No. SC96378

In The Supreme Court of Missouri

STATE OF MISSOURI EX REL. ERIC G. ZAHND,
Platte County Prosecuting Attorney

Relator,

vs.

THE HON. JAMES W. VAN AMBURG,
Circuit Judge of Platte County, Missouri, Division II

Respondent.

RESPONDENT'S BRIEF

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Argument

Mr. Nelson was given a suspended three-year prison sentence for felony stealing. But the offense Nelson pleaded guilty to (stealing over $500) is only a misdemeanor with the maximum sentence of one year in jail. After Nelson filed a request for relief, Respondent (Judge Van Amburg) correctly found that a sentence exceeding that authorized by law results in a manifest injustice, and resentenced Nelson accordingly. Thus, Prosecutor is not entitled to a permanent writ prohibiting that action because an extreme necessity for such a writ does not exist in that:

(1) Missouri case law has consistently held that a judgment is not final unless the sentence is one authorized by law, and a sentence that is contrary to the law when entered may be corrected at any time; and, Rule 29.12(b) allows the sentencing court to correct a manifest injustice, and 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;

(2) Alternatively, habeas corpus is a proper remedy where a court imposes a sentence that is in excess of that authorized by law, and under Rule 91.06, whenever any court has evidence that a person is illegally confined or restrained of his liberty, within the jurisdiction of such court, it shall be the duty of the court to issue a writ of habeas corpus for the person even if no application or petition is presented for such a writ;

(3) Prosecutor concedes that Rule 29.07(d) authorizes a court to set aside a judgment of conviction when the execution of sentence has been suspended if the court finds a manifest injustice that needs to be corrected, and being sentenced to a punishment greater than the maximum sentence authorized by law results in manifest injustice; and,

(4) If Nelson's probation is revoked and he is later delivered to the Department of Corrections, Nelson would be entitled to relief under Rule 24.035 because if a defendant receives a sentence in excess of the maximum sentence authorized by law, then he is entitled relief under that Rule.

Introduction

Jesse Nelson ("Nelson") was on felony probation with a three-year suspended prison sentence for stealing DVDs. This Court has held that Nelson's underlying offense (stealing over $500[1]) is only a misdemeanor with a maximum sentence of one year in jail. *State v. Smith*, --- S.W.3d ---, 2017 WL 2952325, *7 (Mo. banc 2017) (mandate issued 7/27/17). The remedy for such a violation is a remand for resentencing as a misdemeanor. *Id*. Accord, *State v. Bazell*, 497 S.W.3d 263, 267 (Mo. banc 2016) ("The two felony convictions for the firearms stolen must be reversed and the case remanded. … [T]he offenses here must be classified as two misdemeanors….").

[1] Oddly, the restitution was only listed as $349.94.

That is the remedy chosen by the sentencing court in this case when Judge James W. Van Amburg resentenced Nelson to 180 days in jail for the class A misdemeanor of stealing. Relator, the Platte County Prosecuting Attorney ("Prosecutor") does not really complain that Judge Van Amburg gave the wrong remedy, nor could it, in light of this Court's opinions in *Smith* and *Bazell*. Rather, Prosecutor quibbles that the court reached this result in response to Nelson's Motion for Resentencing to Correct Plain Error and Manifest Injustice, which cited to Rules 19.04 and 29.12(b), and cases such as *State v. Morris*, 719 S.W.2d 761, 763 (Mo. banc 1986), whereas Prosecutor believes that Nelson's Motion should have cited to Rule 29.07(d) or Rule 91*et seq.* (habeas Corpus) or that Nelson should have waited until he was delivered to the Department of Corrections for at least one day and filed a Rule 24.035 motion, which would then allow Judge Van Amburg to arrive at the same result.

Writs of prohibition are extraordinary remedies that are only to be used when the facts and circumstances of the case demonstrate unequivocally that an extreme necessity for preventative action exists. Because Judge Van Amburg's actions are authorized by Rule 29.12(b), Rule 29.07(d), Rule 91.06, and would be authorized under Rule 24.035 if Nelson is later delivered to DOC, and Judge Van Amburg would be the judge under any action filed under those rules, it cannot be seriously contended that the facts and circumstances of this case demonstrate unequivocally that an "extreme necessity" for preventative action exists. This Court should quash the preliminary writ and deny the petition.

