SC96378

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

ex rel. Eric G. Zahnd, Platte County Prosecuting Attorney,

Relator,

v.

THE HONORABLE JAMES W. VAN AMBURG,

Judge of the Circuit Court of Platte County, Missouri, Division II,

Respondent.

Petition in Prohibition or, in the Alternative, in Mandamus

BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

Relator Eric G. Zahnd, Platte County Prosecuting Attorney, filed this original petition for a writ of prohibition, or in the alternative, in mandamus, to remedy an excess of judicial authority. Respondent the Honorable James W. Van Amburg, Circuit Judge, acted beyond his authority when he granted a Rule 29.12(b) motion and changed a judgment and sentence that had been pronounced, reduced to writing, signed, and filed more than a year previously in a felony criminal case. The defendant in the underlying felony criminal case was on probation with the court following a suspended execution of the sentence.

The Missouri Supreme Court has authority to issue original remedial writs pursuant to Mo. Const. art. V, sec. 4. Relator sought a writ in the Missouri Court of Appeals for the Western District, but relief was denied on April 13, 2017. This action was filed in the Missouri Supreme Court on April 28, 2017. Therefore, this Court has jurisdiction.

INTRODUCTION

The issue is whether this Court will maintain the established procedures which a defendant must follow to challenge a conviction or will this Court allow a massive expansion of post-conviction challenges in sentencing courts.

Respondent the Honorable James W. Van Amburg changed a judgment and sentence in a criminal case based on the defendant's Rule 29.12(b) Motion, which alleged a plain error and manifest injustice, more than a year after the judgment and sentence was pronounced, reduced to writing, signed and filed. The defendant sought and Respondent granted relief outside of the well-established procedures for challenging a conviction. Respondent had no authority to change the judgment under Rule 29.12(b). The changed judgment and sentence is nullity and must be vacated. If the defendant wishes to challenge the conviction, he is required to follow the well-established procedures.

Allowing sentencing courts to change judgments under Rule 29.12(b) would permit courts to enter a new judgments at any time notwithstanding other procedural rules and contrary to nearly 20 years of case law that has repeatedly held that Rule 29.12(b) "does not provide an independent basis under which a person convicted of a crime can subsequently challenge his conviction or sentence." *State v. Doss,* 503 S.W.3d 290, 293 n. 1 (Mo.App. W.D. 2016). Indeed, "[a] person who has suffered criminal conviction is bound to raise all challenges thereto timely and in accordance with the procedures established for that purpose. To allow otherwise would result in a chaos of review unlimited in time, scope, and expense." *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. 1993) .

The defendant claims that Respondent, and by extension all sentencing courts, retained authority (sometimes incorrectly described as "jurisdiction") under a rogue line of cases that began with the unsupported assertion that, "[i]n order to constitute a final judgment, it is axiomatic that the sentence not be contrary to law." *Ossana v. State*, 699 S.W.2d 72, 73 (Mo.App. E.D. 1985). However, the rules of this Court and the laws of Missouri provide other appropriate ways by which defendants may challenge convictions, i.e. Rule 29.07(d), Rule 24.035, Rule 29.15 and habeas corpus.

The *Ossana* line of cases should be overruled, and defendants should be required to follow the established procedures. If this Court fails to overturn *Ossana* and its progeny, sentencing courts will be able to reopen and change criminal cases years after sentences have been pronounced. All that will be required will be for the affected defendant to show that the judgment and sentence was entered contrary to law. And if the fact that a judgment and sentence was contrary to law is sufficient to reopen and change a criminal case years later, then surely defendants will be permitted reopen and change criminal cases when the judgment and sentence is contrary to the Missouri or U.S. Constitution. The failure of this Court to act will result in a "chaos of review unlimited in time, scope, and expense." *Simmons* at 446. Conversely, by overruling the *Ossana* line of cases, this Court will reaffirm that "[a] person who has suffered criminal conviction is bound to raise all challenges thereto timely and in accordance with the procedures established for that purpose." *Id*.

STATEMENT OF FACTS

The facts in this case are undisputed.[1] On April 20, 2012, the defendant in the underlying criminal case, Jesse S. Nelson, appropriated DVD movies of a value of at least five hundred dollars from Barnes and Noble bookstore without the victim's consent and with the purpose to deprive the victim thereof. Petition, p. 3, ¶ 1. The defendant negotiated a plea agreement with Relator, Eric G. Zahnd, Platte County, Missouri Prosecuting Attorney, in which both the State and the defense recommended the defendant be sentenced to three years in the Missouri Department of Corrections, with a suspended execution of that sentence and probation. Petition, p. 3, ¶ 2.

The defendant pleaded guilty to Count One of the Information, the class C felony of stealing DVD's worth more than $500 pursuant that plea agreement on August 13, 2015, and the circuit court followed the recommendation of the parties. Petition, p. 4, ¶ 3.

Following multiple probation violation reports, the defendant filed a motion under

[1] Relator's Petition contained a short and plain statement of the facts showing that Relator is entitled to relief in six numbered paragraphs. Respondent's Answer to the Petition filed July 3, 2017 did not deny the factual allegations. Accordingly, the facts are admitted pursuant to Mo. Sup. Ct. R. 55.09 ("Specific averments in a pleading to which a responsive pleading is required… are admitted when not denied in the responsive pleadings.") *See* Rule 97.01, "In all particulars not provided for by the foregoing provisions, proceedings in prohibition shall be governed by and conform to the rules of civil procedure…."

