

SC96474

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

ex rel. Amy Fite, Prosecuting Attorney of Christian County Missouri

Relator,

v.

THE HONORABLE LAURA JOHNSON,
Circuit Court Judge 38th Judicial Circuit, Division I

Respondent.

Petition in Prohibition or, in the Alternative, in Mandamus

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

The issue before this Court is whether the circuit court exceeds its jurisdiction and authority when it acts outside of established rules and procedures by granting a Rule 29.07(d) motion and amending the charge and final sentence and judgment previously entered for the defendant who had already served more than 180 days in the Department of Corrections for a sentence imposed on November 6, 2015. This Court has jurisdiction under Article V, Section 3 of the Missouri Constitution to hear this matter. The Court also has jurisdiction to hear the matters concerning Missouri Rules of Criminal Procedure interpretations. Mo. Const. Article V, Section 5.

STATEMENT OF FACTS

On September 3, 2013, the defendant in the underlying criminal case, Robby L. Ledford, appropriated a bracelet of a value of at least five hundred dollars from Michael Day without the victim's consent and with the purpose to deprive the victim thereof. *See Exhibit A, Information for a felony filed May 13, 2014, and the complaint and probable cause statement filed December 4, 2013.*

The defendant negotiated a plea agreement with an assistant prosecuting attorney acting on behalf of the State of Missouri, in which both the State and the defense agreed that upon the defendant entering his plea of guilt, the trial court would suspend imposition of sentence and place defendant on supervised probation for five years. The defendant voluntarily entered his plea of guilty to felony stealing of value over five hundred dollars. *See Exhibit B, defendant's Petition to Enter Guilty, Plea Agreement and Judgment.*

The defendant violated his probation as reported to the court by in violation reports dated October 20, 2014; November 6, 2014; January 15, 2015; February 25, 2015; April 8, 2015; and June 17, 2015. Subsequently, the circuit court revoked defendant's probation and sentenced him to five years in the Missouri Department of Corrections and suspended execution of that sentence. Following this sentence, additional probation violation reports dated August 5, 2015, and August 12, 2015, were filed in circuit court. Again, the State filed a motion requesting the court to revoke defendant's probation. A capias warrant was issued due to the defendant's probation violations in August of 2015.

On November 6, 2015, the circuit court revoked defendant's probation and executed the previously imposed five-year sentence to the Missouri Department of Corrections. Following the revocation of his previously imposed sentence, Ledford was advised by the court of his rights under Mo. Sup. Ct. Rule 24.035. *See Exhibit C, Motions to Revoke Probation; Docket Entry of July 7, 2015, and November 6, 2015; and Judgment dated November 6, 2015. See Exhibit D violation reports dated August 12, 2015; August 5, 2015; June 17, 2015; April 8, 2015; February 25, 2015; January 15, 2015; November 6, 2014; and October 20, 2014.*

Following defendant's delivery to the Missouri Department of Corrections the defendant never filed a 24.035 motion for post-conviction relief. On August 23, 2016, this Court issued its findings in *State v. Bazell*, 497 S.W.3d 263, (Mo. banc 2016).

On February 1, 2017, the defendant filed a Motion to Withdraw Guilty Plea to Correct a Manifest Injustice Under Rule 29.07(d), asking the circuit court to change the judgment entered on November 6, 2015. *See Exhibit E.* Relator filed an objection in Motion to Deny Defendant's Post-Conviction Motion and Suggestions in Support on February 6, 2017. *See Exhibit F.* Defendant's motion was argued on the record on April 7, 2017. The Relator argued that the circuit court did not have jurisdiction to grant the defendant's motion as it was out of time, having been filed more than 180 days since the defendant was delivered to the Department of Corrections. The defendant was delivered to the Department of Corrections on or about November 6, 2015. The Relator argued that if the court granted the defendant the relief of withdrawing his guilty plea, the charge

remained and the Relator could pursue or amend the charge. The Relator further argued that the court's authority pursuant to Rule 29.07(d) was limited to granting relief of setting aside the defendant's guilty plea. Relator argued Rule 29.07(d) did not provide authority for the court to amend the charge and change the judgment and sentence of the defendant. *Exhibit F-2 to F-3; Transcript of hearing on April 7, 2017 Tr. 7:8-18;8:14-9:11;10:19-24.*

