

No. SC83617

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex. rel.
DEAN WILLIAMS

Relator,

v.

THE HONORABLE TIMOTHY J. WILSON,

Respondent.

On Petition for Writ of Prohibition
From the Circuit Court of the City of St. Louis, Missouri
Twenty-second Judicial Circuit, Division 19
The Honorable Timothy J. Wilson, Judge

RELATOR'S STATEMENT, BRIEF, AND ARGUMENT

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this case pursuant to Article V, Section 4 of the Missouri Constitution, § 530.020 RSMo. 2000, and Missouri Supreme Court Rule 97, as this case arises from a petition for a writ of prohibition filed with this Court against a sitting judge of the Twenty-second Judicial Circuit of the City of St. Louis, Missouri, alleging that, under the applicable Missouri case law and Supreme Court Rules, Respondent judge lacks jurisdiction to act in Relator's. Relator also contends that Respondent lacks jurisdiction to act in Relator's case, because such action would constitute a violation of Relator's federal and state rights to be free from double jeopardy. Relator has previously filed a petition for writ of prohibition based on the same legal grounds with the Court of Appeals of the State of Missouri, Eastern District, which petition was denied.

STATEMENT OF FACTS

On November 18, 1999, Relator was charged by indictment in the Circuit Court of the City of St. Louis, Twenty-second Judicial Circuit, in cause number 991-3782, with one count each of the felony offenses of trafficking in the second degree and possession of a controlled substance (Relator's Exhibit 1, Indictment, A2-3). The indictment pleaded Relator as a persistent drug offender.¹ (Id. at A4) At the time of the indictment, Relator was serving a prison sentence pursuant to Section 217.362 RSMo, providing Relator with long-term drug treatment and, upon successful completion of the drug treatment program, the possibility of probation.² (Relator's Exhibit 2, Plea Transcript,

¹ Sections 195.275.1(2) defines a "persistent drug offender" as one who has previously pleaded guilty to or has been found guilty of any felony offense ... relating to controlled substances." Sections 195.285.2 and 195.295.2 RSMo. 2000, respectively provide sentence enhancement for persistent offenders who are convicted of possession of a controlled substance, Section 195.202 RSMo. 2000, and trafficking in the second degree, Section 195.233.3(1), inter alia. Further, Section 195.295.2 deprives a persistent offender convicted under Section 195.233.3(1) of the possibility of probation or parole.

² The board of probation and parole may recommend to the sentencing court that a prisoner who has successfully completed the long-term treatment program be placed on probation. The sentencing court is required to follow the board's recommendation, absent a determination that probation would be an abuse of discretion. Section 217.362.3 RSMo. 2000.

A18). This sentence was imposed following a probation revocation based, at least in part, on the charges embodied in the indictment. (Id.) Relator, however, was not arraigned on the indictment until more than a year later, on December 20, 2000. (Relator's Exhibit 5, Court Minutes, A38). On January 18, 2001, Mr. Dane Roper of the Public Defender Office entered his appearance as counsel for Relator (Id.).

On March 5, 2001, cause number 991-3782 was assigned for trial before the Honorable Judge Evelyn Baker, Division 6, Twenty-second Judicial Circuit. Judge Baker met with Mr. Roper and Mr. Thomas in chambers, and was advised of the nature of the charges, and Relator's current participation in long-term drug treatment under Section 217.362 RSMo (Relator's Exhibit 2, A26, lines 6-8). Judge Baker was also informed that the parties had reached a plea agreement involving the following mutual plea concessions: in return for Relator's pleas of guilty to both counts, the State would not prove up the persistent drug offender status that was pleaded in the indictment (Id. page A11, lines 8-12). It was further agreed that although sentencing would be left to the Court's discretion, (Id. at page A24, lines 2-3) Relator would not request probation, (Id. at page A23, lines 19-20) and the State would recommend concurrent sentences of ten and seven years, opposing probation or sentencing to a drug treatment program in which Relator might become eligible for probation, as provided in Section 217.362 or Section 559.155 RSMo. (Id. at page A11, lines 15-18)

On March 6, 2001, the parties appeared before Judge Baker and Mr. Roper announced Relator's intention to plead guilty to both charges in the indictment. (Id. at page A7, line 23). The court asked Mr. Roper, inter alia, if he had conveyed to Relator

the State's "recommendation", (Id. at page A6, line 20) and Mr. Roper stated that he had. Later in the plea hearing, the court asked Mr. Thomas, "the State's recommendations are what, sir?" (Id. at page A11, line 7) Mr. Thomas answered that the State's "recommendation" was for a ten year sentence, without probation or sentencing to Sections 217.362 or 559.115 RSMo., in return for Relator's pleas of guilty without persistent drug offender status. (Id. at page A11, lines 8-18)

Almost immediately after Mr. Thomas's reply, the court asked Relator if he understood that the court had made no promises as to what sentence would be imposed or whether Relator would be granted probation, that the court had not given anyone permission to make promises to Relator on the court's behalf, and that the State's recommendations were non-binding. (Id. at page A12, lines 7-17) Mr. Thomas did not object to or indicate disagreement with any of the court's statements.

After further questioning of Relator and acceptance of his guilty pleas, the court permitted Relator to address the court on the question of sentencing. Relator requested that the court consider Relator's history of drug addiction and his progress in drug treatment in determining his sentence. (Id. at page A17-18) Mr. Roper then explained to the court that Relator's current incarceration in the long-term drug treatment was the result of a probation revocation based on the charges in the present cause, and that therefore Relator had already "reaped some punishment, if only partially" for the present charges. (Id. at page A18, lines 7-22) Mr. Roper emphasized that he was not arguing for probation (Id. at page A18, line 24), and noted that the plea agreement left the court with

its full discretion in sentencing. (Id. at pages A18-19) Again, Mr. Thomas did not object to any of these statements.

The court then proceeded to allocution, at which time the court asked Mr. Thomas if he knew of any legal cause or reason why Relator should not be sentenced. Mr. Thomas stated he did not. (Id. at page A19, lines 5-8).

The court then proceeded to inquire further of Relator whether he was currently in long-term drug treatment, whether the present cause was pending when his probation was revoked, and why the present cause was not taken up with the causes in which his probation was revoked. (Id. at pages A19-20). Mr. Thomas did not object at any time to these discussions.

Finally, after hearing Relator's responses to these questions, the court asked Mr. Thomas once again if he knew of any legal cause or reason why Relator should not be sentenced. Again, Mr. Thomas stated that he did not, (Id. at page A20, lines 11, 16) failing to make any objection to any part of the plea or sentencing proceedings.