Rule 29.12(b) on January 25, 2017 asking the circuit court to change the judgment filed on August 17, 2015, four days after the original sentence was pronounced. Petition, p. 4, ¶ 4. Relator filed an objection to the Rule 29.12(b) motion which argued that Rule 29.12(b) did not provide an independent basis to challenge a conviction.[2] *Id.*

On March 2, 2017, Respondent, the Honorable James W. Van Amburg, Circuit Judge in Division Two of the Sixth Judicial Circuit, granted the Rule 29.12(b) motion and changed the judgment. Petition, p. 4, ¶ 5. Respondent filed a new judgment four days later. *Id.*

Relator filed a petition for an extraordinary writ in the Missouri Court of Appeals for the Western District on March 29, 2017. Petition, p. 4, ¶ 6. Counsel for the defendant in the underlying case filed Suggestions in Opposition on behalf of Respondent on April 10, 2017. *Id.* The petition was denied on April 13, 2017 without opinion. *Id.* Subsequently, Relator filed this Petition in the Missouri Supreme Court. Petition, p. 5, ¶ 6.

[2] To the extent it was necessary for Relator to preserve the error for appellate review, this objection preserved the error.

POINT RELIED ON

Relator is entitled to a permanent writ: (1) prohibiting Respondent from changing the Judgment and Sentence entered August 17, 2015; (2) mandating that Respondent vacate the amended judgment filed March 6, 2017; and (3) mandating that Respondent deny the Rule 29.12(b) motion filed on January 25, 2017 because a judgment and sentence that has been pronounced, reduced to writing, signed and filed is final and Rule 29.12(b) does not give a sentencing court authority to change it in that on August 13, 2015 the sentencing court pronounced the sentence, and on August 17, 2015 the sentencing court reduced that judgment and sentence to writing, signed and filed it and thereafter had no authority to change the judgment and sentence.

Brown v. State, 66 S.W.3d 721, 731 (Mo. 2002)

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

State ex rel. Scroggins v. Kellogg, 311 S.W.3d 293 (Mo.App. W.D. 2010)

State v. Carrasco, 877 S.W.2d 115 (Mo. 1994)

Missouri Rule of Criminal Procedure 29.07(d)

Missouri Rule of Criminal Procedure 29.12(b)

ARGUMENT

Point Relied On

Relator is entitled to a permanent writ: (1) prohibiting Respondent from changing the Judgment and Sentence entered August 17, 2015; (2) mandating that Respondent vacate the amended judgment filed March 6, 2017; and (3) mandating that Respondent deny the Rule 29.12(b) motion filed on January 25, 2017 because a judgment and sentence that has been pronounced, reduced to writing, signed and filed is final and Rule 29.12(b) does not give a sentencing court authority to change it in that on August 13, 2015 the sentencing court pronounced the sentence, and on August 17, 2015 the sentencing court reduced that judgment and sentence to writing, signed and filed it and thereafter had no authority to change the judgment and sentence.

Standard of Review

The Missouri Supreme Court has stated that in an original writ proceeding filed in an appellate court, "[t]he standard of review for writs of mandamus and prohibition… is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes. *State ex rel. Trans World Airlines, Inc. v. David,* 158 S.W.3d 232 (Mo. banc 2005)." *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. 2007).[3]

The Missouri Supreme Court has recognized that the state constitution authorizes it to grant extraordinary writs and that there are three general situations in which a writ of

[3] Rule 84.04(e) requires a relator in a writ proceeding to include the applicable standard of

prohibition is appropriate. "This Court has jurisdiction to issue original remedial writs. Mo. Const. art. V, sec. 4. A writ of prohibition is available in the following circumstances: (1) to prevent a usurpation of judicial power when the circuit court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion when the lower court lacks the power to act as intended; or (3) when a party may suffer irreparable harm if relief is not granted." *State ex rel. St. Charles Cty. v. Cunningham*, 401

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review in the argument section of the initial brief. However, because a writ proceeding is an original action rather than a traditional appellate review of a circuit court's action, this Court is not "reviewing" the circuit court's action. This Court is deciding whether it should order the circuit court not to change a final judgment and to vacate an amended judgment because the circuit court did not have authority to change the original judgment. This original writ proceeding is more analogous to a suit filed in the Missouri Supreme Court for a permanent injunction against a circuit court than an appeal filed for review of a circuit court's action. Perhaps this Court recognized this confusion of terminology in *State ex rel. Merrell v. Carter*, No. SC 95932, 2017 WL 2334491 (Mo. May 30, 2017), when it stated the grounds upon which a writ of prohibition may issue but declined to set forth the "standard of review" or cite to *State ex rel. City of Jennings* in the section of the opinion titled "Jurisdiction and Standard of Review."

S.W.3d 493, 495 (Mo. 2013). Respondent acted in excess of his authority when he granted the Rule 29.12(b) motion and changed the judgment and sentence.

Also, a writ of mandamus is appropriate when a court exceeds its authority. *State ex rel. Kauble v. Hartenbach,* 216 S.W.3d 158, 159 (Mo. 2007) ("Mandamus is a discretionary writ that is appropriate where a court has exceeded its jurisdiction or authority and where there is no remedy through appeal.") Although Respondent did not explicitly state in the docket entry for March 2, 2017 that Defendant Nelson's probation was revoked, the new judgment sentenced him to 180 days in jail without probation. Accordingly, the defendant's probation has been revoked.

The Missouri Court of Appeals for the Western District recognized in *State ex rel. Zahnd*, 276 S.W.3d 368 (Mo.App. W.D. 2009) that an extraordinary writ is the proper means to challenge a trial court's action upon revocation of probation. "As there is no right to appeal a probation revocation order, *see, e.g., State v. Engle,* 125 S.W.3d 344, 345 (Mo.App. E.D. 2004) ('No appeal may be taken from a revocation of probation; instead, errors in probation revocation proceedings may be contested by the appropriate writ'), validity of the probation revocation order ... can only be reviewed through an extraordinary writ. *State ex rel. Poucher v. Vincent,* 258 S.W.3d 62, 64 (Mo. banc 2008) (additional citations omitted)." *State ex rel. Zahnd* at 369.

