

No. SC83617

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IN THE  
SUPREME COURT OF MISSOURI

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STATE OF MISSOURI ex. rel.  
DEAN WILLIAMS

Relator,

v.

THE HONORABLE TIMOTHY J. WILSON,

Respondent.

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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

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RELATOR'S REPLY BRIEF

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Respectfully submitted,

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## **JURISDICTIONAL STATEMENT**

The jurisdictional statement on page 5 of Relator's opening brief is incorporated herein by reference.

## STATEMENT OF FACTS

The statement of facts appearing on pages 6 through 12 of Relator's opening brief is incorporated herein by reference.

In addition, Relator submits an affidavit of Relator's plea counsel, Mr. Dane Roper, to refute assertions of fact made by Respondent regarding matters that are not contained in the record (e.g., the substance of plea discussions with Relator's plea counsel, Respondent's Brief at 7-8, and the plea conference involving Respondent's counsel, Relator's plea counsel, and Judge Baker, Respondents Brief at 8-9). Relator's Exhibit 6, A1-3. The affidavit is incorporated herein by reference.<sup>1</sup>

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<sup>1</sup> In addition to claims of fact that are not contained in the record, Respondent's statement of facts contains numerous argumentative assertions (e.g., Respondent's assertion that Judge Baker "agreed" to a specific sentencing disposition, based on her alleged failure to deny such alleged "agreement" when supposedly "confronted" with the "agreement", Respondent's Brief at 8; that Relator's plea counsel "agreed" to a specific sentencing concession, Respondent's Brief at 8-9; or that Relator and his counsel "breached" the plea agreement by "implicitly requesting sentencing pursuant to Section 217.362 RSMo.", Respondent's Brief at 10). These assertions violate Missouri Supreme Court Rule of Civil Procedure 84.04(c), which requires that statements of fact be presented "without argument." Accordingly, for purposes of rebuttal, Relator respectfully refers this Court to the argument sections under Point I in his opening brief and in this reply brief.

## 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)

*Pogue v. Swink*, 284 S.W.2d 868 (Mo. 1955)

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

*Ossana v. State*, 699 S.W.2d 72 (Mo. App. ED 1985)

Federal Rule of Criminal Procedure 11(e)

Missouri Supreme Court Rule of Criminal Procedure 24.02(d)

## **II.**

Point Relied On II, appearing at page 14 of Relator's opening brief, is incorporated herein by reference.

## 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.**

In his opening brief, Relator argued that Respondent lacks jurisdiction to hold Relator for trial, because Judge Baker's Order to Set Aside the sentence of March 6, 2001, was void for lack of jurisdiction. Relator's argument is a straightforward application of the basic rules that rendition of a sentence that is not contrary to law constitutes a final judgment, *Ossana v. State*, 699 S.W.2d 72, 73 (Mo. App. E.D. 1985), and that rendition of a final judgment exhausts a court's jurisdiction over a criminal case, except as expressly provided by law. *State ex rel. Simmons v. White*, 866 S.W.2d 443, 445 (Mo. banc 1993). Because Judge Baker's sua sponte, summary Order to Set Aside is not expressly authorized by any statute or rule, it is therefore void for lack of jurisdiction.

Relator attempts to avoid application of these long-standing rules by arguing that Judge Baker retained jurisdiction to issue her Order to Set Aside, because the sentence

was contrary to law and thus not a “final judgment” that would terminate the court’s jurisdiction. Respondent’s Brief, at 16. Specifically, Respondent contends that the court “rejected” the plea agreement between the state and Relator, and the court’s failure to inform the parties of this “rejection” prior to imposition of sentence constitutes a violation of Rule 24.02(d)(4). *Id.* at 16-17. Respondent concludes that this alleged violation of Rule 24.02(d)(4) rendered the sentence “contrary to law”, thus permitting Judge Baker to set aside the sentence and order the cause transferred to the criminal trial assignment division. *Id.* Respondent grounds his argument on the proposition that court rules have the same effect as statutes, *Id.* at 20-21, – a meaningless statement in light of his concession that “[not every] error of law would render a sentence void”, *Id.* at 21, and his failure to provide any further argument or authority that would indicate that a violation of Rule 24.02(d)(4) renders a sentence void.