The court then sentenced Relator on the charge of trafficking in the second degree to ten years in prison, and on the charge of possession of a controlled substance to seven years in prison, both sentences to be served concurrently. The court also ordered the sentences to be served pursuant to the long-term drug treatment program under Section 217.362 RSMo., and concurrent to Relator's previous sentences. (Id. at page A21, lines 4-19).

After the court pronounced Relator's sentences, Mr. Thomas made his first objection, moving the court to set the plea aside for the reason that he "made a material

reliance that the defendant would be sentenced to ten years straight time and waiving prior and persistent drug offender status.” (Id. at pages A21-22)

After Mr. Thomas persisted in his request to prove up Relator’s persistent drug offender status, Mr. Roper explained to the court that the plea agreement contemplated that in exchange for the State’s waiver of persistent drug offender status “that I simply wouldn’t ask for probation in this case. But I have no power to bargain away the Court’s abilities to do as it sees fit.” (Id. at page A23). Mr. Thomas did not deny that the court had discretion, but responded that “although he may not have the power to bargain away your discretion, I think that, you know, we’re here as the result of a plea bargain. And I’m assuming that the Court isn’t involving itself in the plea bargaining process.” (Id. at page A23-24).

The court confirmed that it had not participated in the plea bargaining, and that its sentencing discretion was not bound by the plea bargain. (Id. at page A24, lines 7-9). Mr. Thomas then, for the first time, after acknowledging that the court’s sentencing discretion was not effected by the plea agreement, and without alleging any breach on the part of Relator, requested that he be allowed to prove up Relator’s persistent drug offender status. (Id. at page A23-24).

In response, Mr. Roper protested that he did not breach the plea bargain, because he did not argue for probation. (Id. at page A25-26). Mr. Thomas replied that Mr. Roper “did call some facts to the judge’s attention that really are not relevant to a straight ten-year sentence.” (Id. at page A26, lines4-5). However, when the court pointed out to Mr. Thomas that Relator’s current incarceration with long-term drug treatment had already

been disclosed to her the day before (Id. at page A26, lines 6-9), Mr. Thomas then continued, “Regardless of whether the plea bargain was actually breached –“ whereupon the court interrupted Mr. Thomas by advising him that the sentences would stand (Id. at page A26, lines 11-12).

Further discussion ensued between Mr. Thomas and the court, concluding with Mr. Thomas asserting that he had waived proof of Relator’s persistent drug offender status “on the contingency” (Id. at page A28, line 17) that Relator would not be given probation or a sentence under Section 217.362 or Section 559.115 RSMo. The court answered that “[y]ou cannot make that decision for this Court. It was within my discretion after listening to what Mr. Williams said, I concluded that he should continue with long-term drug treatment.” (Id. at page A28, lines 20-23). Mr. Thomas made no further record and the proceedings ended.

On March 8, 2001, Judge Baker issued, sua sponte, an order summarily setting aside the sentence and judgment of March 6, 2001, and transferring the cause back to the criminal court assignment Division 16 for further proceedings. (Relator’s Exhibit 4, Order to Set Aside, p. A33).

Relator filed in the Missouri Court of Appeals, Eastern District, his petition for writ of prohibition against Respondent, Honorable Judge Michael David, Division 16, Twenty-second Judicial Circuit, alleging that Respondent therein lacked jurisdiction to proceed in Relator’s cause because Judge Baker’s order to set aside was void for lack of jurisdiction, and because holding Relator for trial violated his rights against successive prosecution for the same offense under the Double Jeopardy provisions of the federal and

state constitutions. After receiving the State's response to Relator's petition, the Court of Appeals denied Relator its preliminary writ.

Relator's cause was subsequently transferred for trial before the Honorable Timothy J. Wilson, Division 19, Twenty-second Judicial Circuit. (Relator's Exhibit 5, Court Minutes, p. A35) On May 4, 2001, Relator filed in this Court his petition for writ of prohibition against Respondent, Judge Wilson, alleging the same grounds for lack of jurisdiction as submitted to the Court of Appeals. On May 21, 2001, Judge Wilson transferred this cause back to Judge David, Division 16 for further proceedings (Id. at A34). On May 30, 2001, this Court issued its preliminary writ of prohibition against Judge Wilson.³ (Id.) Respondent submitted his response to Relator's petition, and this brief follows.

³ Though Relator's cause is no longer before Judge Wilson, this Court's writ against Judge Wilson binds all other judges in the Twenty-second Judicial Circuit. *State ex rel. Siegel v. Strother*, 289 S.W.2d 73, 77-79 (Mo. Banc 1956).

POINTS RELIED ON

I.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM HOLDING RELATOR FOR TRIAL IN THIS CAUSE, BECAUSE JUDGE BAKER'S ORDER TO SET ASIDE THE SENTENCE AND JUDGMENT IS VOID FOR LACK OF JURISDICTION, IN THAT JUDGE BAKER RENDERED A FINAL JUDGMENT IN RELATOR'S CAUSE BY ENTERING A SENTENCE CONSISTENT WITH THE LAW, AND IN DOING SO JUDGE BAKER EXHAUSTED JURISDICTION OVER RELATOR'S CAUSE EXCEPT AS EXPRESSLY PROVIDED BY LAW, AND THERE ARE NO SUCH PROVISIONS THAT APPLY TO THIS CASE.

State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993)

Schellert v. State, 569 S.W.2d 735 (Mo. banc 1978)

State v. Jones, 789 S.W.2d 856 (Mo.App., S.D. 1990)

State v. Cullen, 39 S.W.3d 899 (Mo.App. E.D. 2001)

Section 547.200.2 RSMo. 2000

Rule 24.02(d)(4)

Rule 29.07(d)

II.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM HOLDING RELATOR FOR TRIAL IN THIS CAUSE, BECAUSE SUCH ACTION IS JURISDICTIONALLY BARRED BY THE DOUBLE JEOPARDY CLAUSE, IN THAT JEOPARDY ATTACHED TO THIS CAUSE AFTER JUDGE BAKER SENTENCED RELATOR FOR THE SAME OFFENSES FOR WHICH HE IS NOW BEING HELD FOR TRIAL, AND THERE WAS NO “MANIFEST NECESSITY” FOR JUDGE BAKER’S ORDER TO SET ASIDE THE SENTENCE AND JUDGMENT. THEREFORE, HOLDING RELATOR FOR TRIAL ON THESE CHARGES CONSTITUTES AN IMPERMISSIBLE SUCCESSIVE PROSECUTION FOR THE SAME OFFENSE.