Granting the Rule 29.12(b) motion and changing the judgment is a clear excess of judicial authority (frequently referred to as "jurisdiction"). *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. 1986). ("[W]e will entertain a writ of prohibition where there exists a clear excess of jurisdiction or abuse of discretion such that

the lower court lacks the *power* to act as contemplated.") Respondent lacks the power to change the judgment under Rule 29.12(b).

Summary of Argument

Respondent exceeded his authority[4] by granting the Rule 29.12(d) motion and changing the judgment and sentence entered on August 17, 2015. He also exceeded his authority by filing a new judgment and sentence on March 6, 2017.

When Respondent granted the Rule 29.12(b) motion and changed the judgment, Respondent acted outside the Supreme Court's rules and contrary to nearly 20 years of case law. Respondent did not have authority under Rule 29.12(b) to change the previously-entered Judgment. Appellate opinions from all three districts of the Missouri Court of Appeals have held that Rule 29.12(b) does not provide an independent basis or authority to grant relief from a purportedly erroneous conviction.

The Missouri Court of Appeals has recognized that this Court's rules provide a clear mechanism by which a defendant in Defendant Nelson's situation, who was not been

[4] The "jurisdiction" of a court is discussed in many appellate opinions and in Respondent's Return (answer to the Petition). However, "authority" is more properly used in this situation. *See State ex rel. Scroggins v. Kellogg*, 311 S.W.3d 293, 297 (Mo.App. W.D. 2010) ("[P]rior Missouri cases that interpreted statutory or rule restrictions on a trial court's power to take an action in a particular case as a deprivation of the court's 'jurisdiction' are no longer accurate.")

delivered to the Department of Corrections because he was still on probation under a suspended execution of sentence, may challenge a conviction: Rule 29.07(d). However, rather than seek relief under the established procedure, the defendant led the circuit court into error by claiming that court could change the previously entered judgment pursuant to Rule 29.12(b). The defendant ignored the procedure provided in Missouri Rule of Criminal Procedure 29.07(d) which authorizes a sentencing court to set aside the defendant's guilty plea in certain circumstances. Instead, the defendant sought a direct change to the previously-entered Judgment.

A just solution could have been reached in this case. The defendant originally accepted a plea agreement for probation on a felony stealing case at a time when the defense, the prosecution and the Court all believed that stealing more than $500 was a felony. After the opinion in *State v. Bazell*, 497 S.W.3d 263 (Mo. 2016), the parties could have taken steps to re-implement the plea agreement under an amended charge of felony receiving stolen property rather than under felony stealing. Rule 29.07(d) authorizes a circuit court to set aside a judgment of conviction and withdraw a guilty plea when the execution of sentence has been suspended if the court finds a manifest injustice that needs to be corrected.[5] *See Brown v. State*, 66 S.W.3d 721, 731, note 5 (Mo. 2002) ("[A] motion

[5] Relator is not conceding that a Rule 29.07(d) motion should have been granted if one had been or is filed in the future. The question of whether implementing the plea agreement of the parties was a manifest injustice remains unlitigated. Several opinions state that sentencing someone to more than the authorized sentence is manifest

injustice. *See State v. Collins*, 328 S.W.3d 705, 707 (Mo. 2011) (When a defendant is sentenced to a term of punishment greater than the maximum sentence for the offense, the sentencing error constitutes a manifest injustice warranting plain error review.)

But under the facts of the case below, the sentencing court may find that there is no manifest injustice. In the alternative to felony stealing under Section 570.030 RSMo., the prosecuting attorney could have charged Defendant Nelson with felony receiving stolen property under Section 570.080, RSMo. which had elements so similar that it was impossible for someone to steal without also committing the crime of receiving stolen property. All persons guilty of stealing were also guilty of receiving stolen property because receiving stolen property included retaining and disposing of property known to have been stolen. In other words, when a person steals an item, that person retains the item until the thief disposes of it. From August 2011 until December 31, 2016, Section 570.080 RSMo. provided, in pertinent part:

> 1. A person commits the crime of receiving stolen property if for the purpose of depriving the owner of a lawful interest therein, he or she receives, retains or disposes of property of another knowing that it has been stolen, or believing that it has been stolen.

The acts with which defendant was charged in fact were sufficient to convict the defendant of felony receiving stolen property since one who steals retains possession until disposing of the property.

If a Rule 29.07(d) motion is filed, generally the sentencing court would ask, is it

under the first clause of Rule 29.07(d) to withdraw a plea of guilty before sentence is imposed or when imposition of a sentence is suspended would still be proper, as would a motion under the second clause of Rule 29.07(d) to set aside a conviction and withdraw a guilty plea after sentence but before remand to the DOC….").

If the defendant had sought relief under Rule 29.07(d) and the defendant's guilty plea had been withdrawn, Relator could have moved to amend the charge from felony stealing more than $500 to felony receiving stolen property. At that point, the parties and the Court would have been permitted to re-implement the original plea agreement. The

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manifestly unjust to sentence a person to a felony if what that person did was not a felony? Yes. But under the facts of this case, is it manifestly unjust to sentence a person under the name and statute number of one particular felony if that person was actually guilty of a felony with a different name and statute number that had virtually the same elements? No. Is it manifestly unjust to put the wrong name and statute number on a conviction? Not if the names are stealing and receiving stolen property.

As further grounds why there might be no manifest injustice, the defendant below could have challenged the felony stealing charge in the trial court or appealed based on the reasoning of *Bazell* even though at the time almost no one thought the reasoning was legitimate until *Bazell* was handed down. Failing to challenge the felony stealing charge should be considered a waiver of that challenge.

defendant could have pleaded guilty to the amended charge of felony receiving stolen property and been placed back on probation as originally agreed by the parties.

In the alternative to the second clause of Rule 29.07(d), a defendant such as Defendant Nelson may challenge a conviction by direct appeal at the time he receives a suspended execution of sentence. *See State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 66 (Mo. 2008) (Where, as here, a sentence is imposed but then its execution is suspended, the judgment is final and the defendant has a right of immediate appeal.)