In an order dated April 12, 2017, Respondent, the Honorable Laura Johnson, Circuit Judge in Division I of the 38th Judicial Circuit, granted the Rule 29.07(d) motion and in addition amended the charge and entered a new sentence and judgment. The Respondent exceeded the trial court's jurisdiction in granting defendant post-conviction relief. The Respondent amended the filed charge from stealing a value more than five hundred dollars to stealing and entered a new sentence and judgment. *See Exhibit G, Order and case.net docket sheet.* Relator has filed a direct appeal challenging the court's amending the charge and entering a new sentence and judgment. Relator is unsure if she has the right of direct appeal. Therefore, she is seeking extraordinary relief by this Writ.

This Court issued a Preliminary Writ of Prohibition on June 28, 2017, against the Respondent and directed the Respondent to file a response to Relator's petition.

POINTS RELIED UPON

POINT I

THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT FROM AMENDING THE CHARGE AND CHANGING A FINAL SENTENCE AND JUDGMENT OF NOVEMBER 6, 2015, BY ITS APRIL 12, 2017, ORDER AND AN ORDER MANDATING THE CIRCUIT COURT DISMISS THE DEFENDANT'S POST-CONVICTION MOTION FOR LACK OF JURISDICTION, IN THAT THE CIRCUIT COURT DID NOT HAVE JURISDICTION TO HEAR THE DEFENDANT'S MOTION, BECAUSE THE DEFENDANT DID NOT TIMELY FILE A POST-CONVICTION MOTION WITHIN 180 DAYS FROM HIS DELIVERY TO THE DEPARTMENT OF CORRECTIONS FOLLOWING HIS SENTENCE OF NOVEMBER 6, 2015.

Searcy v. State, 103 S.W.3d 201 (Mo. App. 2003)

Morris v. State, 25 S.W.3d 649 (Mo. App. 2000)

Unnerstall v. State, 53 S.W.3d 589 (Mo. App. 2001)

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

Mo. Sup. Ct. Rule 24.035

Mo. Sup. Ct. Rule 29.15

Mo. Sup. Ct. Rule 29.07(d)

Mo. Sup. Ct. Rule 29.12

POINT II

THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT FROM AMENDING THE CHARGE AND CHANGING A FINAL SENTENCE AND JUDGMENT OF NOVEMBER 6, 2015, BY ITS APRIL 12, 2017, ORDER AND MANDATING THE CIRCUIT COURT DENY DEFENDANT'S POST-CONVICTION MOTION TO WITHDRAW GUILTY PLEA TO CORRECT MANIFEST INJUSTICE UNDER RULE 29.07(d), IN THAT, THE CIRCUIT COURT EXCEEDED ITS JURISDICITON AND AUTHORITY ACTING OUTSIDE THE LAW IN GRANTING DEFENDANT'S MOTION UNDER RULE 29.07(d) BECAUSE SAID RULE DOES NOT AUTHORIZE THE AMENDING A CHARGE AND SENTENCE AND JUDGMENT.