Respondent’s argument consists of erroneous interpretations of law (regarding the effect of a Rule 24.02 violation on a sentence, and the nature of the rights conferred by Rule 24.02), applied to a false assumption of fact (that Judge Baker “rejected” the plea agreement). The primary flaw in Respondent’s legal reasoning becomes apparent when one considers the cases he has cited to support it. In *State v. Morris*, the trial court had sentenced the defendant before permitting the defendant to file a motion for new trial. 719 S.W.2d 761, 763 (Mo. banc 1986). The court of appeals dismissed the defendant’s appeal as untimely, finding the sentence void. *Id.* This Court upheld the second sentence, because after remand the trial court had obtained jurisdiction to sentence defendant after the time for a new trial motion had run. *Id.* In *Ossana v. State*, the lower

court had imposed a sentence for attempted rape concurrent to sentences for other offenses arising from the same occurrence, in violation of a statute that expressly required that the sentence for attempted rape run consecutive to the other sentences. 699 S.W.2d 72, 73 (Mo. App. E.D. 1985). The court of appeals upheld the latter sentencing because the initial sentencing was “invalid” due to its conflict with the statute. *Id.*

*Morris* and *Ossana* clearly do not support Respondent’s argument. The rule of law to be abstracted from these cases is not, as Respondent contends, that every possible irregularity in sentencing procedures renders a sentence void, but rather, that only *jurisdictional* defects in a sentence renders the judgment void.<sup>2</sup> Both *Morris* and *Ossana* concern instances where a court acted in excess of its jurisdiction.

“‘Excess of jurisdiction’ ... means that the act, although within the general power of the judge, is not authorized, and *therefore void*, with respect to the particular case

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<sup>2</sup> Other states distinguish void and voidable judgments explicitly in terms of jurisdiction. See *People v. Davis*, 619 N.E.2d. 750, 155-156 (Ill. 1993) (“Whether a judgment is void or voidable presents a question of jurisdiction ... Where jurisdiction is lacking, any resulting judgment is void ... By contrast, a voidable judgment is one entered erroneously by a court having jurisdiction ...”) (citations omitted), and *Ex parte Seidel*, 39 S.W.3d 221, 224 (Tex. Cr. App. 2001) (“Lack of jurisdiction renders a judgment void ... Lack of authority to act in a particular manner may render the judgment either void or voidable depending on the type of error ... While a judgment is merely ‘voidable for irregularity,’ it is ‘void for illegality.’) (citations omitted).

because the conditions which alone authorize the exercise of his general power in that particular case are wanting, and hence the judicial power is not in fact lawfully invoked.”

*Pogue v. Swink*, 284 S.W.2d 868, 873 (Mo. 1955). Both of the lower courts in *Morris* and *Ossana* had personal and subject matter jurisdiction to sentence their respective defendants. However, the trial court in *Morris* exceeded its jurisdiction by sentencing the defendant prematurely. 719 S.W.2d at 763. Similarly, in *Ossana*, a statute effectively removed the defendant’s case from the class of cases wherein concurrent sentences may legally be imposed. 699 S.W.2d at 73. In imposing concurrent sentences, the lower court exceeded its jurisdiction. *Id.*

In contrast, the violation alleged by Respondent – failure to inform the parties under Rule 24.02(d)(4) of a rejection of a plea agreement prior to sentencing – is not jurisdictional in nature, and would render the sentence merely voidable. Rule 24.02(d)(4) is a procedural safeguard designed to protect a defendant’s due process rights against involuntary pleas of guilty. *Schellert v. State*, 569 S.W.2d 735, 738-739 (Mo. banc 1978). However, a court with jurisdiction over a case has jurisdiction to commit error, *State ex rel. Junior College District of St. Louis v. Godfrey*, 465 S.W.2d 1, 4 (Mo. App. SLD 1971), and consequently a litigant’s claim of a violation of substantial rights goes only to the propriety of an act of court, not the power of the court to act. Accordingly, in *State ex rel. Simmons v. White*, this Court expressly held that a sentencing court may entertain claims of rights violations only under the special grants of jurisdiction under Rules 24.035 and 29.15. 866 S.W.2d 443, 445 (Mo. banc 1993). If such claims rendered

a sentence void, and not merely voidable, then such an express provision would obviously not be necessary.<sup>3</sup> Moreover, Rules 24.035 and 29.15 expressly provide that failure to allege constitutional rights violations under the proscribed procedures results in a complete waiver of such claims. Rule 24.035(b), Rule 29.15(b). However, it is axiomatic that jurisdictional error is never waived.