Realizing that the withdrawal of the defendant's guilty plea pursuant to Rule 29.07(d) would have enabled the State to seek the amendment of the charge, the defense asked the Court to change the previously entered judgment pursuant to Rule 29.12(b). However, nearly 20 years of case law from all three districts of the Missouri Court of Appeals have held that Rule 29.12(b) does not provide a circuit court independent authority to change a conviction. The text of the rule does not give a sentencing court authority to change a judgment. The rule states that the court may *consider* plain errors, but it does not authorize a court to take action to correct them.

The defendant claims that all sentencing courts retain authority to change judgments without any limitation if a judgment does not comply with the law. The defendant relies on *Ossana* and its progeny. However, these cases are contrary to and outside of the main line of cases that hold a court loses authority to change a judgment once it is entered, except as specifically provided by rule or law. For instance, Rules 24.035 and 29.15 provide the exclusive procedure by which defendants who have been delivered to the Department of Corrections may seek relief in the sentencing court on a claim that the sentence exceeds

the maximum provided by law. The *Ossana* line of cases conflicts with the cases that hold that defendants seeking relief from the sentencing court must raise the enumerated claims of Rule 24.035 and Rule 29.15, one of which is the claim that the sentence exceeded the maximum provided by law, within the time provided.

Relator objected to the Rule 29.12(b) Motion and informed Respondent that case law from all three districts of the Missouri Court of Appeals have held that Rule 29.12(b) does not provide a circuit court independent authority to change a conviction. Despite binding precedent to the contrary, Respondent granted the Rule 29.12(b) motion and changed the previously-entered Judgment.

Allowing the new Judgment to stand would enable sentencing courts to act outside the law and established rules, namely Rule 29.07(d) (for defendants on probation), Rule 24.035 (for defendants who pleaded guilty and have been delivered to the Department of Corrections), Rule 29.15 (for defendants who have been convicted at trial and have been delivered to the Department of Corrections), and habeas corpus.

Again, this Court has clearly stated that, "[a] person who has suffered criminal conviction is bound to raise all challenges thereto timely and in accordance with the procedures established for that purpose. To allow otherwise would result in a chaos of review unlimited in time, scope, and expense." *Simmons* at 446. Accordingly, "[a]s a general matter, a trial court lacks the authority to amend a sentence once the judgment becomes final." *State ex rel. Scroggins v. Kellogg*, 311 S.W.3d 293 (Mo.App. W.D. 2010). "A final judgment in a criminal case occurs 'when a sentence is entered.'" *State v. Joordens*, 347 S.W.3d 98, 100 (Mo.App. W.D. 2011) (citation omitted). Simply put, "once

judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction. It can take no further action in that case except when otherwise expressly provided by statute or rule. *See*, for example, Rule 24.035, Rule 29.15 and § 217.775, RSMo 1986." *Simmons* at 445.

Because Respondent exceeded his authority by granting the Rule 29.12(b) motion and changing the previously entered Judgment and Sentence, this Court should grant relief, via an extraordinary writ, to correct a substantial error and to restrain Respondent to its authority. The Circuit Court's amended judgment is a nullity and must be vacated.

Procedures Established to Challenge Convictions

"This state has established a procedural system that provides a timely review of criminal convictions. It allows for direct appeal and for post-conviction review of certain constitutional protections pursuant to Rules 29.15 and 24.035." *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. 1993). Direct appeal is available for all defendants who have been convicted, either of felonies or misdemeanors. Rules 29.15 and 24.035 are available to defendants who have been convicted of felonies and delivered to the Department of Corrections. Defendants found guilty of misdemeanors may challenge convictions pursuant to Rule 29.07(d) in addition to direct appeal. Defendants found guilty of felonies but who have not been delivered to the Department of Corrections because they have been given a chance at probation by the suspended imposition of sentence or the suspension of the execution of the sentence, may also challenge a court's judgment pursuant to Rule 29.07(d).

Rule 29.07(d) has two clauses. The first is available when the imposition of sentence is suspended ("A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended."). The second clause is available when the execution of sentence is suspended, as happened in the underlying case to Defendant Nelson ("but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."). Simply put, Rule 29.07(d) provides a procedural system to challenge both a suspended imposition of sentence and a suspended execution of sentence: "[A] motion under the first clause of Rule 29.07(d) to withdraw a plea of guilty before sentence is imposed or when imposition of a sentence is suspended would… be proper, as would a motion under the second clause of Rule 29.07(d) to set aside a conviction and withdraw a guilty plea after sentence but before remand to the DOC…." *Brown v. State*, 66 S.W.3d 721, 731, n. 5 (Mo. 2002).

In the alternative to the second clause of Rule 29.07(d), a defendant such as Defendant Nelson may challenge a conviction by direct appeal at the time he receives a suspended execution of sentence. *See State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 66 (Mo. 2008) ("Where, as here, a sentence is imposed but then its execution is suspended, the judgment is final and the defendant has a right of immediate appeal.")

In sum, while Defendant Nelson remains on probation, a Rule 29.07(d) motion would be appropriate to be filed and heard. Respondent would then be required to decide whether the requirements of the second clause of Rule 29.07(d) had been met. If Respondent denied the Rule 29.07(d) motion, then the court would proceed with a probation violation hearing for Defendant Nelson. If the probation granted by the August

17, 2015 judgment was revoked and the defendant was delivered to the Department of Corrections, then a Rule 24.035 motion would be the appropriate procedure to challenge the conviction.

Rule 29.12(b) Does Not Give a Court Authority to Change a Final Judgment

The defendant in the underlying case asked Respondent to change a final judgment based on Rule 29.12(b). That rule provides, "Plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Mo. R. Crim. P. 29.12(b).