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

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

State ex rel. Poucher v. Vincent, 258 S.W.3d 62 (Mo. banc 2008)

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

State v. Joordens, 347 S.W.3d 98 (Mo. App. 2011)

State ex rel. Moore v. Brown, 270 S.W. 3d 447 (Mo. App. 2008)

State v. Paul, 401 S.W.3d 591 (Mo. App. 2013)

State v. Lawrence, 477 S.W.3d 170 (Mo. App. 2015)

State v. Doss, 503 S.W.3d 290 (Mo. App. 2016)

Vernor v. State, 30 S.W.3d 196 (Mo. App. 2000)

State v. Vickery, 878 S.W.2d 460 (Mo. App.1994)

State ex rel. Wagner v. Ruddy, 582 S.W.2d 692 (Mo. 1979)

State re rel. Peach v. Tillman, 615 S.W.2d 514 (Mo. App. 1981)

State ex rel. Johnston v. Berkemeyer, 165 S.W.3d 222 (Mo. App. E.D. 2005)

State ex rel. Mertens v. Brown, 198 S.W.3d 616 (Mo. 2006)

State ex rel. Bennett v. Ravens. 258 S.W.3d 929 (Mo. App. 2008)

State v. Eckelamp, 133 S.W.3d 72 (Mo. App. 2004)

State ex rel. Kauble v. Hartenbach, 216 S.W.3d 158 (Mo. banc 2007)

State ex rel. Zahnd, 276 S.W.3d 368 (Mo. App. 2009)

State v. Engle, 125 S.W.3d 344 (Mo. App. 2004)

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State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861 (Mo. 1986)

River Salvage, Inc. v. King, 11 S.W.3d 877 (Mo. App. 2000)

Mo. Const. Article V Section 5

Section 559.115.3, RSMo.

Section 217.775, RSMo.

Section 56.060, RSMo.

Mo. Sup. Ct. Rule 29.07(d)

Mo. Sup. Ct. Rule 24.035

Mo. Sup. Ct. Rule 29.12(b)

Mo. Sup. Ct. Rule 75.01

Mo. Sup. Ct. Rule 4.-1.2

Mo. Sup. Ct. Rule 2 Code of Judicial Conduct

Mo. Sup. Ct. Rule 29.07(c)

Mo. Sup. Ct. Rule 74.01

ARGUMENT

POINT I

THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT FROM AMENDING THE CHARGE AND CHANGING A FINAL SENTENCE AND JUDGMENT OF NOVEMBER 6, 2015, BY ITS APRIL 12, 2017, ORDER AND AN ORDER MANDATING THE CIRCUIT COURT DISMISS THE DEFENDANT'S POST-CONVICTION MOTION FOR LACK OF JURISDICTION, IN THAT THE CIRCUIT COURT DID NOT HAVE JURISDICTION TO HEAR THE DEFENDANT'S MOTION, BECAUSE THE DEFENDANT DID NOT TIMELY FILE A POST-CONVICTION MOTION WITHIN 180 DAYS FROM HIS DELIVERY TO THE DEPARTMENT OF CORRECTIONS FOLLOWING HIS SENTENCE OF NOVEMBER 6, 2015.

Defendant did not file his request for relief within 180 days pursuant to Rule 24.035(b). The defendant's failure to file a timely motion is a complete waiver of any right to proceed under Rule 24.035 or 29.15. *Searcy v. State*, 103 S.W.3d 201-204 (Mo. App. 2003); *Morris v. State*, 25 S.W.3d 649, 650-651 (Mo. App. 2000); *Unnerstall v. State*, 53 S.W.3d 589, 591-592 (Mo. App. 2001); *Crabtree v. State*, 91 S.W.3d 736, 737-738 (W.D. Mo. App. 2002). Because no timely motion had been filed, the trial court did not have jurisdiction to proceed or the ability to address the merits in the untimely Motion. *Hines v. State*, 83 S.W.3d 108 (Mo. App. 2002). Therefore, the defendant's motion should have been dismissed for lack of jurisdiction.

The Missouri Supreme Court Rules only allow one post-conviction motion and do not allow successive filing. Rule 29.15(1) and 24.35(1). In *State v. Brooks*, this Court held that supplementing PCR pleadings outside the valid and mandatory time limits will not be reviewed. 960 S.W.2d 479, 499 (Mo. banc 1997).