General Standards for Writs of Prohibition

"Prohibition will lie only where necessary to prevent a usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent an absolute irreparable harm to a party." *State ex rel. Director of Revenue v. Gaertner*, 32 S.W.3d 564, 566 (Mo. banc 2000). Whether a writ should issue in a case is left to the sound discretion of the court to which application has been made. *State ex rel. Hannah v. Seier*, 654 S.W.2d 894, 895 (Mo. banc 1983).

A court should only exercise its discretionary authority to issue this extraordinary remedy when the facts and circumstances of the case demonstrate unequivocally that there exists an extreme necessity for preventative action. *Derfelt v. Yocum*, 692 S.W.2d 300, 301 (Mo. banc 1985). Absent such conditions, this Court should decline to act. *Id*. If there is any doubt of its necessity or propriety, it will not be issued. *McDonald v. City of Brentwood*, 66 S.W.3d 46, 50-51 (Mo. App. E.D. 2001).

A. Relief is appropriate under Rule 29.12(b)

Rule 29.12(b), directed toward trial courts, 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.

Prosecutor takes the illogical position that Rule 29.12(b) "states that the court may *consider* plain errors, but it does not authorize a court to take action to correct them." (Relator Brief at 20) (emphasis in original). There would be no purpose in having a rule that allows the court to only "consider" plain errors, but that does not authorize the court to correct them. Rule 29.12(b) gives the trial court great discretion to *grant* relief when a manifest injustice has resulted, not just "*consider* plain errors." E.g., *State v. Tinoco*, 967 S.W.2d 87 (Mo. App. W.D. 1998) (circuit court had the authority under Rule 29.12(b) to grant a new trial before sentencing because of ineffective assistance of counsel).

Nelson's three-year prison sentence for felony stealing is a significantly harsher punishment than the maximum one-year jail sentence for misdemeanor stealing over $500. *Smith*, 2017 WL 2952325 at *7. "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." *State v. Collins*, 328 S.W.3d 705, 707 (Mo. banc 2011). Thus, Judge Van

Amburg correctly found that a manifest injustice had resulted as a result of Nelson's three-year prison sentence, and appropriately resentenced him to a punishment that did not exceed the maximum sentence for the offense.

Nelson's prior judgment and sentence resulted in a manifest injustice. Rule 29.12(b) gives the sentencing court discretion to remedy that manifest injustice in the fashion that it did. But there remains the issue of whether the sentencing court still had the authority to grant relief under Rule 29.12(b) at the time that it did.

As recently noted by Chief Justice Fischer of this Court, "the circuit court itself has discretion pursuant to Rule 29.12(b) if it determines during any time that it still has jurisdiction that it has erred in a manner that would cause manifest injustice or a miscarriage of justice." *State v. Collings*, 450 S.W.3d 741, 769, n. 1 (Mo. banc 2014). But the question remains: Did the court still have jurisdiction or the authority under Rule 29.12(b) at the time that it acted (after the written judgment and sentence had been entered)?

It is true, as noted by Prosecutor, that this Court has held that once a written judgment and sentence has been entered in a criminal proceeding, the trial court can take no further action in that case *except when otherwise expressly provided by statute or rule*, such as Rule 24.035. *State ex rel. Simmons v. White*, 866 S.W.2d 443 (Mo. banc 1993). Correspondingly, this Court has also held that a trial court does not have the authority to alter a defendant's sentence after a revocation

of probation. *State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 65 (Mo. banc 2008).[2]

But Nelson's case is distinguishable from *Simmons* because there this Court found that the circumstances did not rise to a level of manifest injustice to excuse Simmons' failure to raise the issue by Rule 24.035 because this Court was convinced that his procedural default stemmed from a calculated, strategic decision to forego a Rule 24.035 motion in the hope of receiving probation. No evidence of such a strategy exists in this case and Nelson's right to file his Rule 24.035 motion has not commenced because he has not been delivered to DOC.

Nelson's case is also distinguishable from *Poucher* because that case involved a *nunc pro tunc* changing the sentences to run consecutively instead of concurrently, and thus did not involve Rule 29.12(b), nor did it involve an illegal sentence such as that present in Nelson's case.