State v. Paden, No. WD 79544, 2017 WL 2644088, at *4 (Mo.App. W.D. June 20, 2017) is the most recent case to discuss the fact that Rule 29.12(b) does not give a court authority to provide post-conviction relief to defendants. The circuit court in *Paden* sentenced the defendant on November 2, 2015 to consecutive prison terms based on the mistaken belief that the law required the two counts to be run consecutively. At sentencing, both the prosecutor and the defense attorney told the court that it was obligated to run the sentences consecutively. Paden was thereafter delivered to the Department of Corrections. *Id.*

Several weeks after the court pronounced the sentence, reduced to it writing, signed and filed the judgment and sentence, the prosecutor and defense attorney advised the court that the law did not require the sentences to run consecutively. The attorneys filed a joint motion under Rule 29.12(d) on January 27, 2016. The Rule 29.12(b) motion was granted and the court set the case for resentencing. *Id.*

The Missouri Court of Appeals for the Western District held that, "the circuit court concluded its jurisdiction when it entered the November 2, 2015 sentence." *Id.* Further, the appellate court held, "because the circuit court lacked jurisdiction to modify Paden's sentence after it became final, the circuit court's grant of the parties' joint Rule 29.12(b) motion is void." *Id.*

In addition to the fact that the circuit court lacked authority under Rule 29.12(b) to change the judgment and sentence, the Western District further explained that there is no right to appeal under Rule 29.12(b). *Id.* at n. 6.

State v. Doss, 503 S.W.3d 290 (Mo.App. W.D. 2016) also discusses the limits of Rule 29.12(b). The defendant in *Doss* was convicted at trial of eight counts: felony murder, armed criminal action, robbery and armed criminal action for each of two victims. *Id.* at 291. In an earlier appeal from the trial, the Court of Appeals found that the evidence was insufficient to support the conviction for robbery and armed criminal action for one of the victims. *State v. Doss*, 394 S.W.3d 486, 494 (Mo.App. W.D. 2013). The court reversed only the convictions for robbery and armed criminal action and left untouched the convictions for the felony murder premised on the robbery and armed criminal action connected to the felony murder. *Id.*

On remand, the defense sought an acquittal on the felony murder and armed criminal action charges that were predicated on the robbery that the appeals court had set aside due to insufficient evidence. The defense argued that because the robbery conviction had been reversed for insufficient evidence, the felony murder and armed criminal action convictions based on that robbery also must be set aside. However, the defense had not sought reversal

of the felony murder and armed criminal action convictions in the original appeal. It is unclear if there was a strategic reason for defense counsel not to seek such relief.

The defense in *Doss* filed a motion after remand in the trial court in part pursuant to Rule 29.12 and asked for an acquittal of the felony murder and armed criminal action convictions based on the robbery that had been found to be supported by insufficient evidence. The trial court denied the Rule 29.12 motion. The defense appealed.

The appellate court reached its holding based on the law defining a circuit court's authority following mandate. That part of the opinion is inapplicable to the issue in this petition for an extraordinary writ. However, in a footnote, the court cited to a line of cases that have held that Rule 29.12(b) does not provide an independent basis under which a person convicted of a crime can challenge that conviction. The court stated:

> Moreover, we note that the rules Doss cites, Rules 29.07(c) and 29.12(b), did not provide the circuit court with the authority to grant his motion for judgment of acquittal. Rule 29.07(c) states that "[a] judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly." This rule merely sets forth what information is required to be included in a final judgment in a criminal case. *See, e.g.*, *State v. Paul*, 401 S.W.3d 591–92 (Mo. App. 2013). It does not allow the circuit court to enter a new judgment at any time notwithstanding other procedural rules. Likewise, Rule 29.12(b), the plain error rule, did not give the circuit court such authority, as the rule "does not provide an independent basis under which a person convicted of a crime

can subsequently challenge his conviction or sentence." *State v. Lawrence*, 477 S.W.3d 170, 170 (Mo. App. 2015).

Id. 293, n. 1 (Mo.App. W.D. 2016). Thus, the Court of Appeals for the Western District let stand a conviction for felony murder based on a robbery conviction that it had earlier found to be supported by insufficient evidence. Despite the "plain error" rule, Rule 29.12(b), the court found that the trial court did not have authority to set aside the conviction for felony murder.

A conviction for felony murder predicated on a robbery that an appellate court has vacated due to insufficient evidence surely must be contrary to law. Yet the *Doss* court stated that Rule 29.12(b) did not give the trial court authority to set aside the felony murder conviction.

Doss cited to an Eastern District case that stated that Rule 29.12(b) "does not provide an independent basis under which a person convicted of a crime can subsequently challenge his conviction or sentence." *State v. Lawrence*, 477 S.W.3d 170 (Mo.App. ED 2015).

Vernor v. State, 30 S.W.3d 196 (Mo.App. E.D. 2000) discussed Rule 29.12(b) at greater length. Vernor pleaded guilty to first-degree assault and armed criminal action. Pursuant to a plea agreement with the State, the plea court sentenced Vernor to concurrent terms of fourteen years for first-degree assault and three years for armed criminal action. Vernor did not file a direct appeal from his conviction and sentence. Instead, Vernor filed a Rule 24.035 motion for post-conviction relief, which the motion court denied without a hearing. In *Vernor v. State,* 894 S.W.2d 209, 211 (Mo.App. E.D. 1995), the Eastern

District remanded his motion for a hearing. On remand, the motion court held a hearing and denied Vernor's motion. This judgment was upheld in *Vernor v. State,* 926 S.W.2d 685, 686 (Mo.App. E.D. 1996). On December 1, 1999, Vernor filed a petition for relief under Rule 29.12(b). Vernor sought relief for "plain error" from his 1993 convictions for first degree assault and armed criminal action. On December 7, 1999, the circuit court entered a judgment dismissing, overruling and denying Vernor's Rule 29.12(b) motion. Vernor appealed. In response, the State filed a motion to dismiss the appeal, contending Rule 29.12(b) will not support an independent cause of action, and therefore, the appellate court lacked jurisdiction to entertain Vernor's appeal. The Eastern District agreed and dismissed the appeal. *Vernor v. State*, 30 S.W.3d 196, 196 (Mo.App. E.D. 2000).