Rule 24.035(a) provides, that “[a] person convicted of a plea of guilty and delivered to the custody of the department of corrections who claims that the conviction or sentence imposed violates the... law of this state... including claims...that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 24.035.” Further, “Rule 24.035 provides the *exclusive* procedure by which such person may seek relief in the sentencing court for claims enumerated.” *Id.* Accordingly, any claim by a defendant who has been delivered to the Department of Corrections that he was sentenced to more than the authorized term for a particular offense must be made in a Rule 24.035 motion.

Defendants making *Bazell* claims who have been delivered to the Department of Corrections are restricted to seeking timely relief under either Rule 24.035 or a habeas corpus proceeding filed in the court where the defendant is housed. Rule 29.07(d) only applies to defendants who have not been sentenced to the Department of Corrections. For defendants who have been delivered to the Department of Corrections, Rule 24.035 remains the *exclusive* remedy for claims that they have been sentenced in excess of the statutory maximum, except to the extent that habeas corpus is available.

If the time has passed for filing a motion that raises one of the enumerated claims in Rule 24.035, and the defendant alleges that he was sentenced in excess of the maximum permitted by law, “it is settled that the imposition of a sentence beyond the applicable statute or rule may be raised by way of writ of habeas corpus.” *State ex rel Zinna v. Steele*, 301 S.W.3d 510, 517 (Mo. banc 2010). “[W]here a court imposes a sentence that is in excess of that authorized by law, habeas corpus is a proper remedy.” *Id.* In other words, defendants that have been received by the Department of Corrections may only seek *Bazell* relief either under a timely filed Rule 24.035 motion or through a habeas corpus action.

The defendant purports to rely on the “manifest injustice” provision of Rule 29.07(d). But on a more fundamental level, the defendant’s claim in the motion is one of the enumerated claims exclusive in Rule 24.035. As such, the court is required to apply the procedure of Rule 24.035 to the defendant’s motion.

In *Elam v. State*, the Western District Court of Appeals held that if defendant files a motion which raises a claim enumerated in Rule 24.035, but files the motion purportedly under a different rule, then the time limit of Rule 24.035 still applies. 210 S.W.3d 216 (Mo. App. 2006). In *Elam* the defendant pleaded guilty to unlawful use of a weapon and was granted probation with a suspended imposition of sentence. *Id.* The suspended imposition of sentence was later revoked, and the defendant was sentenced to prison. *Id.* The defendant filed a motion under Rule 29.12(b) to correct a manifest of injustice, referred to as the “first motion”, which was overruled by the circuit court. *Id.*, at

218. The defendant's appeal was denied on jurisdictional grounds. *Id.* The defendant filed a motion under Rule 24.035, the "second motion," but it was dismissed because it had been filed out of time. The defendant did not appeal the circuit court's dismissal. *Id.* The defendant then filed the "third motion", which cited Rule 29.07(d), and the circuit court overruled the third motion, which the defendant appealed. *Id.* The Western District Court of Appeals addressed the third motion.

The third motion claimed the defendant's plea was not made voluntarily and intelligently because he was suffering from mental disease. *Id.* The Western District held that the circuit court lacked jurisdiction to consider the third motion because "if a defendant raises claims in a Rule 29.07(d) motion, which are within those enumerated in Rule 24.035, the motion remains a Rule 24.035 motion and is subject to all the terms and conditions of Rule 24.035, including time limitation[.]" *Id.*, at 219 (citations omitted). The Western District held that the defendant's claims, though cloaked under the authority of Rule 29.07(d), should have been raised in a timely Rule 24.035 motion. *Id.* "The issues Mr. Elam has raised in his Rule 29.07(d) motion challenge the constitutionality of his conviction and sentence and effectiveness of counsel and involve matters that were known to Mr. Elam within the time limit imposed by Rule 24.035. Thus, they should have been raised in a timely Rule 24.035 motion for post-conviction relief and not some four years after his probation-revocation hearing." *Id.*

