as a consequence the Privileges and Immunities Clause was never even implicated. Munoz's claim was that his sentence was imposed on the basis of race or national origin. *Id.* at 495.

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[3] The State's citation to *State v. Pettit*, 171 Wis.2d 627, 492 N.W.2d 633 (1992) is inapt. *Pettit* involved a situation in which counsel submitted a brief which made references to transcripts that were not in the record, did not engage in any legal reasoning, cited no legal authority for the claims submitted, and did not comport with rules relating to the briefing of arguments. *Pettit* was not a case in which the defendant was briefing an issue that was *res integra*, that is, one of first impression.

Upon a review of the entire record the Fourth Circuit Court of Appeals determined that it was "... satisfied that the sentence in this case did not improperly reflect consideration of Munoz's national origin." *Id.* at 496. There was no evidence that Munoz would have received a different sentence had he been a citizen of North Carolina. In that sense, *Munoz* is similar to *Buckner,* where the trial judge in its sentencing comments mentioned murders in which various defendants hailed from Chicago, Illinois and Milwaukee, Wisconsin. *Buckner*, 56 Wis.2d at 551-52. The *Buckner* Court wrote that "[w]e are satisfied from the quoted portion of the record that the trial court was making a general protestation against the rise in callousness for human life" and that "[t]he record does not sustain the charge that the trial court imposed its sentence on this particular defendant because he was from a particular place—Chicago." *Id.*

That was not the situation in Johnson's case. In Johnson's case the facts adduced at trial showed that two of the codefendants, Thompson and Higgins, who were both residents of Superior, Wisconsin, conspired with a man named "Bone" to bring heroin from Chicago, Illinois, for the purpose of selling those drugs in Superior, Wisconsin. (R.108:118). Johnson and Jenkins were "Bone's" couriers, bringing the heroin from Chicago, Illinois, for the purpose of selling those drugs in Superior, Wisconsin. (R.108:79). All four were arrested and charged with possession of heroin (>10-50g) with the intent to deliver, as parties to the crime. Both Thompson and Higgins admitted at the trial to having made deliveries of heroin, and to have aided and abetted defendants Jenkins and Johnson in the delivery of heroin. (R.108:107 and 218). Thompson and Higgins just as surely participated in the flow of drugs from Chicago to Superior. They all aided and abetted in the commission of the same crime. And yet the two white defendants of Superior, Wisconsin received probation dispositions while the two black defendants from Chicago, Illinois received lengthy prison sentences. Clearly, the fact that Jenkins and Johnson came from Chicago, Illinois, worked as an aggravating factor in their lengthy prison sentences.

In *United States v. Bredimus*, 352 F.3d 200 (5th Cir., 2003), the other case cited by the State (State's br. 10), Nicholas Bredimus, a Texas resident, traveled to Thailand where he engaged in sexually explicit conduct with a thirteen-year-old Thai boy. *Id.* at 202. Bredimus was charged with one count of knowingly traveling in foreign commerce for the purpose of engaging in a sexual act with children under 18 years of age, and one count of traveling in foreign commerce with the intent to promote sexually explicit conduct by minors for the purpose of producing visual depictions of such conduct, both acts being crimes under federal statutes. *Id.* Bredimus challenged both statutes for exceeding Congress' authority under the Commerce Clause.[4] *Id.* He further challenged the statutes as violating the right to travel under the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.* at 209-10. The *Bredimus* Court acknowledged that the right to travel is a fundamental right and that a government infringement on that right will be subject to strict scrutiny. *Id.* The Court also observed that this was a case of "foreign travel" which "... clearly is accorded less stature than the right to travel interstate." *Id.* at fn. 12, citing *Haig v. Agee*, 453 U.S. 280 (1981). The Court rejected *Bredimus*' argument that the statute criminalized "mere travel," stating, that "[w]hile the right to travel is well-established, no federal court has ever held that an individual has a fundamental right to travel for an illicit purpose." *Id.* at 210.