State v. Cody, 525 S.W.2d 333 (Mo. banc 1975)

State v. Morton, 971 S.W.2d 335 (Mo.App. E.D. 1998)

United States v. Britt, 917 F.2d 353 (8th Cir. 1990)

ARGUMENT

I.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM HOLDING RELATOR FOR TRIAL IN THIS CAUSE, BECAUSE JUDGE BAKER'S ORDER TO SET ASIDE THE SENTENCE AND JUDGMENT IS VOID FOR LACK OF JURISDICTION, IN THAT JUDGE BAKER RENDERED A FINAL JUDGMENT IN RELATOR'S CAUSE BY ENTERING A SENTENCE CONSISTENT WITH THE LAW, AND IN DOING SO JUDGE BAKER EXHAUSTED JURISDICTION OVER RELATOR'S CAUSE EXCEPT AS EXPRESSLY PROVIDED BY LAW, AND THERE ARE NO SUCH PROVISIONS THAT APPLY TO THIS CASE.

On March 6, 2001, Judge Baker accepted Relator's pleas of guilty to the charges in the cause below and entered her sentence and judgment in that cause (Relator's Exhibit 3, Sentence and Judgment Form, A31). Two days later, Judge Baker issued her order setting aside the sentence and judgment and transferring Relator's cause back to the criminal trial assignment division (Relator's Exhibit 4, Order to Set Aside, A33). Relator's cause was subsequently assigned to Respondent for trial proceedings (Relator's Exhibit 5, Court Minutes, A35). The ultimate issue of whether Respondent has jurisdiction in Relator's cause therefore depends on the penultimate issue of whether Judge Baker had jurisdiction to issue her Order to Set Aside.

Respondent is without jurisdiction to act in Relator's cause, because Judge Baker lacked jurisdiction to issue her Order to Set Aside. Prohibition thus lies to prevent

Respondent from holding Relator for trial in the underlying cause, because the essential purpose of a writ of prohibition is to prevent the wrongful assumption of jurisdiction by a court. *See State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994) (writ of prohibition lies where court below lacks or exceeds jurisdiction). Whether Respondent has jurisdiction over Relator's cause is a question of law that is reviewed *de novo* by this Court. *See, e.g., Brady v. Brady*, 39 S.W.3d 557, 561 (Mo.App., E.D. 2001) (subject matter jurisdiction); *Farris v. Boyke*, 936 S.W.2d 197, 200 (Mo. App., S.D. 1996) (personal jurisdiction).

“[T]his Court [has] clearly held that once judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction.” *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. banc 1993) (citation omitted). A sentence constitutes the “judgment” of a criminal case, *State v. Pruitt*, 169 S.W.2d 399, 400 (Mo. 1943). For a sentence to constitute a final judgment of a criminal case, the sentence imposed must be consistent with the law. *State v. Morris*, 719 S.W.2d 761, 763 (Mo. banc 1986). Furthermore, a judgment becomes final when the sentencing court enters it. *State ex rel. Wagner v. Ruddy*, 582 S.W.2d 692, 695 (Mo. banc 1979). Entry occurs once a written record has been made. *State v. White*, 646 S.W.2d 804, 809 (Mo. App. 1982).

A court does not have plenary power to set aside its final judgment, *See State ex rel. Carver v. Whipple*, 608 S.W.2d 410, 412 (Mo. banc 1980). On the contrary, once a final judgment has been entered, the court has jurisdiction to act only as *expressly* authorized by law. *State ex rel. Simmons*, at 445 (citing Rules 24.035 and 29.15 as examples of such authority) (emphasis supplied).

The record clearly establishes that all of the prerequisites of a final judgment were satisfied during the plea and sentencing proceedings on March 6, 2001. After accepting Relator's pleas of guilty to both counts, Judge Baker pronounced sentence on both counts (Relator's Exhibit 2, Plea Transcript, A18) and made a written entry of the sentences by signing the sentence and judgment form proffered by Relator's plea counsel (Relator's Exhibit 3, A3). Further, the sentences were consistent with the law: the sentences of ten and seven years were within the range of punishment prescribed by law for the offenses of trafficking in the second degree, and possession of a controlled substance, respectively.⁴

In his response to this Court's order to show cause, Respondent states that Judge Baker retained jurisdiction to issue her Order to Set Aside because the sentences did not constitute a final judgment, in that they were contrary to law. (Response to Order, page 6). Respondent does not, however, attack the legality of the sentences *per se*, in the sense, for example, that the sentences were not within the range of punishment prescribed by law, or that the sentencing court lacked jurisdiction. Instead, Respondent attacks the sentencing proceedings, not the sentences themselves. Specifically, Respondent claims

⁴ Trafficking, second degree is punishable by a prison term of not less than five years and not more than fifteen years. Sections 195.223.3(1), 558.011.1(2) RSMo. 2000. Possession of a controlled substance is punishable by, inter alia, a prison term of not less than one year and not more than seven years. Sections 195.202.2, 558.011.1(3) RSMo. 2000.

that the sentences “violated Missouri Supreme Court Rule 24.02(d), which governs plea agreement procedure”, because Judge Baker allegedly rejected the plea agreement between Relator and the state, and the court failed to inform the state of the court’s rejection before rendering its judgment. (Id., pages 6-7). Respondent claims that the court’s violation of Rule 24.02(d)(4) prejudiced the state, because the state was denied the opportunity, after learning of the court’s rejection, to prove Relator’s persistent drug offender status (Response to Order, page 7). Underlying this argument is the dubious notion that Rule 24.02(d)(4) vests the state with the same rights as a defendant, and that a violation of those rights renders the sentence “contrary to law”.

Whatever the merits of Respondent’s argument, it has no bearing on the question of whether Judge Baker’s sentences constituted a “final judgment”. Respondent fails to distinguish the different jurisdictional implications of a challenge based on the legality of a sentence *per se*, and one where a litigant claims that an error in the pre-sentence proceedings affected his substantial rights. A sentencing court that enters a legally void sentence has not rendered a final judgment, retains jurisdiction over the case, and may resentence the defendant without special provision of law. For example, in *State v. Morris*, this Court determined that a sentencing court required no special grant of authority to resentence a defendant after the original sentence was rendered in excess of the court’s jurisdiction; the original sentence was void and therefore not a final judgment. 719 S.W.2d 761, 763 (Mo. banc 1986). Similarly, *Ossana v. State*, concerned a sentence for attempted rape that was imposed concurrently to other sentences arising out of the same incident, in violation of a statute that expressly required that such sentence run

consecutively to the other sentences. 699 S.W.2d 72, 73 (Mo. App. 1985). The Eastern District held that the sentence did not constitute a final judgment; hence, the sentencing court's general jurisdiction had not been exhausted, and the court required no express provision of law to resentence the movant. *Id.*