Relator respectfully submits that this case provides this Court with the opportunity to formally state what is already clear in the court rules (post-conviction relief provisions) and what has long been held in its jurisprudence; that judicial error involving irregularity of procedure renders a judgment merely voidable, and that only jurisdictional defects render a sentence void and deprive a judgment of finality. There is no dispute that the sentencing court had jurisdiction over Relator's case or that the sentences imposed by

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<sup>3</sup> In the civil context, the issue of whether non-jurisdictional defects render a judgment void or merely voidable, is unclear. However, in *Williams v. Williams*, No. WD 57947, (Mo. App. W.D. 2000), *remanded*, *Williams v. Williams*, 41 S.W.3d 877 (Mo. 2001) (per curiam), the court of appeals noted the trend of this Court and two districts of the courts of appeal in holdings that suggest that non-jurisdictional rule violations relating to substantial rights are merely voidable, *Williams* No. WD 57947. The Western District certified the question to this Court, which found the question not in issue and remanded to the Western District for further proceedings. 41 S.W.3d 877 (Mo. banc 2001).

Judge Baker – ten and seven years concurrent on counts I and II respectively – were within the lawful range of punishment.<sup>4</sup>

Accordingly, this case presents no jurisdictional error that would render Judge Baker’s sentence of March 6, 2001 null and void. As such, any irregularities in procedure, such as an alleged violation of Rule 24.02(d)(4), would render the judgment merely voidable, not void. Consequently, Judge Baker did not retain jurisdiction to enter her Order to Set Aside the sentence, and Respondent’s jurisdiction in this case must be predicated on some express provision of law that grants a sentencing court the sua sponte, unfettered discretion to set aside a final judgment.

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<sup>4</sup> Respondent states that, since the state had agreed to waive sentence enhancement as part of its plea bargain, any sentence imposed by the court that is less than that provided for in the plea agreement is “less than that required by law.” Respondent’s brief at 21. This argument is in error, because the lawful range of punishment is at all times controlled by the legislature through statute, not by the parties to a plea agreement. Section 195.275 RSMo. 2000 acts to enhance the range of punishment and eliminate probation or parole, but this must be triggered by judicial findings, upon proof beyond reasonable doubt submitted by the state. The mere fact that the state has charged a defendant as a persistent drug offender – much less the fact that such allegation has been waived – is therefore not sufficient to alter the lawful range of punishment, or to eliminate the possibility of probation or parole.

Further, Respondent's argument (that an alleged Rule 24.02 violation renders a sentence void) is based on another interpretation of law that is erroneous – the notion that Rule 24.02(d)(4) confers on the state a right to be notified of the court's rejection of the plea bargain. Relator has addressed this issue in his opening brief and hereby incorporates by reference the argument on page 24 of his opening brief.

Finally, Respondent's argument is also based on a false assumption of fact – that Judge Baker “rejected” the plea agreement between the state and Relator. This premise would be true only if the plea agreement contemplated a specific sentencing disposition, of the type authorized by Rule 24.02(d)(1)(C). To some extent, this issue presents a question of fact, specifically, the terms of the agreement as objectively manifested by the statements and conduct of the parties. *State v. Jones*, 789 S.W.2d 856, 858 (Mo. App. S.D. 1990). This issue has been briefed previously by Relator, and pages 25-30 of Relator's opening brief, are herein incorporated by reference.

However, in answering this issue of fact, there is also a question of law involved; specifically, whether a “recommendation” is, by its plain meaning, an agreement that leaves sentencing to the discretion of the judge, or alternatively, one that calls for a sentencing concession, and is to that extent “binding” on the court.