But more importantly, the general rule that once a written judgment and sentence has been entered the trial court can take no further action unless otherwise authorized by statute or rule is tempered by prior cases holding that a judgment is not final unless the imposed sentence is one authorized by law. As held by this Court in *State v. Morris*, 719 S.W.2d 761, 763 (Mo. banc 1986), "a sentence that is contrary to law cannot constitute a final judgment," and if the

[2] Although probation revocation proceedings were pending against Nelson, Judge Van Amburg never revoked his probation.

sentence is not entered in compliance with the law, the sentence is void and can be corrected.[3] Where the record shows that the court did not have the authority to render the particular judgment that it rendered, the judgment is void and subject to collateral attack. *State ex rel. Dutton v. Sevier*, 336 Mo. 1236, 83 S.W.2d 581, 582 (Mo. banc 1935). *In accord, State v. Ferrier*, 86 S.W.3d 125, 127 (Mo. App. E.D. 2002), which held that the trial court had the authority to resentence Ferrier over one year after the original sentence because the first sentence was not a correct sentence for a persistent or predatory sexual offender, and a sentence that does not comply with a statute is void and cannot constitute a final judgment; *Ossana v. State*, 699 S.W.2d 72 (Mo. App. E.D. 1985), which held that a concurrent sentence imposed on the defendant for attempted rape was invalid as violating a statute, and thus, the court retained jurisdiction to resentence the defendant in accordance with the statute.

Prosecutor describes these cases, including this Court's opinion in *Morris*, as "a rogue line of cases." (Relator's Brief at 9). But those cases are in accord with the rule followed by most jurisdictions to the effect that an unlawful sentence is of

[3] Respondent uses the phrase "illegal sentence" or "a sentence that is contrary to law" to refer to one that was not authorized by the statute governing the penalty or a sentence that the judgment of conviction did not authorize. *Montgomery v. Louisiana*, 136 S.Ct. 718, 726 (2016); *United States v. Morgan*, 348 U.S. 502, 506 (1954).

no legal effect, allowing the court to correct the sentence by imposing lawful terms at any time the illegality is discovered. See 28 A.L.R. 4th 147 (originally published in 1984). Also see, *Bozza v. United States*, 330 U.S. 160, 166 (1947) ("It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside ... in habeas corpus proceedings."). Thus, it was appropriate for Judge Van Amburg to resentence Nelson.[4]

The instant case is distinguishable from this Court's opinion in *State v. Carrasco*, 877 S.W.2d 115 (Mo. banc 1994). In that case, Carrasco was sentenced to ten years imprisonment even though the maximum penalty was five years imprisonment. *Id*. at 116. Carrasco did not file a Rule 24.035 motion and the time for filing such a motion had expired. *Id*. On appeal, Carrasco argued for *nunc pro tunc* relief under Rule 29.12(c). *Id*. Also, during argument before this Court, Carrasco made an oral petition for relief by writ of habeas corpus, which this Court denied without prejudice. *Id*.

[4] Rule 19.04 provides that "[i]f no procedure is specially provided by rule, the court having jurisdiction shall proceed in a manner consistent with judicial decision or applicable statutes." Thus, Judge Van Amburg was entitled to proceed in a manner consistent with *Morris*, *Ferrier*, and *Ossana* and correct the judgment and sentence to one that was authorized by the stealing statute.

Thus, *Carrasco* is inapposite because it involved a request for relief under Rule 29.12(c), and clearly a *nunc pro tunc* was not appropriate because it only applies to corrections of clerical mistakes and what occurred in *Carrasco* was a judicial error, not a clerical mistake. Further, Carrasco did not avail himself of the remedy afforded by Rule 24.035, and thus Carrasco could not evade that time limit under the guise of Rule 29.12(c).

Nelson's three-year prison sentence was "contrary to law," § 570.030, RSMo Supp. 2010, because his stealing offense was only a misdemeanor, and a sentence for a misdemeanor cannot be more than a year in the county jail; thus, it was not a final judgment. Therefore, Judge Van Amburg had the authority or jurisdiction to subsequently render a sentence that conformed to the law. This Court should quash the preliminary writ and deny the petition.