On the other hand, a court renders a final judgment when it deprives a party of a right in the plea or sentencing proceedings, but imposes a sentence that otherwise conforms to the law. *See State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. banc 1993) (citing the post-conviction relief provisions of Rules 24.035 and Rule 29.15 as examples wherein a sentencing court retains jurisdiction after rendering a final judgment). Accordingly, a defendant who claims a violation of Rule 24.02(d)(4) has nonetheless suffered a final judgment, and must prosecute his claim under Rule 24.035. *See Hattemar v. State*, 654 S.W.2d 652 (Mo. App. 1983) (Rule 24.035 proceeding alleging error of court by not permitting movant to withdraw his guilty plea under Rule 24.02(d)). Assuming for the sake of argument that Rule 24.02(d)(4) confers on the state a "right" to be notified of the court's rejection of a plea agreement, it would be anomalous to hold that a violation of the state's right under the rule impeaches the finality of the judgment, yet a violation of that same right does not affect the finality of the judgment vis-à-vis the defendant. Respondent's novel argument regarding a Rule 24.02(d)(4) violation therefore cannot support the claim that Judge Baker's original judgment was not final.

Respondent poses another Rule 24.02(d)(4) challenge to the finality of Judge Baker's judgment, however, by claiming that the original sentence was "contrary to law"

because the court's failure to inform the state of its rejection of the plea agreement denied the state the opportunity to prove up Relator's status as a persistent drug offender. (Response to Order, page 6). Respondent claims that, because he was denied this opportunity, Judge Baker "improperly dismissed charges in the indictment" (Response to Order, page 5), by "eliminating the sentence enhancement that was charged in the indictment" (Id., page 8). Thus, Judge Baker's violation of Rule 24.02(d)(4) resulted in a further transgression of the law, a "[violation of] the law governing the charging power of the State." (Id., page 8).

To the extent that Respondent's argument relies on Rule 24.02(d)(4), it is, as explained above, completely lacking in legal support as an attack on a judgment's finality. More important, Respondent is simply wrong when he suggests that Judge Baker effectively reduced the charges against Relator when she denied the state the opportunity to prove up Relator's recidivist status. It is well settled that sentence enhancements are not "charges" that define an offense or elements of an offense. *State v. Cullen*, 39 S.W.3d 899, 904 (Mo. App. 2001). Further, the double jeopardy clause has been broadly held not to apply in noncapital sentencing proceedings. *State v. Cobb*, 875 S.W.2d 533, 537 (Mo. banc 1994). Accordingly, the state was not prejudiced by any alleged "dismissal" of charges by Judge Baker, because the state had an adequate remedy under Section 547.200.2 RSMo. 2000, which permits the state to appeal a court's final judgment, where the result of such appeal would not result in double jeopardy. Missouri courts have repeatedly upheld this provision as a means for resentencing a defendant as a

persistent offender. See *State v. Cullen*, 39 S.W.3d 899, 904 (Mo. App. 2001), and cases cited therein.

It is therefore not subject to serious dispute that Judge Baker's entry of sentence constituted a final judgment and exhausted her general jurisdiction over Relator's cause. *State ex rel. Simmons*, at 445. Consequently, Judge Baker's Order to Set Aside is void for a lack of jurisdiction unless there is a provision of law that *expressly* permits a sentencing court the unbridled discretion to act as Judge Baker did in Relator's cause, i.e., to issue, on its own motion or on motion of the state, an order to set aside the sentence and judgment of a criminal case, without granting the defendant notice and a hearing, and without making any factual findings. *Id.*

The only provisions of Missouri law that authorize a court to set aside a judgment of conviction after a defendant's guilty plea are Missouri Supreme Court Rules 24.035, 29.07(d), and habeas corpus relief under Sections 532.010 et seq., RSMo. 2000, and Rule 91. Unfortunately for Respondent, these provisions are solely concerned with a defendant's rights to post-conviction relief after a guilty plea, and none of these provisions allow a judge to set aside her sentence and judgment on her own motion or the motion of the state, or to do so without making factual findings. On the contrary, each of these provisions requires the *defendant* to invoke the court's jurisdiction by initiating claims of relief. Rule 24.035(b), Rule 29.07(d), and Rule 91.01(b). Furthermore, under each provision, a court would exceed its jurisdiction if it were to grant the movant's relief without first making certain factual findings. Rule 24.035(j) (also requiring factual findings when the court denies relief), Rule 29.07(d) (requiring a finding of "manifest

injustice” to set aside a conviction), and Section 532.430 RSMo. 2000 (grounds for state habeas relief). There is therefore no provision of law that expressly grants Judge Baker the authority to issue, sua sponte, a summary order setting aside the sentence and judgment, and without affording Relator an opportunity to be heard in opposition.

Respondent, in fact, concedes that “*there is no rule explicitly governing the procedure by which a circuit court may set aside a guilty plea on motion by the State ...*” (Response to Order, page 8) (emphasis supplied). This admission is dispositive against Respondent, per *Simmons*. Nevertheless, Respondent attempts to justify Judge Baker’s Order to Set Aside on various grounds, each of them meritless. For example, Respondent urges this Court that “it should be assumed that the court has the power [to set aside a guilty plea on motion by the state]” (Id. at page 8). Of course, this Court rejected this same argument over twenty years ago in *State ex rel. Wagner v. Ruddy*, 582 S.W.2d 692, 695 (Mo. banc 1979), and more recently has affirmed that after final judgment, any further action taken by a sentencing court must be **expressly** provided by law. *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. banc 1993).

Additionally, Respondent has assayed a number of more specific justifications for Judge Baker’s Order to Set Aside, including: Judge Baker “rejected” the plea agreement, and failed to inform the state as required by Rule 24.02(d)(4) (Response to Order, page 7); Relator “breached” the plea agreement by “implicitly request[ing] that Judge Baker reject the plea agreement” (Id. at page 7); Rule 29.07(d) permits the state to move to “withdraw” a defendant’s guilty plea (Id. at page 9); and finally, that jurisdiction exists “as a matter of public policy” (Id. at page 10). Each of these will be addressed in turn.

Respondent claims that Rule 24.02(d)(4) authorizes Judge Baker's Order to Set Aside.⁵ In citing to Rule 24.02(d)(4), Respondent conveniently fails to include the italicized portion of its full text, which reads as follows:

4. *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, *advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.*

Rule 24.02(d)(4) (emphasis supplied). It is clear that the rule provides no express authority to a sentencing court to overturn its final judgment when a party later complains that the court merely failed to inform the parties of its rejection of the plea agreement. Accordingly, a sentencing court would have to rely on some other express provision of law, such as Rule 24.035, to set aside its final judgment for failure to comply with this rule. *State ex rel. Simmons*, at 445.