The question is important because the alternatives are clearly distinguished by Rule 24.02. Rule 24.02(d)(1) provides for the types of plea agreements that are authorized. Rule 24.02(d)(1)(B) permits the state to “make a recommendation ... for a particular sentence”, and Rule 24.02(d)(1)(C) allows the state to “agree that a specific sentence is the appropriate disposition of the case.” If any plea agreement for a

“recommendation” required the court to sentence the defendant to the recommended sentence, then Rule 24.02(d)(1)(C), which provides for an “agreement,” as opposed to a recommendation, would be mere surplusage. The sensible interpretation is that a plea agreement for a sentencing “recommendation” from the state does not contemplate a sentencing concession, and thus a sentencing court is not bound by the recommendation. This is consistent with the plain meaning of the word “recommend”; “to urge or *suggest* as appropriate or beneficial”. Random House Webster’s Dictionary, 3<sup>rd</sup> Edition, Ballentine Books, New York, 1993. (emphasis supplied). It is thus an apparent contradiction in terms to speak of a “binding” recommendation – such a phrase can only describe an agreement for a specific sentence under Rule 24.02(d)(1)(C), wherein the parties contemplate a specific sentencing concession from the court, and by implication there is no argument by either party as to the appropriate sentencing disposition. Ordinarily, then, the use of the term “recommendation” should be presumed to connote a plea agreement under Rule 24.02(d)(1)(B), wherein sentencing discretion is ultimately left to the court.

Such is the interpretation of Federal Rule of Criminal Procedure (hereinafter “F.R.C.P.”) 11(e)(1), which is largely the model for Rule 24.02(d)(4). See *Schellert v. State*, 569 S.W.2d 735, 740 (Mo. banc 1978) (concurring opinion, Finch, J.), *McMahon v. State*, 569 S.W.2d 753 (Mo. banc 1978). As F.R.C.P. 11(e)(1)(B) provides, a plea agreement for a “recommendation” is “not binding on the court”. Respondent’s Exhibit 8, A11. Also, FRCP 11(e)(1)(C) provides that an agreement for a specific sentence “is

binding on the court once it is accepted by the court.” Id. The federal rules merely state expressly what is clear from the plain language and structure of Rule 11(e)(1).

Because Rule 24.02(d) follows Rule 11(e) so closely in both language and structure, Relator submits that Rule 24.02(d) should be interpreted similarly, as they are both promulgated to protect a defendant’s federal constitutional rights. *Schellert* at 745.

Seen in this light, it is clear that Judge Baker did not “reject” the plea agreement, because as the record reveals, the plain terms of the agreement contemplated only a sentencing “recommendation” that would not be binding on the court. In addition, Relator has already demonstrated, by thorough reference to the record, the non-binding nature of the state’s recommendation. Relator therefore incorporates herein by reference the argument at pages 24-30 of his opening brief. Relator also refers the Court to the affidavit of Relator’s plea counsel, Relator’s Exhibit 6, A1-3, which directly refutes Respondent’s contention that the parties had formed an agreement of the type embodied in Rule 24.02(d)(1)(C).

Respondent’s brief reiterates other points raised in his response to this Court’s order to show cause. As for Respondent’s argument that Relator “breached” the plea agreement, Relator refers this Court to Respondent’s counsel’s Motion to File Notice of Appeal Out of Time, Relator’s Exhibit 7, A4-9, served on Relator September 24, 2001, which fails to allege “breach” as a ground for rendering the judgment void. Respondent should therefore be estopped from arguing such grounds in this Court. Furthermore, Relator refers this Court to the affidavit of Relator’s plea counsel, which directly refutes

this contention. Respondent's Exhibit 6, A1-3. Finally, Relator incorporates herein by reference the argument of the opening brief contained in pages 30-32.

As for Respondent's further arguments, Relator refers this Court to the affidavit of Relator's plea counsel, and Relator's argument in his opening brief at pages 15-36.

## **II.**

The argument contained in pages 37-41 of Relator's opening brief is incorporated herein by reference.

## CONCLUSION

Based on the Point Relied On I and Argument I, here and in Relator's opening brief, Relator respectfully requests that this Court make absolute its writ of prohibition preventing Respondent from holding Relator for trial. For the reasons stated in Point Relied On II and Argument II of Relator's opening brief, Relator respectfully requests that this Court make absolute its writ of prohibition preventing Respondent from holding Relator for trial.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 25<sup>th</sup> day of September, 2001, I delivered by hand two true and accurate copies of the foregoing to the office of Respondent's counsel:

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Certificate of Service

I hereby certify that on this 25<sup>th</sup> day of September, 2001, I delivered by hand two true and accurate copies of this certificate of virus-free disks to the office of Respondent's counsel:

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**APPENDIX OF  
EXHIBITS**