In this case, even though defendant's motion purports authority under Rule 29.07(d), which does not provide an independent basis for relief, the issue raised remains

one of the enumerated claims of Rule 24.035, to-wit: “that the conviction or sentence imposed violates the ... law of this state...including... that the sentence imposed was in excess of the maximum sentence authorized by law.” Accordingly, the defendant must have filed a timely motion under Rule 24.035 in order to seek relief from the circuit court. “If... the allegation of the motion and the relief sought bring the motion within Rule 24.035, the time limitations of Rule 24.035 cannot be avoided simply by entitling the pleading a Rule 29.07(d) motion. It remains a Rule 24.035 motion and is subject to all the terms and conditions of Rule 24.035, including the time limitations.” *State v. Pendleton*, 910 S.W.2d 268, 271 (Mo. App. 1995).

The defendant argued that a 24.035 motion does not apply and the time had passed; therefore, the circuit court was without authority to grant the relief requested in the defendant’s motions. *April 7, 2017, Tr. 4:4-5:9*. To the extent that the defendant claims he could not have raised *Bazell* in a timely 24.035 motions, this Supreme Court has held that habeas corpus is the proper route to seek relief; “[T]his Court also holds that habeas corpus, rather than Rule 29.07(d), now provides the proper avenue for relief in those limited circumstances in which the petitioner asserts a claim that is of the type enumerated in Rule 24.035, but that is time barred under that rule, if the petitioner can meet the ‘cause and prejudice’ standard set out in *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210 (Mo. banc 2001).” *Brown v. State*, 66 S.W.3d 721, 723 (Mo. banc 2002). “[I]n cases ... in which a person asserts a claim that comes within those enumerated under Rule 24.035, but that the person asserts he could not bring within the time limits set

out in that rule, then habeas corpus rather than Rule 29.07(d) provides the mechanism by which the person may attempt to obtain relief.” *Brown*, at 730.

In this case, the defendant had been delivered to the Department of Corrections to serve his five-year sentence pursuant to his voluntary plea on or about November 6, 2015. He did not timely file any post-conviction pleadings. His filing on February 1, 2017, is untimely. Under the law, it must be dismissed for lack of jurisdiction. The Respondent exceeded her authority under the law in granting the defendant’s post-conviction motion.

POINT II

THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT FROM AMENDING THE CHARGE AND SENTENCE AND JUDGMENT OF NOVEMBER 6, 2015, BY ITS APRIL 12, 2017, ORDER AND MANDATING THE CIRCUIT COURT DENY DEFENDANT'S POST-CONVICTION MOTION TO WITHDRAW GUILTY PLEA TO CORRECT MANIFEST INJUSTICE UNDER RULE 29.07(d), IN THAT, THE CIRCUIT COURT EXCEEDED ITS JURISDICTION AND AUTHORITY ACTING OUTSIDE THE LAW IN GRANTING DEFENDANT'S MOTION UNDER RULE 29.07(d) BECAUSE SAID RULE DOES NOT AUTHORIZE THE AMENDING OF A CHARGE AND CHANGING A FINAL SENTENCE AND JUDGMENT.

Respondent granted relief under Rule 29.07(d) and changed the charge and judgment that had been entered and became final more than a year earlier. Multiple opinions over a period of nearly 20 years have held that Rule 29.07(d) does not provide an independent basis for relief in the defendant's situation. A circuit court loses authority to change a judgment once it becomes final unless such authority is expressly granted. A challenge to a conviction must be made within established rules and by following prescribed procedures. A defendant on probation following a suspended execution of sentence may appeal directly at the time the judgment is entered, or he may seek to set aside the judgment of conviction and withdraw the guilty plea during probation under the

authority of Rule 29.07(d) to correct a manifest injustice. However, a circuit court does not have authority under Rule 29.07(d) to change a final judgment.