⁵ Although Respondent couched his Rule 24.02(d)(4) argument in terms of an attack on the finality of Judge Baker's judgment, and Relator has shown, *supra*, that this argument fails, Relator will nevertheless consider here whether it provides express authority for a sentencing court to act in a case after final judgment.

Further, the state has no standing to complain of a violation of this rule, because the rule provides only the defendant with an enforceable “right” to be informed of the court’s rejection of a plea bargain. This is obvious from the fact that, upon being informed of the court’s rejection of a plea bargain, the rule makes no provision that the state be permitted to request that the court vacate the defendant’s plea. Rule 24.02(d)(4). The rule was promulgated in response to this Court’s decision in *Schellert v. State*, 569 S.W.2d 735, 739 (Mo. banc 1978). This Court, recognizing that a guilty plea is essentially a confession, *Id.* at 738-739, stressed the importance that a court ensure that a guilty plea is not given involuntarily, i.e. in false hopes of the court giving effect to the plea agreement. *Id.* To that end, the Court held that a court must advise a defendant when it rejects a plea agreement, and afford the defendant an opportunity to withdraw his plea. *Id.* at 739. Thus the requirement of Rule 24.02(d)(4) that the court “inform the parties” of its rejection of the plea agreement vests no “rights” in the state; it is simply a recognition that without such advisement, the defendant will have no practical opportunity to withdraw his plea. *Schellert*, at 736 (“At no time prior to imposition of sentence did the court inform defendant the court was not going to follow the recommendation of the prosecutor, and this being the case, of course the occasion never arose whereby the appellant was given an opportunity thereafter to withdraw his plea.”).

Respondent, in his Response to Order to Show Cause, placed great weight on Rule 24.02(d)(4), because he claimed that Judge Baker had “rejected” the plea agreement. Specifically, Respondent claims that Judge Baker rejected the plea agreement when she sentenced Relator to long-term drug treatment pursuant to Section 217.362 RSMo. 2000,

and the state had recommended that Relator not be sentenced to long-term drug treatment. Respondent basically disputes whether the recommendation was binding or non-binding. The standards of interpreting a plea agreement term disputed between the state and a defendant have been well put by the Court of Appeals, Southern District.

“Plea bargaining ... though a matter of criminal jurisprudence, is subject to contract-law standards. Therefore, the terms of the agreement, if disputed, are to be determined by objective standards ... Given the relative interests implicated by a plea bargain, we find that the costs of an unclear agreement must fall upon the government. While we affirm the general applicability of contract law principles, we hold that *the government must shoulder a greater share of responsibility for lack of clarity in a plea agreement.*”

State v. Jones, 789 S.W.2d 856, 858 (Mo. App. S.D. 1990). The record soundly refutes respondent’s argument. It is clear from the record that the plea agreement between the parties consisted of reciprocal concessions in the plea and sentencing phases. In the plea phase, it was agreed that Relator would plead guilty in return for the state’s waiver of proof of the persistent offender allegations that were pleaded in the indictment. During the sentencing phase, it was agreed that, although the court would retain full discretion, the court would make a non-binding recommendation of concurrent prison sentences of ten and seven years on counts I and II, respectively. It was also agreed that during sentencing, Relator would not request probation, and the state would oppose Relator being granted or being placed in a drug-treatment program that could result in

Relator being placed on probation, such as provided in Sections 217.362 and 559.115 RSMo. 2000.

The fact that the state's sentencing recommendation was in fact, non-binding, is evidenced by the fact that, as part of the plea bargain, Relator agreed not to argue for probation. This term is judicially admitted by Respondent's counsel (Response to Order, page 4) (Relator and his counsel "breached the plea agreement by implicitly requesting sentencing pursuant to Section 217.362, RSMo."). However, a condition that Relator not argue for probation is fundamentally inconsistent with a plea agreement that "bargains away [a court's] discretion" (Relator's Exhibit 2, A21), by means of a binding recommendation for a prison term, without probation or sentencing pursuant to a drug-treatment program (such as 217.362 RSMo.) that could result in probation. Such a term, in fact, necessarily implies that the court had discretion in sentencing Relator; otherwise, Relator's promise not to argue for probation would be illusory consideration. Furthermore, Relator's plea counsel represented to the court on two occasions that that plea agreement required Relator not to request probation (Relator's Exhibit 2, A23, A25), and at no time did state's counsel object to these statements as incorrect. State's counsel's conduct amounts to a tacit assent to the statements of Relator's plea counsel.

Further, the statements of the parties and Judge Baker, and the conduct of state's counsel conclusively prove the non-binding nature of the state's recommendation during the plea and sentencing hearing. For example, the state's sentencing recommendation was referred to as simply that, a "recommendation", no less than six times (Relator's Exhibit 2, A5, A11 (twice), A12 (twice), and A16). Further, state's counsel made no

objection when Judge Baker asked Relator if he understood that “the State’s recommendations are merely that? They’re recommendations and *they’re not binding on this Court?*” (Relator’s Exhibit 2, A12) (emphasis supplied). If the plea agreement truly contemplated a sentencing concession from the court, then surely state’s counsel would have corrected the judge at this point. Instead, state’s counsel made no objection, and by his silence manifested his assent to the court’s characterization of the state’s recommendation as non-binding (Id. at page 12).

The record is replete with other instances where state’s counsel failed to object when he would be expected to if the plea agreement between the state and Relator called for a binding sentencing recommendation. State’s counsel failed to object when the court informed Relator that she had “made no promises regarding sentences imposed or probation” (Id. at A12). State’s counsel failed to object when, during sentencing, Relator informed the court of his progress in the long-term drug treatment program (Id. at A17-18), though these statements would have been irrelevant if the court were bound by the state’s sentencing recommendation. Also, state’s counsel was silent when, during sentencing, Relator’s plea counsel told the court “I recognize *that I don’t have the power to plea bargain away the Court’s ability to do as it sees fit*. And so I will, on behalf of Mr. Williams, lay this matter on the conscience of the Court or the mercy of the Court.” (Id. at A18-19) (emphasis supplied). If, as Respondent argues, the parties had a plea agreement for a binding recommendation from the state for a specific sentencing disposition, these statements would have been not merely superfluous, but a *direct contradiction* of the terms of the plea agreement. Yet state’s counsel failed to make a

single objection to these remarks. This happened not just once, however, but again, after sentencing, when the parties discussed whether the terms of the plea bargain had been fulfilled by Judge Baker's sentences. At that point, the following exchange occurred between Relator's plea counsel, Mr. Roper, state's counsel, Mr. Thomas, and Judge Baker:

MR. ROPER: Judge, my understanding was that in exchange for – and maybe you can tell me if I'm wrong, Wade, but my understanding was that in exchange for not proving up Mr. Williams as a prior and persistent drug offender that I simply wouldn't ask for probation in this case. *But I have no power to bargain away the abilities of the Court to do as it sees fit.* That was my understanding.