Prosecutor cites cases such as *State v. Paden*, --- S.W.3d ---, 2017 WL 2644088 (Mo. App. E.D. 2017) for the proposition that "Rule 29.12(b) does not give a court authority to provide post-conviction relief to defendants." (Relator's Brief at 24).[5] In reaching that conclusion, *Paden* relied in part on cases that had 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

[5] Prosecutor is taking an inconsistent position in this case than it did in *Paden* where the Platte County Prosecutor's Office joined in a joint motion under Rule 29.12(b). *Paden*, 2017 WL 2644088 at *2.

sentence." *Paden*, 2017 WL 2644088, at * 4. That conclusion is wrong, and is not supported either by the text of Rule 29.12(b) or any case from this Court.

The genesis behind that conclusion is *State v. Massey*, 990 S.W.2d 201, 204 (Mo. App. S.D. 1999), which came to that conclusion without citation to any authority: "This court holds that Rule 29.12(b) provides no basis for an independent motion." *Massey* was a situation where the defendant had filed a Motion for New Trial under Rule 29.11, and after that motion was denied, but prior to sentencing, the defendant filed a Motion to Correct Plain Error to allege a ground of ineffective assistance of counsel. *Id*. at 203. *Massey* held that Rule 29.12(b) could not be used as a motion independent from Rule 29.11 to raise additional grounds not asserted in the motion for new trial. Thus, *Massey* is distinguishable from the facts in this case.

Further, *Massey* was wrongly decided. *Massey* distinguished its situation from *Tinoco* by noting that *Tinoco* involved a situation where the claim was included in an amended motion for new trial. *Massey*, 990 S.W.2d at 203-04. But that distinction is not meaningful because the amended motion for new trial in *Tinoco* was untimely, and thus a nullity, and as a result the trial court in *Tinoco* was forced to grant relief under Rule 29.12(b). *Id*. at 203.

Tinoco was correctly decided because the court still had jurisdiction over the case and thus it had discretion under Rule 29.12(b) to correct a manifest injustice. *Massey* should have followed *Tinoco* because the trial court in *Massey*

still had jurisdiction over the case, and thus it could have granted relief under Rule 29.12(b), *if* it found that there was a manifest injustice.

Other Rule 29.12(b) cases cited by Prosecutor involve situations like *Vernor v. State*, 30 S.W.3d 196 (Mo. App. E.D. 2000) where the trial court no longer had jurisdiction over the petitioner, who had already filed a 24.035 motion, appealed it, and lost that appeal. The essence of cases like *Vernor* is that Rule 29.12(b) cannot be used to enlarge the time limits of Rule 24.035 to raise grounds not timely raised under that rule. Respondent does not dispute that rules like 29.12(b) and 29.07(d) cannot be used to undermine the time limits of Rule 24.035. But here, unlike those cases, the exercise of Rule 29.12(b) was not used to make an end-run around the time limits of Rule 24.035 because Nelson's right to proceed under Rule 24.035 has not started.

B. Nelson is entitled to a writ of habeas corpus (Rule 91.06)

When Nelson filed his motion in the sentencing court, he was entitled to file the motion that he did and rely upon cases such as *Morris* and *Ferrier* that had held that a sentence that is contrary to law cannot constitute a final judgment, and thus it can be corrected at any time. But if this Court decides that Nelson was not entitled to proceed under Rule 29.12(b), and that those prior cases should be overruled, Judge Van Amburg was authorized to grant relief to Nelson on his

claim under a writ of habeas corpus (Rule 91.06); in fact, this Court also could grant relief to Nelson and issue a writ of habeas corpus.[6]

Rule 91.06 provides that "[w]henever any court of record, or any judge thereof, shall have evidence from any judicial proceedings had before such court or judge that any person is illegally confined or restrained of his liberty within the jurisdiction of such court or judge, *it shall be the duty of the court or judge to issue a writ of habeas corpus for the person's relief, although no petition be presented for such writ*" (emphasis added). Section 532.070 requires the same.