“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. banc 1993). Rule 24.035 is available after a defendant is delivered to the Department of Corrections. For defendants, with a suspended imposition of sentence, which Ledford originally received, the Missouri Supreme Court has provided a procedure to challenge a conviction before probation is revoked in 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, “but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.” 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, note 5 (Mo. banc 2002). In the alternative to the second clause of Rule 29.07(d), a defendant, such as Defendant Ledford, 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. banc 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.”) “A person who has suffered a 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*, 866 S.W.2d at 446.

The Respondent also could not resentence the defendant. “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. 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. 2011) (citation omitted). “[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. See, for example, Rule 24.035, Rule 29.15 and § 217.775, RSMo. 1986.” *Simmons* at 445. “Once a trial court enters a sentence consistent with the law, the trial court exhausts its authority. The trial court cannot take further action in the case unless a statute or rule provides the court authority to do.” *State ex rel. Moore v. Brown*, 270 S.W. 3d 447, 449

(Mo. App. 2008) (citations omitted).

In *Brown*, a writ was granted against a trial court for re-sentencing a defendant more than 30 days after entry of judgment. “No statute or rule provided the court with the authority to re-sentence defendant.” *Id.* This applies to Rule 29.07(d): it only authorized the trial court to set aside a judgment and permit a defendant to withdraw his guilty plea. *Id.*

The defendant in this case asked Respondent to change a final judgment based on Rule 29.07(d). Moreover, we note that the rules, Rules 29.07(c) and 29.12(b), do not provide the circuit court with the authority to grant defendant’s 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 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 29.07(d) does 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); *State v. Doss*, 503 S.W.3d 290, 293, footnote 1 (Mo. App. 2016).

In *Doss*, the Court of Appeals 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 of Appeals found that the trial court did not have authority to set aside the conviction for felony murder. *Id.*

In *Vernor v. State*, the Eastern District held:

[T]he Supreme Court rules still provide no basis for an independent motion under Rule 29.12(b). Appellant's remedy was to pursue a motion for post-conviction relief under Rule 24.035, which he did. Appellant is not entitled to a successive Rule 24.035 motion, which is clearly what he is attempting to do by filing a motion labeled as a Rule 29.12(b) motion. Rule 24.035; *See also, State v. Vickery*, 878 S.W.2d 460 (Mo. App. 1994). Even so, the circuit court correctly dismissed Appellant's motion because there is no independent basis for it. 30 S.W.3d 196, 196-197 (Mo. App. 2000).

The issue to be decided in this writ proceeding was addressed more than 30 years ago in *State ex rel. Wagner v. Ruddy*. 582 S.W.2d 692 (Mo. 1979). “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.* In that case, Mr. Wagner was sentenced for embezzling money to provide “everything he could” for his terminally ill wife. *Id.*, at 693. The trial court learned that Mr. Wagner’s explanation of his motive was false and set aside the previous judgment and sentence. *Id.* Mr. 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 upon entry of the judgment and sentence and exceeded its jurisdiction 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.*

In *State ex rel. Simmons v. White*, 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.” 866 S.W.2d 443, 444 (Mo. 1993). “[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 trial court in *Simmons* originally sentenced the defendant on August 18, 1992, for a felony driving while intoxicated charge. *Id.*, at 444. On August 25, 1992, the trial court set aside the August 18th sentence, allowed an amended Information that charged an additional prior DWI conviction that had been filed the day before to stand and resentenced the defendant. *Id.* Later, the defendant sought a writ of habeas corpus challenging his incarceration. *Id.*

The Supreme Court 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. “When the plea of guilty is set aside the charge remains and the prosecuting attorney, not the court, is empowered to dismiss the charge pending” under Rule 29.07(d). *State re rel. Peach v. Tillman*, 615 S.W.2d 514, 518 (Mo. App. 1981).