MR. THOMAS: Judge, in response to that statement. The State again made a material reliance in waiving prior and persistent offender drug offender status so that the defendant could receive parole in this case. Now, *although he may not have the power to bargain away your discretion,* I think that, you know, we're here as the result of a plea bargain. And I'm assuming that the Court isn't involving itself in the plea bargaining process.

THE COURT: I am not involved in the plea bargain process. What I'm saying is that *I am not bound by that.*

(Relator's Exhibit 2, A23-24) (emphasis supplied). State's counsel thus frankly admitted that under that under the terms of the plea agreement, the court had full discretion as to sentencing. There is no other plausible interpretation, on its face or in

context, of the phrase “*although he may not have the power to bargain away your discretion*”, for in a plea agreement for a binding recommendation (i.e. an agreement for a specific sentencing disposition, or “sentencing concession”), the court’s discretion is, in effect, “bargained away”, upon acceptance of the defendant’s guilty plea. *See* Rule 24.02(d)(4) (stating that court must permit the defendant to withdraw his plea if the court rejects the plea agreement). This statement alone conclusively proves that the plea agreement was understood by all concerned, the state, Relator, and the court, to involve a non-binding recommendation. Furthermore, since Respondent stands now in the state’s position, state’s counsel’s admission should be treated as a judicial admission, and binding on Respondent. *See e.g., State v. Roberts*, 948 S.W.2d 577, 588 (Mo. banc 1997) (a party’s statements on record “dispenses with proof of the actual fact and the admission is conclusive on him for the purposes of the case.”) (citation omitted). Additionally, judicial estoppel should be applied to prevent Respondent arguing now that state’s counsel had a different understanding than that to which he admitted on the record below. The doctrine of judicial estoppel prevents a person who states facts in one proceeding from denying those facts in a later proceeding. *See, e.g., State v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 403 (Mo. App. 1998) (Eastern District).

In any event, Respondent cannot credibly claim that state’s counsel did not admit that the parties’ plea bargain contemplated a non-binding sentencing recommendation, and that ultimately, the court’s sentencing discretion had not been “bargained away”. To hold otherwise, this Court would have to completely disregard the statements and

conduct of the court, Relator's plea counsel, and state's counsel, all of which were wholly inconsistent with a binding sentencing recommendation.

Looking at the intent as manifested objectively by the statements, admissions, and conduct of the parties, as a reviewing court is bound to do, *State v. Jones*, 789 S.W.2d 856, 858 (Mo. App. SD 1990), the conclusion is inescapable that state's counsel understood the recommendation to be non-binding, and that his post-sentencing complaints were prompted merely by a disappointed, subjective belief that the court would follow the state's recommendation. It is telling that at the plea hearing, state's counsel stated he waived sentence enhancement against Relator "on the *contingency* that the defendant would not be given probation, would not be sentenced [to long-term drug treatment], would not be sentenced [to 120 day drug treatment]." (Relator's Exhibit 2, Plea Transcript, page 25). However, Missouri courts have long told post-conviction movants that a mere expectation of a "contingency", describes a non-binding sentencing recommendation, and the court's failure to satisfy that expectation does not constitute a "rejection" of a plea agreement. *See State v. England*, 599 S.W.2d 942, 946 (Mo.App., S.D. 1980). The state should be treated no differently.

Respondent's contention that Relator "breached" the plea agreement is equally lacking in record support. Respondent claims that "In the sentencing phase of the plea hearing, Relator and Mr. Roper breached the plea agreement by implicitly requesting sentencing pursuant to Section 217.362. RSMo." (Response to Order, page 7). Though it was an express term of the plea agreement that Relator not request probation, neither Relator's statements nor Relator's counsel's statements in sentencing constituted an

“implicit” request for sentencing pursuant to Section 217.362. The plea agreement called for a non-binding sentencing recommendation of a prison term of ten and seven years, concurrent. (Relator’s Exhibit 2, A11). However, because the court retained sentencing discretion (Id. at p. A24), the court could have imposed a term longer than the state’s recommendation, and could have imposed the sentences in the two counts consecutively with each other, and consecutively to previously imposed sentences. Relator’s and Relator’s plea counsel’s statements were thus nothing more than a general plea for leniency (Id. at p. A18-19) (“I ... lay this matter on the conscience of the Court or the mercy of the Court”), and Relator’s plea counsel in fact made it clear that he was not requesting probation (Id. at p. A18).

State’s counsel’s statements on the record further belie Respondent’s contention that Relator breached the plea agreement after imposition of sentence. State’s counsel at no time accused Relator’s counsel of a breach of the plea agreement. State’s counsel claimed at one point that the pleas of leniency by Relator’s plea counsel “really are not relevant to a straight ten-year sentence” (Relator’s Exhibit 2, p.. A26). State’s counsel, however, made no objection at the time of Relator’s counsel’s statements, and as explained above, Relator’s and Relator’s plea counsel’s statements were relevant to sentencing, given the judge’s discretion in sentencing under the plea agreement. Judge Baker responded to state’s counsel by reminding him that Relator’s counsel had divulged nothing that had not already been disclosed to her in chambers the day before. State’s counsel then indicated he was not, in fact, relying on a theory of breach when he objected to the sentences (Id. at page A26) (“Regardless of whether the plea bargain was actually

breached –“). Respondent’s claim that Relator breached the plea agreement is without merit.⁶

Respondent also cites Rule 29.07(d) as support for Judge Baker’s Order to Set Aside, stating that the rule “authorizes a circuit court to set aside a judgment of conviction *at any time* ‘to correct manifest injustice.’” (Response to Order to Show Cause, page 9) (emphasis supplied). Respondent would have this Court believe that Rule 29.07(d), titled “Withdrawal of Plea of Guilty”, is not merely a limited means of post-conviction relief for a criminal defendant, but also a grant of power to the court to act on its own motion, or the state’s motion (Id.).

The text of Rule 29.07(d) reads in full:

“Withdrawal of Plea of Guilty. A motion to withdraw a guilty may be made only before sentence is imposed or when imposition of sentence is suspended; but to correct manifest

⁶ Respondent claims that granting an absolute writ in this case would “create a forum in which improper ex parte contact between judges and defense attorneys could strip the State of the power vested by the legislature through Section 195.295.2, RSMo.” However, it is also fair to point out that, by denying an absolute writ in this case, this Court may be creating a forum for improper ex parte contact between judges and prosecutors who are disappointed when a judge does not follow a non-binding sentencing recommendation, and the state fails to pursue a timely appeal under Section 547.200.2.

injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.”