Habeas corpus is a proper remedy where a court imposes a sentence that is in excess of that authorized by law. *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995) (sentencing court acted beyond its authority when it sentenced the defendant to 15 years in prison where the maximum authorized term of imprisonment was 7 years). Accord, *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516-17 (Mo. banc 2010) (the imposition of a consecutive sentence when the oral pronouncement was silent on whether the sentence was to be served concurrently with another sentence exceeded that which the court was authorized to impose and provided a basis for habeas relief even though inmate did not timely file a Rule 24.035 motion); *State ex rel. Koster v. Jackson*, 301 S.W.3d 586, 589 (Mo. App. W.D. 2010) (petitioner was entitled to habeas corpus relief on the basis

[6] Prosecutor's brief does not dispute that habeas corpus is an available avenue of relief for Nelson because of his excessive sentence. (Relator's Brief at 9, 21).

that he was improperly sentenced on his DWI conviction as a persistent offender based on a prior municipal DWI offense for which he had received a suspended imposition of sentence because the imposition of a sentence beyond that permitted by the applicable statute may be raised by way of a writ of habeas corpus); *Sevier*, *supra* (defendant who was charged with assault with intent to kill, which was an offense with a maximum prison sentence of 5 years, was entitled to habeas corpus relief because the court was without authority to impose a sentence of 12 years' imprisonment); *Merriweather v. Grandison*, 904 S.W.2d 485 (Mo. App. W.D. 1995); *Clay v. Dormire*, 37 S.W.3d 214, 218 (Mo. banc 2000) (recognizing the exception).

At the time of Nelson's offense, the crime of stealing over $500 was a class A misdemeanor with a maximum sentence of one year in jail. *Smith*, 2017 WL 2952325, at * 7-8. Thus, Nelson's three-year prison sentence was in excess of the statutory maximum for a misdemeanor stealing offense. This is patent upon the face of the record. Nelson was entitled to be resentenced for misdemeanor stealing. *Smith*, 2017 WL 2952325, at *8. As a result, habeas corpus is a proper remedy under Rule 91.06. *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 701-03 (Mo. banc 2010); *Zinna*, 301 S.W.3d at 516-17; *Osowski*, 908 S.W.2d at 691; *Koster*, 301 S.W.3d at 589; *Sevier*, 83 S.W.2d at 582-583.

Judge Van Amburg, and this Court, have evidence that Nelson was illegally confined or restrained of his liberty,[7] Nelson is within the jurisdiction of Judge Van Amburg and this Court, and thus it was Judge Van Amburg's duty, and it would be this Court's duty, to issue a writ of habeas corpus granting Nelson relief from a three-year prison sentence for misdemeanor stealing. If Nelson is entitled to the same relief under a habeas corpus as was granted under Nelson's Rule 29.12(b) motion, then it cannot be said that there is an "extreme necessity" for granting Prosecutor's petition, and this Court should quash the preliminary writ and deny the petition.

C. Rule 29.07(d)

Rule 29.07(d) provides, in pertinent part, that a "court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea" "to correct manifest injustice." Thus, if a defendant, like Nelson, receives a suspended execution of sentence and was never delivered to DOC, a Rule 29.07(d)

[7] A defendant who is on probation or parole is restrained of his liberty for purposes of seeking habeas relief. *State ex rel. Fleming v. The Missouri Board of Probation or Parole*, 515 S.W.3d 224, 228 n.6 (Mo. banc 2017). At the time Judge Amburg entered the new judgment and sentence, Nelson was on probation in Judge Amburg's court.

motion can be filed since Rule 24.035 would not be applicable without a delivery to DOC. *Brown v. State*, 66 S.W.3d 721, 723, 730-31 (Mo. banc 2002); *State v. Ison*, 270 S.W.3d 444 (Mo. App. W.D. 2008).[8]

Prosecutor admits that "Rule 29.07(d) authorizes a circuit court to set aside a judgment of conviction and withdraw a guilty plea when a defendant has been sentenced and when the execution of sentence has been suspended if the court finds a manifest injustice that needs to be corrected" (Relator's Brief at 17). Judge Van Amburg necessarily found a manifest injustice existed when he granted the Rule 29.12(b) motion because a manifest injustice is a requirement under that rule. That was a correct finding because "[w]hen 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." *Collins*, 328 S.W.3d at 707.

If Nelson would be entitled to relief under a different rule as a result of a manifest injustice, it cannot be said that there is an "extreme necessity" for granting the writ petition. *Derfelt*, 692 S.W.2d at 301.

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[8] But Rule 29.07(d) cannot be used to circumvent the time limitations in Rule 24.035(b) as to claims enumerated in that rule. *Brown*, 66 S.W.3d at 723, 730-31. Habeas corpus, rather than Rule 29.07(d), 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. *Id*.