Where to begin with the differences between *Bredimus* and Johnson's case? To begin with Johnson is not challenging the constitutionality of any statute, under the Commerce Clause or any other constitutional provision. What Johnson is challenging is the sentencing court's using the fact that he came from out-of-state as an aggravating factor in his case. Unlike *Bredimus*, the statute in question in Johnson's case did not require travel for its commission. Johnson was convicted

[4] U.S. CONST. art. I, § 8, cl. 3.

of possession of heroin (>10-50g) with the intent to deliver,[5] as a party to a crime,[6] the same crime that the codefendant's Thompson and Higgins were charged with. (R.72, R.37 and R.107:6).; Appx. 1-4). To commit this particular crime, it is irrelevant where you traveled from in order to commit the crime. A resident of Superior, Wisconsin can commit the crime of possession of heroin (>10-50g) with intent to deliver, as a party to a crime, just as readily as a resident of Chicago, Illinois; and yet in the case of Johnson the Court treated Johnson's being from Chicago, Illinois, as an aggravating factor, while exercising leniency to Thompson and Higgins, in part because they were from Superior, Wisconsin. Further, unlike *Bredimus,* Johnson's case did not involve foreign travel, which is accorded less stature than the right to travel interstate. *Bredimus*, 352 F.3d 200, at fn. 12. Also, Nicholas Bredimus was alleging a violation of the right to travel under the Due Process Clauses of the Fifth and Fourteenth Amendments, not the Privileges and Immunities Clause, which is yet another distinguishing factor. In short, *Bredimus* is too different from Johnson's case to have any applicability.

Finally, the State takes umbrage in what it views as "... Johnson's insinuation that the circuit court based its sentence on race." (State's br. 11). If such an insinuation exists, it exists in the facts of this case, not in Johnson's pleadings. Johnson never alleged that the circuit court based its decision on race. The State denied the existence of any such bias, and Johnson would concede the record does not support any such claim. (R.116:6). My eyes cannot peer into the souls of men to find such bias. Am I then to be silent about that which I can see? In this case, four people were charged with of possession of heroin with intent to deliver, all as parties to the same crime. And yet the two white defendants of Superior, Wisconsin received probation dispositions while the two black defendants from Chicago, Illinois received lengthy prison sentences. The fact that

[5] § 961.41(1m)(d)3, Wis. Stats.
[6] § 939.05, Wis. Stats.

Johnson came from Chicago, Illinois, was clearly used as an aggravating factor in his sentencing.

The racial compositions of the Chicago and the Superior/Duluth metropolitan areas are profoundly different.[7] It is these contrasts which accentuate the need for norms of comity among the States. "The privileges and immunities clause ''establishes a norm of comity', *Austin v. New Hampshire*, 420 U.S. 656, 660, 95 S.Ct. 1191, 1194, 43 L.Ed.2d 530 (1975), that is to prevail among the States with respect to their treatment of each other's residents.' *Hicklin v. Orbeck*, 437 U.S. 518, 523-24, 98 S.Ct. 2482, 2486-87, 57 L.Ed.2d 397 (1978)." *Taylor v. Conta*, 106 Wis.2d 321, 327-28, 316 N.W.2d 814 (1982). "By this clause the Constitution expressly limits a state's power to discriminate against inhabitants of other states." *Id.* citing, *Hague v. CIO*, 307 U.S. 496, 511 (1939). A young black man from Chicago, Illinois, should not fear that he will be treated more harshly by a court in Superior, Wisconsin, more harshly than that court would treat its own residents, simply because he came from Chicago.

[7] According to census date Chicago metropolitan area has a racial composition of 65.8 % White and18.9 % Black or African American. The Duluth/Superior metropolitan area has a racial composition of 94.6 % White and only 0.8 % Black or African American. *Metropolitan Area Census Data: Race and Hispanic or Latino*. Census-Charts.Com. http://www.census-charts.com/Metropolitan/Race.html (accessed: February 8, 2018).

IV. Conclusion.

Wherefore, Mr. Johnson respectfully requests that this Court vacate his sentence and remand this case to the circuit court for a resentencing hearing before a new judge.

Respectfully submitted May 15, 2018.

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V. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2499 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Finally, I further certify that pursuant to Rule 809.19(12)(f) if I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated May 15, 2018.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by priority mail on 5/15/2018. I further certify that the brief was correctly addressed, and postage was pre-paid.

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Signature: _____