The Eastern District held that the Supreme Court's rules, "still provide no basis for an independent motion under Rule 29.12(b)." *Id.* at 197. Vernor's remedy was to pursue a motion for post-conviction relief under Rule 24.035, which he did. Vernor was not entitled to a successive Rule 24.035 motion, which was what he was attempting to do by filing a motion labeled as a Rule 29.12(b) motion. The Eastern District held, "the circuit court correctly dismissed Appellant's motion because there is no independent basis for it." *Id.*

The Southern District likewise has held, "Rule 29.12 makes no provision for independent motions to enforce claims of plain error." *State v. Massey*, 990 S.W.2d 201, 204 (Mo.App. S.D. 1999).

A Court's Authority Ends When Judgment is Entered

Many cases discuss various attempts by sentencing courts to reduce or set aside previously imposed sentences.

In *State ex rel. Simmons v. White*, 866 S.W.2d 443 (Mo. 1993), the Supreme Court reaffirmed that "a circuit court loses jurisdiction over a criminal case after judgment and sentencing," and that "subsequent proceedings were a nullity." *Id.* at 444. "[O]nce judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction. It can take no further action in that case except when otherwise expressly provided by statute or rule." *Id.* at 445.

The situation in *Simmons* is similar to the situation in this petition in an important way. Both Simmons and Defendant Nelson pleaded guilty to charges that the parties believed to be felonies. Simmons pleaded guilty to felony driving while intoxicated based on the belief that only two prior DWI offenses were necessary to elevate a misdemeanor DWI to a felony DWI. Defendant Nelson pleaded guilty to felony stealing believing that a misdemeanor stealing would be elevated to a felony stealing if the item stolen was worth more than $500. This Court recently held that "[T]he enhancement provisions of section 570.030.3 do not apply to the definition of stealing in section 570.030.1." *State v. Smith*, 2017 WL 2952325 (Mo. July 11, 2017).

Simmons pleaded guilty shortly after the hand down of *State v. Stewart*, 832 S.W.2d 911, 914 (Mo. 1992). *Stewart* held that three prior DWI convictions were required for a DWI charge to be a felony, rather than two priors. The parties in *Simmons* realized that three prior DWI convictions were required to make the charge a felony, and the court set

aside the first conviction. The parties then implemented the plea agreement under the amended charge that listed three prior convictions for DWI. Later, the defendant sought a writ of habeas corpus challenging his incarceration.

The court in *Simmons* stated, "[t]here can be little doubt that the informations and evidence supporting Simmons' first conviction and sentencing were inadequate in light of *Stewart.* The state alleged and Simmons admitted only two prior convictions, instead of the requisite three." *Id.* at 446. In other words, the sentence first given to Simmons was contrary to the law because it gave him a felony level sentence for a misdemeanor offense.

Similar to Simmons, the Defendant Nelson pleaded guilty to stealing, believing that it was a felony. Both the sentencing court in *Simmons* and Respondent set aside the original convictions based on the belief that the original sentence was in excess of that permitted by law, i.e. the charge was actually a misdemeanor but the sentence was a term of years. Both courts entered new convictions.

The Supreme Court in *Simmons* reviewed the proceedings below and held, "the setting aside of the first conviction and sentencing and the entering of the second conviction and sentencing are void. The first conviction and sentencing stand." *Id.* at 445. This court should again vacate the new judgment because Respondent had no authority to set aside the first conviction and sentencing of Defendant Nelson. The second conviction and sentencing of Defendant Nelson are void.

The facts of *State v. Carrasco*, 877 S.W.2d 115 (Mo. 1994) are also similar to the facts at bar in very important ways. Carrasco pleaded guilty to transportation of marijuana and was sentenced pursuant to a plea agreement to ten years imprisonment. *Id.* at 116.

However, the maximum penalty for that crime was five years imprisonment. *Id.* On appeal Carrasco "correctly pointed out that at the time he was sentenced the maximum penalty for transporting marijuana was a term of imprisonment for not more than five years." *Id*.

Carrasco filed a Rule 29.12(b) motion and an amended motion, which asked the sentencing court to reduce the sentence, approximately two years after his judgment and sentence were entered. *Id.* Carrasco also asked for relief in the appellate courts under Rule 29.12c) (nunc pro tunc) and via an oral petition for a writ of habeas corpus. *Id.*

The trial court denied the motion to reduce the sentence, and the Missouri Supreme Court affirmed that denial. *Id.* The *Carrasco* Court held: (1) "[t]he trial court did not have jurisdiction to grant the relief sought under the guise of Rule 29.12,"; (2) the nunc pro tunc request was inappropriate; (3) the applicable rule for the relief sought (relief from a sentence in excess of the statutory maximum) was Rule 24.035, but that the time for filing a Rule 24.035 motion had passed, and finally (4) the defendant could file a petition for writ of habeas corpus in the circuit court having jurisdiction. *Id.* at 116-118.

Even though it was undisputed that Carrasco's sentence was contrary to the law because it sentenced to him to more than the maximum permitted, the Missouri Supreme Court affirmed the trial court's denial of the motion to reduce his sentence. The Court instructed that if Carrasco wanted relief, he would have to file a petition for writ of habeas corpus. Just as in *Carrasco*, Defendant Nelson must follow the established procedures for challenging a conviction. Respondent did not have authority to grant relief under Rule 29.12. Defendant Nelson could have appealed after the sentence was entered or sought to have his guilty plea set aside pursuant to Rule 29.07(d).