Apparently, Prosecutor is arguing that Nelson should have sought relief under Rule 29.07(d) instead of 29.12(b) because Prosecutor is under the erroneous belief that "[i]f 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." (Relator's Brief at 19). That assertion ignores a couple of important problems.

First, Rule 23.08(a) specifically prohibits an amendment of an information if a "different offense is charged." *See State v. McKeehan*, 894 S.W.2d 216 (Mo. App. S.D. 1995) (amended information, alleging that defendant possessed 35 grams of marijuana, rather than original charge that he possessed more than 5 grams of marijuana with the intent to distribute, violated Rule 23.08, which prohibits the amendment of an information to charge an offense different from the one originally charged). Stealing is a different offense than receiving stolen property.

Second, the statute of limitations for felony receiving stolen property is three years, § 556.036.2(1), RSMo Supp. 2010, and since the alleged crime here was committed on April 20, 2012, the statute of limitations for that offense expired two years ago, which was before Nelson even filed his Motion for Resentencing to Correct Plain Error and Manifest Injustice.

Because Nelson would have been entitled to relief under Rule 29.07(d), it cannot be said that there is an "extreme necessity" for granting the writ, *Derfelt*,

692 S.W.2d at 301, and this Court should quash the preliminary writ and deny the petition.

D. Nelson would be entitled to relief under Rule 24.035

Rule 24.035 provides that a person convicted of a felony on a plea of guilty and delivered to the custody of the department of corrections, who claims that the sentence imposed was in excess of the maximum sentence authorized by law, may seek relief in the sentencing court under the provisions of Rule 24.035. But in order to proceed under Rule 24.035 motion, the defendant must be delivered, physically, into the custody of the DOC.[9] *Thomas v. State*, 808 S.W.2d 364, 365 (Mo. banc 1991) (rejecting the state's argument that the date of sentencing rather than the date of delivery to DOC was the significant date for measuring the time period to file a Rule 24.035 motion).

Prosecutor concedes that if Nelson's probation is revoked, and he is delivered to DOC, "then a Rule 24.035 motion would the appropriate procedure to challenge the conviction" (Relator's Brief at 23-24). Such a motion would be appropriate, and should be granted, because if a defendant receives a sentence that exceeds the statutory maximum, then the defendant is entitled to post-conviction relief. *Olds v. State*, 891 S.W.2d 486, 492 (Mo. App. E.D. 1994). *Also see*, Rule

[9] Effective January 1, 2018, Rule 24.035 will no longer require that the movant be delivered to the department of corrections in order to proceed under that rule.

24.035(a), which provides that a movant who claims that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court under Rule 24.035.

Implicit in Prosecutor's argument is that if Nelson is physically delivered to DOC for at least one day, then the sentencing court (Judge Van Amburg) could grant relief under Rule 24.035, and do what Judge Van Amburg has already done. If, as implied by Prosecutor, the only thing preventing Judge Van Amburg from doing what he has already done in this case is for Nelson to spend at least one day in prison instead of the county jail, where he had been incarcerated, then it cannot be said that there is an "extreme necessity" for granting Prosecutor's writ, and this Court should quash the preliminary writ and deny the petition.

CONCLUSION

Mr. Nelson was given a suspended three-year prison sentence for felony stealing. But the offense Nelson pleaded guilty to (stealing over $500) is only a misdemeanor with the maximum sentence of one year in jail. Judge Van Amburg correctly found that such a sentence, which exceeded the sentence authorized by law, resulted in a manifest injustice, and resentenced Nelson accordingly.

Because Judge Van Amburg's actions are authorized by Rule 29.12(b), Rule 29.07(d), Rule 91.06, and would be authorized under Rule 24.035 if Nelson is later delivered to DOC, and Judge Van Amburg would be the judge under any action filed under those rules, it cannot be seriously contended that the facts and circumstances of this case demonstrate unequivocally that an "extreme necessity" for preventative action exists. This Court should quash the preliminary writ and deny the petition.

Respectfully submitted,

/s/ Craig A. Johnston

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b), it was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and it includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,297 words. On this 21st day of August, 2017, electronic copies of Respondent's Brief and Respondent's Brief Appendix, were sent through the Missouri e-Filing System to Joseph W. Vanover, Attorney for Relator.

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