Appeal No.
SC96474

IN THE SUPREME COURT OF MISSOURI

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

RELATOR

v.

THE HONORABLE LAURA JOHNSON,
Circuit Court Judge 28th Judicial Circuit, Division I

RESPONDENT

RESPONDENT'S BRIEF

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IN THE MISSOURI SUPREME COURT

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ARGUMENT

Mr. Ledford was given a suspended imposition of sentence for felony stealing. Mr. Ledford violated his probation and the Court revoked Mr. Ledford's probation and sentenced him to the Missouri Department of Corrections for a term of five years. That sentence was suspended and he was placed on a new term of probation. On November 6th, 2015, the Circuit Court revoked Mr. Ledford's probation and executed the five-year sentence to the Missouri Department of Corrections. Mr. Ledford was advised of his rights under Missouri Supreme Court 24.035. However, the offense Mr. Ledford plead guilty to (stealing over $500) is only a misdemeanor with the maximum sentence of one year in the Christian County Jail. After Mr. Ledford filed for relief, Respondent (Judge Laura Johnson) correctly found that a sentence exceeding that authorized by law results in a "manifest injustice", and resentenced Mr. Ledford accordingly. Thus, the 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 or Rule 29.07(d) allows the sentencing court to correct a manifest injustice, and when a defendant is sentenced to a term of imprisonment greater than the maximum sentence for the offense, the sentencing error constitutes manifest injustice;
2. *Thornton v. Denn*y, 467 S.W.3d 292 (Mo. App. 2015) is controlling because where a later judicial decision interprets the meaning of a pre-existing statute, there is not an issue of retroactivity.
3. *Bazell* applies to all 18 conditions of the felony enhancement provision (subsection 3), including the offense of stealing over $500.
4. Alternatively, Rule 29.12(b) is a proper remedy where a court imposes a sentence that is in excess of that authorized by law, and under Rule 29.12(b).
5. 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;

INTRODUCTION

Robby Ledford was sentenced to the Missouri Department of Corrections for felony stealing. This Court has held that Ledford's underlying offense (stealing over $500) 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 offense here must be classified as two misdemeanors…").

That is the remedy chosen by the sentencing court in this case when Judge Laura J. Johnson resentenced Mr. Ledford to one year in the county jail for the class A misdemeanor of stealing. Relator, the Christian County prosecuting attorney does not address *Bazell* or *Smith* instead stating that Respondent did not have authority to resentence Ledford as his proper remedy was exclusively Missouri Supreme Court Rule 24.035. It is unclear why the State wishes for Mr. Ledford to remain in custody on a sentence that is clearly beyond the scope of the law.

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 Johnson's actions are authorized under Missouri Supreme Court Rule 29.07(d), 29.12(b) and Rule 91.06. It should be noted that when Mr. Ledford was sentenced to the Missouri Department of Corrections, *Bazell* had

not yet been decided and it was long after his 180 days had run when *Bazell* had been decided. Judge Johnson could be or would have been the Judge in any of those actions and therefore, it cannot be contended that the facts and circumstances of this case demonstrates unequivocally that an "extreme necessity" for preventative actions 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. Gaeriner*, 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 29.07(D)

The Prosecutor contends that Defendant (Ledford) did not file his request for relief within 180 days pursuant to Rule 24.035(b). Therefore, 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. As such, the Trial Court did not have jurisdiction to proceed or the ability to address the merits in the untimely motion.

On August 23, 2016, the Missouri Supreme Court invalidated the provision of the stealing statute that the State employed to enhance the stealing charge from an A misdemeanor to a class C felony. *State v. Bazell*, 2016 WL 4444392 (Mo. banc, August 23, 2016). The Court ruled, in pertinent part, that the plain language of the statute did not permit enhancement based on value because the stealing statute, § 570.030.1, does not contain "value" as an element of the offense. *Id*. The Court wrote,

> Under section 570.030.1, a person commits the crime of stealing when she appropriates the property or services of another with the purpose to deprive the owner thereof. Section 570.030.3 provides for the enhancement to a class C felony of "any offense in which the value of property or services is an element" if certain conditions are met. The definition of stealing in section 570.030.1 is clear and unambiguous, and it does not include the value of the property or services appropriated as an element of the offense. As a result, enhancement pursuant to section 570.030.3 does not apply to Defendant's stealing convictions for the theft

> of the firearms. These offenses must, therefore, be classified as misdemeanors.

(*Bazell*, Slip Opinion at 2).