Similarly, in *State ex rel. Johnston v. Berkemeyer*, the trial court sentenced the defendant to 30 days in jail on a property damage case. 165 S.W.3d 222 (Mo. App. E.D. 2005). 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 had 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 Eastern District Court of Appeals 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.* Rule 75.01 applies to civil judgments. "Rule 75.01 does not apply to criminal proceedings." *Id.*

Finally, Section 559.115.3, RSMo. was discussed as a possible means to take action on a criminal case following the entry of judgment in *State ex rel. Mertens v. Brown*. 198 S.W.3d 616 (Mo. 2006). Before detailing the proper procedure to follow under this section, the Supreme Court reaffirmed that "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." *Id.*, at 618.

Our criminal justice system has established rules of law. It also has established roles. The prosecutor has the role of determining if charges should be filed and what charge should be pursued under proper procedure. Section 56.060 RSMo. The defense attorney has the role to represent his or her client in a criminal proceeding. Rule 4.-1.2 The Judge

has the role to be neutral in the proceeding. Rule 2 Code of Judicial Conduct. The Judge decides matters in dispute between the litigants. All the participants are to follow established rules of law and procedure. *State ex rel. Bennett v. Ravens*, 258 S.W.3d 929, 930-931 (Mo. App. 2008); *State v. Eckelamp*, 133 S.W.3d 72, 74-75 (Mo. App. 2004); *State ex rel. Peach v. Tillman, supra*; Mo. Const., Article V, Section 5. The criminal justice system is designed to provide justice and mercy for all sides; the defendant, victims, and the people of our State.

While the Respondent and defendant claim this is a *Bazell* issue, Relator argues there is more at stake. As discussed previously, the defendant has another proper legal avenue to properly pursue any alleged *Bazell* issue. Without following well established rule of law, the defendant has caused the Respondent to circumvent the established roles for the participants in the criminal justice system.

If the circuit court is allowed to do as the defendant requested, then the circuit court now has asserted itself into the role of the prosecuting attorney. On any alleged “manifest of injustice” claim that is untimely raised, the circuit court could change at any time a filed charge and final sentence to a new charge and sentence. For example, a defendant sentenced to the department of corrections for domestic assault in the second degree who has not timely sought review, could then seek to relief based on a claim of manifest injustice over two years later or at anytime during the sentence, and a circuit court could change the felony charge and sentence to a misdemeanor of peace disturbance or domestic assault in the fourth degree. Further, under the color of “manifest injustice” a

circuit court could reduce a felony DWI to a misdemeanor if the court felt the State was being too hard on a chronic offender. Vice versa, if the circuit court disagrees with the charge being a misdemeanor for sexual misconduct in the third degree the circuit court could raise it as a “manifest injustice” and change the charge to felony child molestation in the first degree.

In this case, the circuit court exceeded its authority. The circuit court exceeded its authority when it exercised the role of the prosecutor by amending a charge and further exceeded its authority by entering a new sentence and judgment after a final judgment. The defendant was not entitled to seek relief under Rule 29.07(d). Even if defendant was entitled to consideration of his motion pursuant to Rule 29.07(d), the only relief the circuit court has authority to grant is to set aside the defendant’s guilty plea to the filed charge. The parties would be restored to status prior to the defendant’s guilty plea. The prosecutor could pursue the filed charge, amend the charge to another applicable felony, file a misdemeanor charge, or elect not to proceed. The defendant could pursue the case to trial, plea bargain, move for dismissal, or plead again to the filed charge.