Respondent points to no language in the rule to support his argument that the rule expressly allows the court to set aside a final judgment of conviction on its own or the state’s motion. Instead, Respondent argues that such jurisdiction should be “inferred” (Response to Order to Show Cause, page 10). However, this Court has unequivocally rejected the notion that post-conviction jurisdiction can be “inferred” in the absence of express authorization in a provision of law. *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. banc 1993) (citation omitted). Further, Respondent’s suggestion that the state has standing to “withdraw” a defendant’s guilty plea, without the defendant’s consent and over his objection, is unsupported by reference to any legal authority, and is absurd on its face. This is so because a guilty plea is a waiver of constitutional rights, and such rights are *personal* rights, *State v. Fanning*, 939 S.W.2d 941, 949 (Mo.App, W.D. 1997) and as such are nondelegable, least of all to an adversary party.

Finally, Respondent offers that Rule 29.07(d) permits the court, on its own motion or on motion of the state, to “withdraw” a defendant’s guilty plea because the court may prevent “manifest injustice” in one of two “separate” ways: (1) setting aside a judgment of conviction, *and* (2) permitting the defendant to withdraw his guilty plea (Response to Order to Show Cause, page 9). In other words, the use of the conjunctive “and” means that, so long as the court finds “manifest injustice”, the court may *either* set aside the judgment of conviction, *or* permit the defendant to withdraw his guilty plea. This construction saves the two phrases from being rendered “duplicitous” (*Id.*).

Respondent's argument does not survive a cursory reading of the rule. The first clause of the rule requires that the defendant move to withdraw his guilty plea before imposition of sentence (i.e. before entry of a "final judgment" that exhausts a court's jurisdiction). Rule 29.07(d). The second clause of the rule makes an exception to the preceding clause: after imposition of sentence (and thus entry of a "final judgment", the court may set aside the conviction and permit the defendant to withdraw his plea. Clearly, the second clause of the rule, in context, simply permits the court (upon finding "manifest injustice") to set aside its final judgment and permit the defendant to withdraw his guilty plea. These are not "separate" actions; the express authority to perform the former act is necessary to give effect to withdrawal of a guilty plea. The defendant obviously would not be able to withdraw his plea of guilty after imposition of sentence if the conviction that is predicated on the guilty plea were still in force – an anomalous result for a provision titled "Withdrawal of Plea of Guilty". The rule merely recognizes what Respondent consistently ignores – that in the absence of express authority, a court has no jurisdiction to set aside its own sentence and judgment. *State ex rel. Simmons*, at 445.

It is also bears mentioning that Respondent claimed that the imposition of Judge Baker's sentences constituted "manifest injustice", because the state was deprived of the opportunity to prove up Relator's persistent drug offender status. The problem with this argument, as pointed out supra, is that the state suffered no prejudice from Judge Baker's sentences because the state had an adequate remedy: to appeal the judgment under Section 547.200.2 RSMo. 2000, and request a vacation of the sentences, and remand for

resentencing. *State v. Cullen*, 39 S.W.3d 899, 904 (Mo. App. 2001). The state simply neglected to do so; accordingly, there is no “manifest injustice” in letting Judge Baker’s sentences stand.

Finally, Respondent urges the court to find that Judge Baker had jurisdiction to set aside her final judgment, not on any express legal authority, but “[a]s a matter of public policy”. Such an argument is oblivious to the jurisdictional restrictions this Court imposed in *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. banc 1993). And again, Respondent’s argument fails to take into account that the state may appeal any sentences in which the state was unfairly denied an opportunity to prove a Relator’s persistent offender status. Section 547.200.2, RSMo. 2000. *State v. Cullen*, 39 S.W.3d 899 (Mo. App. 2001)

In sum, Judge Baker’s sentences of March 6, 2001 were consistent with the law and therefore constituted a final judgment. As there is no legal authority that expressly authorizes Judge Baker to set aside the final judgment in summary, sua sponte fashion.⁷ Judge Baker’s Order to Set Aside is therefore void for lack of jurisdiction, and Respondent is without jurisdiction to hold Relator for trial or any other proceedings

⁷ Rule 29.13 permits a court on its own motion to set aside a judgment of conviction, but apparently only after a trial, not a plea of guilty. *See* Rule 29.13(a) (“Within thirty days ... prior to the filing of the transcript of the record in the appellate court ...”). Further, the rule requires certain factual findings, *Id.*, (sufficiency of the charging document to state a criminal offense and jurisdiction of the court) that are inapposite to this case.

inconsistent with the sentence and judgment of March 6, 2001. Relator is therefore entitled to this Court's absolute writ of prohibition against Respondent.

II.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM HOLDING RELATOR FOR TRIAL IN THIS CAUSE, BECAUSE SUCH ACTION IS JURISDICTIONALLY BARRED BY THE DOUBLE JEOPARDY CLAUSE, IN THAT JEOPARDY ATTACHED TO THIS CAUSE AFTER JUDGE BAKER SENTENCED RELATOR FOR THE SAME OFFENSES FOR WHICH HE IS NOW BEING HELD FOR TRIAL, AND THERE WAS NO “MANIFEST NECESSITY” FOR JUDGE BAKER’S ORDER TO SET ASIDE THE SENTENCE AND JUDGMENT. THEREFORE, HOLDING RELATOR FOR TRIAL ON THESE CHARGES CONSTITUTES AN IMPERMISSIBLE SUCCESSIVE PROSECUTION FOR THE SAME OFFENSE.

On March 6, 2001, Judge Baker accepted Relator’s pleas of guilty to the charges in the cause below and entered her sentence and judgment in that cause (Relator’s Exhibit 3, Sentence and Judgment Form, A32). Two days later, Judge Baker issued her order setting aside the sentence and judgment and transferring Relator’s cause back to the criminal trial assignment division (Relator’s Exhibit 4, Order to Set Aside, A33). Relator’s cause was subsequently assigned to Respondent for trial proceedings (Relator’s Exhibit 5, Court Minutes, A35).

In the event that this Court should find that a provision state law expressly grants Judge Baker the jurisdiction to issue her Order to Set Aside, Relator submits that Respondent nonetheless lacks jurisdiction over Relator’s cause, because Judge Baker’s

Order to Set Aside violates Relator's federal and state constitutional rights to be free from double jeopardy. Because this Court has held that a defendant's constitutional right to be free from double jeopardy, goes "to the very power of the State to bring the defendant into court to answer the charge brought against him ..." *State v. Cody*, 525 S.W.2d 333, 335 (Mo. banc 1975) (citation omitted), prohibition should lie in this case. See *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994) (prohibition is intended to prevent usurpations of jurisdiction by a trial court).