Mr. Ledford was charged with and convicted of the class C felony of stealing even though the Missouri Supreme Court states it could only be classified as an A misdemeanor. Mr. Ledford's sentence was not a final sentence as it did not comply with the law. Mr. Ledford was prejudiced because received a felony conviction and a five-year sentence in the Department of Corrections for a crime that carries a maximum of one year in jail;

Respondent has jurisdiction to set aside Mr. Ledford's guilty plea after sentencing to correct a "manifest injustice" under Rule 29.07(d). Mr. Ledford cannot undertake a post-conviction motion at this point as the time to file has passed. Nevertheless, Mr. Ledford was the subject of a manifest injustice because he was denied his rights to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution in that there was no factual basis upon which the Court could find him guilty of and sentence for stealing as a felony under §§ 570.030.1 and 570.030.3;

The Court may not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea. Rule 24.02(e). The trial court must determine facts which defendant admits by his plea that would result in the defendant being guilty of the offense charged. *Brown v. State*, 45 S.W.3d 506, 508 (Mo.App. W.D. 2001). "A factual basis for a guilty plea is necessary to ensure that the guilty plea was intelligently and

voluntarily entered, thereby satisfying due process requirements." *State v. Henry*, 88 S.W.3d 451, 457 (Mo.App. W.D. 2002);

The Court did establish a factual basis to convict Ledford of misdemeanor stealing. In short, the Court convicted and sentenced Movant for a crime – "stealing over $500" – that does not exist. Movant asks that the Court vacate his conviction for felony stealing and enter a conviction for misdemeanor stealing and resentence him accordingly. See, *State v. Woolford*, 58 S.W.3d 87, 90 (Mo. App. E.D. 2001) (entering a conviction for misdemeanor stealing where the evidence of value was insufficient) and *State v. Ecford*, 239 S.W.3d 125, 129-130 (Mo. App. E.D. 2007) (entering a conviction for misdemeanor stealing where the evidence of value was insufficient).

Relator has argued that Respondent did not have authority to set aside Mr. Ledford's previous plea of guilty and impose a misdemeanor judgment.

Respondent still had jurisdiction as a sentence that does not comply with the Statute is void and cannot constitute a final judgment. *State v. Morris*, 719 S.W.2d 761, 763 (Mo.banc 1986); see *also Ossana v. State*, 699 S.W.2d 72, 73 (Mo.App. E.D. 1985). The trial court does not exhaust its jurisdiction until it renders a sentence in accordance with the law. *Ossana*, 699 S.W.2d at 73. Therefore, a trial court has jurisdiction to re-sentence a defendant. *State v. Ferrier*, 86 S.W3d 125, 127 (Mo. App.2002)(affirming jurisdiction of the trial court to resentence a defendant nine years after the original sentence); citing *Morris* at 763; (See also, *Newberry v. State*, 812 S.W.2d 210, 212-13 (Mo.App. W.D.1991).

Mr. Ledford was sentenced to the Missouri Department of Corrections for a term of five-years. Such judgment was not legal as a matter of law and was void. Since it was not a final judgment, Respondent still had jurisdiction to render a legally permissible judgment. Respondent never lost its authority to sentence Mr. Ledford.

B. THORNTON V. DENNY IS CONTROLLING BECAUSE WHERE A LATER JUDICIAL DECISION INTERPRETS THE MEANING OF A PRE-EXISTING STATUTE, THERE IS NO ISSUE OF RETROACTIVITY.

The State has argued that *Bazell* should not be applied retroactively, i.e., to cases that have completed direct review. However, *Thornton v. Denny*, 467 S.W.3d 292 (Mo. App. 2015) forecloses the State's position. *Thornton* was an original proceeding on a petition for writ of habeas corpus, and like this case, Thornton had been convicted of a felony when he should have only been convicted of a misdemeanor. *Thornton* at 293. Specifically, Thornton pleaded guilty to the Class D Felony of Driving While Intoxicated – Persistent Offender, based on two prior alcohol-related offenses, and was sentenced to four years in prison. *Id*. at 294. While serving his term, the Missouri Supreme Court decided *Turner v. State*, 245 S.W.3d 826 (Mo. 2008), in which it held, based on its reading of the DWI statute in effect at the time of Thornton's plea, "the use of prior municipal offenses resulting in an SIS cannot be used to enhance punishment under section 577.023." *Thornton*, 245 S.W.3d at 829. One of Thornton's prior offenses was a "prior municipal offense resulting in an SIS," so he filed a petition for writ of habeas corpus. And just as the State now argues that *Bazell* should not be applied retroactively, they argued that *Turner* should not be applied retroactively. *Thornton*, 467 S.W.3d at