The Respondent, Honorable Laura Johnson, exceeded her jurisdiction and authority on April 12, 2017, by granting the Rule 29.07(d) motion and entering a new charge and sentence and judgment changing the November 6, 2015 charge, sentence and judgment. Granting the motion and changing the judgment is substantial error. Respondent had no authority to take that action. *State re rel. Peach v. Tillman, supra*. Rule 29.07(d) does not give a court authority to enter new charge or a new judgment. While the defendant

remains on probation, a Rule 29.07(d) motion would be appropriate to be filed and heard. The circuit court then is required to decide whether the requirements of the second clause of Rule 29.07(d) are met. If the probation granted by the October 3, 2014, judgment is revoked with new judgment sentence on November 6, 2015, and the defendant is delivered to the Department of Corrections, then a Rule 24.035 motion is an appropriate procedure to seek relief. However, Respondent has no authority to change the November 6, 2015, judgment under Rule 29.07(d). The order dated April 12, 2017 is void and must be vacated. Respondent acted outside of the law and beyond her authority when she granted the Rule 29.07(d) motion and amended the charge and entered a new sentence and judgment. At this point, the available procedure for the defendant to seek relief is a habeas corpus claim in the jurisdiction where he was housed.

Relator's proper avenue to challenge the action of Respondent is via a petition for an extraordinary writ. *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 159 (Mo. banc 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.")

The Respondent has sought to replace the final sentence and judgment via an order. While not directly on point, some guidance on which remedy is appropriate to pursue is found in cases addressing how to challenge a trial court's action revoking a probation.

The Western Court of Appeals has recognized that an extraordinary writ is the proper means to challenge a trial court's action upon revocation of probation. *State ex rel. Zahnd*, 276 S.W.3d 368 (Mo. App. 2009). "As there is no right to appeal a probation

revocation order, validity of the probation revocation order ... can only be reviewed through an extraordinary writ.” *State ex rel. Zahnd*, at 369, citing, *State v. Engle*, 125 S.W.3d 344, 345 (Mo. App. 2004) (‘No appeal may be taken from a revocation of probation; instead, errors in probation revocation proceedings may be contested by the appropriate writ’), *State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 64 (Mo. banc 2008) (additional citations omitted).”

As to whether a writ of prohibition is the proper remedy, “[o]ur Supreme Court has recognized three situations in which writs of prohibition will issue.” *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171, 175 (Mo. App. W.D. 2000). The second situation is applicable here: “to remedy a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated.” *Id.* Granting the Rule 29.12(b) motion and amending the charge and sentence and 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 amend a charge and enter a new sentence and judgment under Rule 29.07(d).

Further, the Respondent’s Order dated April 12, 2017, may not be a final judgment. It is not titled or denominated Judgment. While there is no specific criminal rule on final judgments being denominated judgments, Rule 29.07(c) is titled Judgment. The Civil Rule 74.01 defines judgement for finality as being in writing, signed by the judge,

denominated “judgment” on the document, and filed of record. *River Salvage, Inc. v. King*, 11 S.W.3d 877, 880 (Mo. App. 2000). The November 6, 2015, judgment sentencing defendant Ledford to the Department of Corrections was denominated Judgment. The Respondent’s Order changing the charge and sentence dated April 12, 2017, is titled “Order”.

CONCLUSION

The Circuit Court exceeded its jurisdiction and authority and acted outside the law and established rules by granting the Rule 29.07(d) motion and changing the felony charge filed on May 13, 2014, and judgment entered on November 6, 2015, executing the previously imposed sentenced remanding defendant to serve five years in the Department of Corrections. The new order is a nullity and must be vacated. Relator asks this Court to set aside and vacate the new order judgment and to order Respondent to deny the Rule 29.07(d) motion.

Relator prays that this Court issue a Writ of Prohibition, or in the alternative a Writ of Mandamus, to the Honorable Laura Johnson to prohibit her from changing charge and sentence and judgment entered on November 6, 2015, to vacate the new order changing the charge and sentence and judgment, to deny the defendant's Rule 29.07(d) motion, and for any further relief as may be appropriate.

Respectfully Submitted,

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s//John L. Young

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CERTIFICATE OF SERVICE AND COMPLIANCE

I, the undersigned, hereby certify that the above and foregoing was transmitted electronically to opposing counsel of record via the Missouri eFiling system on the 7th day of August, 2017.

I further certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 6,819 words as determined by Microsoft Word.

/s/John L. Young

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