State ex rel. Wagner v. Ruddy, 582 S.W.2d 692 (Mo. 1979), discusses whether a sentencing court has authority to change a judgment and sentence after it is entered. "The sole issue is whether the trial court in a criminal prosecution retains general jurisdiction to reopen or modify its judgment after judgment and sentence is entered." *Id.* at 692. Wagner was sentenced for embezzling money to provide "everything he could" for his terminally ill wife. *Id.* at 693. The trial court learned that Wagner's explanation of his motive was false and set aside the previous judgment and sentence. *Id.* Wagner sought to prohibit the trial court from vacating judgment and sentence previously entered for the purpose of resentencing him. *Id.* at 692. The Missouri Supreme Court analyzed several other similar cases and held that the trial court exhausted its jurisdiction (or, more properly, authority) upon entry of the judgment and sentence and exceeded its jurisdiction (authority) in setting aside the original sentence. *Id.* at 695. The Supreme Court held that the order setting aside the original sentence should be stricken from the record. *Id.*

Similarly, in *State ex rel. Johnston v. Berkemeyer*, 165 S.W.3d 222 (Mo.App. E.D. 2005), the trial court sentenced the defendant to 30 days in jail on a property damage case. Seven days into the sentence, the court purported to suspend the balance of the sentence and place the defendant on probation. *Id.* at 223. Later, the court began proceedings to revoke the defendant's probation. *Id.* The defendant sought a writ to prevent the trial court from taking further action because it has exceeded its authority. *Id.* The trial court claimed that it retained jurisdiction for thirty days after entry of the judgment under Rule 75.01. *Id.* at 225.

The *Johnston* court found that the trial court exhausted its jurisdiction to amend the defendant's sentence to include probation when the judgment and sentence of 30 days was entered. *Id.* The appellate court also held the proceeding in which the trial court purported to place the defendant on probation was a nullity. *Id.*

Finally, *State ex rel. Mertens v. Brown*, 198 S.W.3d 616 (Mo. 2006) discussed Section 559.115.3 RSMo as a possible means to take action on a criminal case following the entry of judgment. Before detailing the proper procedure to follow under this section, the Supreme Court reaffirmed that "[o]nce judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction. It can take no further action in that case except when otherwise expressly provided by statute or rule." *Id.* at 618.

"As a general matter, a trial court lacks the authority to amend a sentence once the judgment becomes final." *State ex rel. Scroggins v. Kellogg*, 311 S.W.3d 293 (Mo.App. W.D. 2010). "A final judgment in a criminal case occurs 'when a sentence is entered.'" *State v. Joordens*, 347 S.W.3d 98, 100 (Mo.App. W.D. 2011) (citation omitted). Simply put, "once judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction. It can take no further action in that case except when otherwise expressly provided by statute or rule. *See*, for example, Rule 24.035, Rule 29.15 and § 217.775, RSMo 1986." *Simmons v. White* at 445.

Ossana and its Progeny Should be Overruled

The Defendant Nelson claims that Respondent, and by extension all sentencing courts, retain authority under a line of cases that began with the unsupported assertion that, "[i]n order to constitute a final judgment, it is axiomatic that the sentence

not be contrary to law." *Ossana v. State*, 699 S.W.2d 72, 73 (Mo.App. E.D. 1985). However, the idea that a judgment that is contrary to law may be changed by the sentencing court without any limitation as to time is contrary to law. Missouri's established procedures for challenging convictions do not allow defendants to seek relief in the sentencing court except as provided in the first clause of Rule 29.07(d) (defendants with suspended imposition of sentence probation), the second clause of Rule 29.07(d) (defendants with suspended execution of sentence probation), Rule 24.035 (defendants who have pleaded guilty and been received by the Department of Corrections), or Rule 29.15 (defendants who have been found guilty after trial and been received by the Department of Corrections).

Allowing defendants to return to sentencing courts months or years after the convictions without limitation, while on probation, in prison or even after parole supervision has ended, would seriously undermine the finality of judgments and open the door to the sort of uncertainty warned about in *Simmons v. White*. *Simmons* at 446 ("To allow otherwise would result in a chaos of review unlimited in time, scope, and expense."). The timing of appeals is also cast in doubt if this Court allows *Ossana* to stand. Appeals must be filed a certain number of days after judgments become final. If judgments that are contrary to law never become final, then the deadline to appeal never comes. Further, if the judgment is not final, then any appeal would be premature. Finally, if a judgment that is contrary to law if never final, then it seems logical that a judgment contrary to the federal or state constitution is never final. This extension of *Ossana* would swallow virtually all—if not all—of both Rule 24.035 and Rule 29.15 since the majority of motions under those

rules address whether a defendant received constitutionally effective counsel.

Several cases since *Ossana* have relied on its "axiomatic" statement without fully appreciating the consequence. The continued viability of *Ossana* directly conflicts with the many opinions that hold that Rule 24.035 and Rule 29.15 are the exclusive procedures for raising the enumerated claims, including the claim that the sentence exceeded the maximum provided by law. *See, e.g. Vogl v. State*, 437 S.W.3d 218, 226 (Mo. 2014) ("Rule 24.035 provides the exclusive procedure by which a person convicted of a felony on a guilty plea may seek post-conviction relief."); *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 701–02 (Mo. 2010) ("Rule 29.15(b), however, states that the rule 'provides the exclusive procedure by which such person may seek relief *in the sentencing court.'*"); *Schleeper v. State*, 982 S.W.2d 252, 253 (Mo. 1998) ("Rule 29.15 provides that it is the "exclusive" procedure for seeking post-conviction relief."); *Pettry v. State*, 345 S.W.3d 335, 339 (Mo. App. E.D. 2011) ("Moreover, this motion is the exclusive procedure by which a person may seek relief in the sentencing court.").