The Double Jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy ...". U.S. Const. amend. V. Accordingly, the state generally may not bring a successive prosecution against a defendant who has already been convicted of that same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). This prohibition is applicable to the States through the Fourteenth Amendment to the United States Constitution. *Benton v. Maryland*, 365 U.S. 784, 794 (1969). The essential values of the Double Jeopardy clause are to "preserve finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching." *Garrett v. United States*, 471 U.S. 773, 795 (1985).

The threshold question in determining whether a defendant's double jeopardy interests have been implicated is when jeopardy attaches. Jeopardy is very broadly defined as "exposure to danger", *State v. Morton*, 971 S.W.2d 335, 339 (Mo. App. E.D., 1998), and is generally viewed to attach when "the risks of injury are so great that the government should have to 'shoulder' the 'heavy' burden of showing manifest necessity

for repetitious proceedings.” *United States v. Santiago Soto*, 825 F.2d 616, 618 (1st Cir.) (1987) (quotation omitted).

The precise point at which jeopardy attaches depends on the nature of the proceedings; in the context of a jury trial, it is well settled that jeopardy attaches upon impaneling and swearing-in the jury. *State v. Stevenson*, 589 S.W.2d 44, 49 (Mo. App. E.D., 1979). Further, jeopardy has been held to attach upon the presentation of evidence in a bench trial. *State v. Shoemaker*, 798 S.W.2d 191, 193 (Mo.App. E.D., 1990).

However, the question of when jeopardy attaches in a guilty plea proceeding appears not to have been finally resolved in either the federal courts system or this state. (Reponse to Order, page 11). In *Ricketts v. Adamson*, the United States Supreme Court declined to decide whether jeopardy attaches upon acceptance of a defendant’s guilty plea or upon sentencing. 483 U.S. 1, 8 (1987) (assuming that jeopardy attached “at least” upon sentencing). At least one district of the Missouri Court of Appeals has assumed that jeopardy attaches upon sentencing, rather than acceptance of the defendant’s guilty plea. *Jones v. State*, 771 S.W.2d 349, 351 (Mo.App. E.D. 1989); *State v. Morton*, 971 S.W.2d 335, 339 (Mo.App. E.D. 1998) (citing *Jones*).

However this Court may decide the matter, there is no question that jeopardy had attached in Relator’s cause when Judge Baker issued her Order to Set Aside, for the apparent reason that Relator had been sentenced (Relator’s Exhibit 3, A32). Rather, the decisive question in this case is whether, given the fact that jeopardy had attached, the defendant’s constitutional interests in finality of the judgment and to be free from prosecutorial overreaching are sufficient to invoke the Double Jeopardy clause as a

jurisdictional bar to Judge Baker's Order to Set Aside. *Illinois v. Somerville*, 410 U.S. 458, 467 (1973). ("the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial").

Again, the federal and state decisional law lacks certain guidance, as to when jeopardy bars the vacation of a sentence and judgment of conviction based on a plea agreement. The Eighth Circuit, however, has analogized the situation to a mistrial, and has studied the question under the applicable "manifest necessity" standard. *United States v. Britt*, 917 F.2d 353, 358 (8th Cir. 1990). Under this standard, retrial after the attachment of jeopardy in this case is not precluded if the state's interest in prosecution outweighs Relators' interest in the finality of his previous sentence and judgment, and Relator's interest in being free from prosecutorial overreaching. See, *Id.*

Relator submits that there was no "manifest necessity" for Judge Baker to issue her Order to Set Aside. On the contrary, though Judge Baker's order made no factual findings, there is an apparent lack of "manifest necessity". This is so because none of the post hoc rationales offered by Respondent for Judge Baker's Order to Set Aside outweigh Relator's constitutional interests in finality and protection from overreaching. As shown supra, Respondent's arguments regarding Rule 24.02(d)(4) and Rule 29.07(d) are patently without merit. Furthermore, there was no "breach" by Relator of the plea agreement; as the record demonstrates, supra, there was at worst an absence of a plea agreement. In that event, Relator's plea would be valid as a "blind" plea.

One need not find that Respondent's arguments are meritless, however, to find that there was no "manifest necessity". This is so because, whatever the merit of

Respondent's alleged grounds of failure to notify under Rule 24.02(d)(4), or breach of the plea agreement, or Rule 29.07(d) "manifest injustice", the only harm that was ever alleged by Respondent was the lack of an opportunity for the state to prove up the Relator's prior offender allegations. As has been demonstrated, however, the state had ample opportunity to take an appeal as expressly provided in Section 547.200.2, and the state's simple failure to do so amounts to laches. Thus, there are no grounds for "manifest necessity", even if one grants merit to Respondent's arguments for the Order to Set Aside.

Consequently, Relator's constitutional rights were violated when Judge Baker issued her Order to Set Aside and ordered Relator's cause transferred back to the criminal trial assignment division. Such action constitutes a successive prosecution for the same offense within the meaning of the Double Jeopardy clause of the Fifth and Fourteenth Amendments to the United States Constitution, and therefore deprives Respondent of jurisdiction to hold Relator for trial. Accordingly, Relator respectfully requests this Court make its writ against Respondent absolute.

CONCLUSION

Based on the Point Relied On and Argument I, and the Point Relied On and Argument II, Relator, Dean Williams, respectfully requests this Court make absolute its writ of prohibition restraining Respondent, Judge Timothy J. Wilson, from holding Relator for trial in the underlying cause, and from taking any other action in the underlying cause inconsistent with commitment on the sentence and judgment as rendered by the Hon. Judge Evelyn Baker on March 6, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael S. Meyers, hereby certify that on this 7th day of August, 2001, two true and correct copies and a floppy disk containing a copy of the foregoing brief were delivered by hand to the office of Respondent's counsel,

Mr. Wade Thomas
Assistant Circuit Attorney
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Room 330
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Michael S. Meyers

Respectfully submitted,

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Certificate of Service

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Mr. Wade Thomas
Assistant Circuit Attorney
1320 Market Street
Room 330
St. Louis, MO 63103

Michael S. Meyers

Certificate of Service

I hereby certify that on this 7th day of August, 2001, I delivered by hand two true and accurate copies of this certificate of virus-free disks to the office of Respondent's counsel:

Mr. Wade Thomas
Assistant Circuit Attorney
1320 Market Street
Room 330
St. Louis, MO 63103

Michael S. Meyers

**APPENDIX OF
EXHIBITS**