The *Ossana* cases fail to recognize that challenges to convictions, even challenges that claim the judgment was contrary to law, must be pursued under established procedures in a timely manner. A judgment and sentence that has been pronounced, reduced to writing, signed and filed but is contrary to law remains a "final" judgment even though it may be an erroneous judgment. The opinion in *Doss* held that Rule 29.12(b) "does not allow the circuit court to enter a new judgment at any time notwithstanding other procedural rules." *Id.* at 170. The same limitation should be applied when a judgment is allegedly entered contrary to law. Overruling the *Ossana* cases will remove a contradiction from Missouri

law on the authority of a sentencing court after a judgment and sentence is pronounced, reduced to writing, signed, and filed. The fact that a judgment is alleged to be contrary to law does not allow the sentencing court to enter a new judgment at any time notwithstanding other procedural rules. The judgment is final even though it may be erroneous.

Writ is the Proper Remedy

The Missouri Supreme Court has recognized that the state constitution authorizes it to grant extraordinary writs and that there are three general situation in which a writ of prohibition is appropriate. "This Court has jurisdiction to issue original remedial writs. Mo. Const. art. V, sec. 4. A writ of prohibition is available in the following circumstances: (1) to prevent a usurpation of judicial power when the circuit court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion when the lower court lacks the power to act as intended; or (3) when a party may suffer irreparable harm if relief is not granted." *State ex rel. St. Charles Cty. v. Cunningham*, 401 S.W.3d 493, 495 (Mo. 2013). Respondent acted in excess of his authority when he granted the Rule 29.12(b) motion and changed the judgment and sentence.

Also, a writ of mandamus is appropriate when a court exceeds its authority. *State ex rel. Kauble v. Hartenbach,* 216 S.W.3d 158, 159 (Mo. 2007) ("Mandamus is a discretionary writ that is appropriate where a court has exceeded its jurisdiction or authority and where there is no remedy through appeal.")

Although Respondent did not explicitly state in the docket entry for March 2, 2017 that the Defendant Nelson's probation was revoked, the new judgment sentenced him to

180 days in jail without probation. Accordingly, the defendant's probation has been revoked. The Missouri Court of Appeals for the Western District has recognized in *State ex rel. Zahnd*, 276 S.W.3d 368 (Mo.App. W.D. 2009) that an extraordinary writ is the proper means to challenge a trial court's action upon revocation of probation. "As there is no right to appeal a probation revocation order, *see, e.g., State v. Engle,* 125 S.W.3d 344, 345 (Mo.App. E.D. 2004) ('No appeal may be taken from a revocation of probation; instead, errors in probation revocation proceedings may be contested by the appropriate writ'), validity of the probation revocation order ... can only be reviewed through an extraordinary writ. *State ex rel. Poucher v. Vincent,* 258 S.W.3d 62, 64 (Mo. banc 2008) (additional citations omitted)." *State ex rel. Zahnd* at 369.

In addition, because the sentencing court had no independent basis to change the judgment and sentence under Rule 29.12(b), there is not an appealable judgment. *See State v. McGee*, 417 S.W.3d 260, 261 (Mo.App. E.D. 2013) (Without an independent basis for Movant's motion, there is not an appealable judgment.) In *Vernor v. State*, 30 S.W.3d 196 (Mo.App. E.D. 2000), the defendant sought relief for "plain error" from his 1993 convictions for first-degree assault and armed criminal action. On December 7, 1999, the circuit court entered a judgment dismissing, overruling and denying Vernor's Rule 29.12(b) motion. Vernor appealed. In response, the State filed a motion to dismiss the appeal, contending Rule 29.12(b) will not support an independent cause of action, and therefore, the appellate court lacked jurisdiction to entertain Vernor's appeal. The Eastern District agreed and dismissed the appeal. *Vernor v. State*, 30 S.W.3d 196, 196 (Mo.App. E.D. 2000). Because Respondent granted a Rule 29.12(b) motion and changed a judgment

without authority, the amended judgment and sentence is void. Accordingly there is not an appealable judgment.

The Missouri Court of Appeals for the Western District intimated that a writ of mandamus would be the appropriate procedure to challenge the grant of a Rule 29.12(b) motion in *Paden*. *See State v. Paden*, No. WD 79544, 2017 WL 2644088, at *4 (Mo.App. W.D. June 20, 2017) ("There is no right to appeal under Rule 29.12(b) and neither the State nor Paden attempted to appeal the motion court's grant of their joint Rule 29.12(b) motion or the court's order for resentencing. Likewise, neither pursued a writ of mandamus which is a discretionary writ that is appropriate where a court has exceeded its jurisdiction or authority and where there is no remedy through appeal.") (internal citations and quotation marks omitted).

Granting the Rule 29.12(b) motion and changing the judgment is a clear excess of judicial authority (frequently referred to as "jurisdiction"). *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. 1986). ("[W]e will entertain a writ of prohibition where there exists a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the *power* to act as contemplated.") Respondent lacks the power to change the judgment under Rule 29.12(b).

CONCLUSION

The issue is whether this Court will maintain the established procedures which a defendant must follow to challenge a conviction or will this Court allow a massive expansion of post-conviction challenges in sentencing courts.

The circuit court exceeded its authority and acted outside the law and established rules by granting the Rule 29.12(b) motion and changing the August 17, 2015 judgment. The new judgment is a nullity and must be vacated. Relator asks this Court to set aside and vacate the new judgment and to order Respondent to deny the Rule 29.12(b) motion.

If this Court fails to overturn the *Ossana* line of cases, sentencing courts will be able to reopen and change criminal cases years after the sentences have been pronounced. All that will be required will be for the affected defendant to show that the judgment and sentence was entered contrary to law. If the fact that a judgment and sentence was contrary to law is sufficient to reopen and change a criminal case years later, then surely defendants will be permitted reopen and change criminal cases when the judgment and sentence is contrary to the Missouri or U.S. Constitution. The failure of this Court to act will result in a "chaos of review unlimited in time, scope, and expense." *Simmons* at 446.

Respectfully Submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I, the undersigned, hereby certify that the above and foregoing was transmitted to opposing counsel of record via the Missouri eFiling system on the date electronically stamped on the upper right edge of this document.

I further certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 9,476 words.

/s/ Joseph W. Vanover
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