296. In rejecting the State's position, the Court of Appeals held, "In these circumstances, where Thornton's petition relies on a judicial opinion interpreting a statute which was in effect at the time of his conviction, and that judicial opinion 'created no new law,' no retroactivity issue arises." *Id*. at 298. Put another way, the petitioner does not seek retroactive application of a new rule of law; rather, the petitioner seeks application of the statute – properly construed -- that was in effect at the time of his plea. *Id*. at 298 & 299. The Court of Appeals further noted that its decision was consistent with the United States Supreme Court's decisions on retroactivity in *Fiore v. White*, 531 U.S. 225 (2001), and *Bunkley v. Florida*, 538 U.S. 835 (2003). *Id*. at 299. There are only minor differences between *Thornton* and the case at bar. Both involve a defendant who pleaded guilty to a felony that should have been a misdemeanor. Both involve a Missouri Supreme Court decision that clarified the meaning of a statute (*Thornton* involved *Turner*, which clarified the DWI statute, and this case involves *Bazell*, which clarified the Stealing statute). *Turne*r and *Bazel*l are similar in that they "merely clarified the language of an existing statute." *Id*. at 298. Accordingly, *Thornton* is controlling on the issue of retroactivity, and Mr. Ledford need not seek retroactive application of a new rule of law and Respondent has the authority to act upon Mr. Ledford's motion under Supreme Court Rule 29.07(d).

C. BAZELL APPLIES TO ALL 18 CONDITIONS OF THE FELONY ENHANCEMENT PROVISION (SUBSECTION 3), INCLUDING THE OFFENSE OF STEALING OVER $500.

The State has conceded that *Bazell* applies to the offense Stealing A Firearm. The State has in other cases, contended that *Bazell* did not address any of the other 17 conditions of Subsection 3 of the Stealing statute and therefore, according to the State, *Bazell* does not apply to those 17 conditions.

The problem with the State's position is that the Supreme Court's logic in *Bazell* is just as applicable to the other 17 conditions, including the condition at issue in this case, namely that the value of the property or services appropriated is $500 or more. Subsection 1 of the Stealing statute, Section 570.030, RSMo., defines the offense of stealing by stating,

"A person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." Subsection 3, known as "the felony enhancement provision," states, "Notwithstanding any other provision of law, any offense in which the value of property or services is an element is a class C felony if" one of 18 conditions is present.

The condition present in *Bazell* was that the property appropriated consisted of firearms, see § 570.030(3)(3)(d). The ruling in *Bazell* is that, even though the property appropriated consisted of a firearm, which is one of the 18 conditions in the felony enhancement provision, "the value of property or services" is not an element of Stealing, as defined in Subsection 1. *Bazell* at 5.

The Supreme Court further held that the words of the felony enhancement provision are clear and unambiguous, and therefore, there is no need to employ canons of

construction; instead, the Court is to give effect to the plain and ordinary meaning of the statutory language. *I*d. Therefore, because the felony enhancement provision applies only to offenses "in which the value of the property or services is an element," and stealing is not such an offense, the crime of stealing a firearm is a misdemeanor. *Id*. at 5-6.

Any fair reading of the *Bazell* opinion and the Stealing statute will demonstrate that the *Bazell* holding is applicable to entire felony enhancement provision, i.e., all of Subsection 3 – not just stealing a firearm. Nothing in the *Bazell* opinion suggests that the holding is limited to its facts. "The value of property or services" is not an element of the offense of stealing – period – no matter what is stolen.

The State cites several cases for the proposition that value is an essential element of the offense Stealing Over $500. But the State conflates an element of the offense (Subsection 1) with an element of the felony enhancement provision (Subsection 3). When a defendant is charged with Stealing Over $500, value is an element of the felony enhancement provision. But *Bazell's* holding is that value is not an element of the offense of stealing: [The State's] reading of section 570.030.3, however, critically ignores the fact that the felony enhancement provision, by its own terms, only applies if the offense is one "in which the value of the property or services is an element." Stealing is defined in section 570.030.1 as "appropriat[ing] property or services of another with the purpose to deprive him or her thereof, either without his consent or by means of deceit or coercion." The value of the property or services appropriated is not an element of the offense of stealing. *Bazell* at 5 (emphasis added). And since the value of the property or services appropriated is not an element of the offense of stealing (Subsection 1), the felony

enhancement provision (Subsection 3) can never be applicable – no matter which of the 18 conditions in Subsection 3 is present in a particular case. Since *Bazell* was decided, the court of appeals has correctly and consistently held section 570.030.3 is inapplicable to the offense of stealing, regardless of the particular provision of section 570.030.3 under which enhancement is sought. *State v. Smith*, No SC95461, (Mo.banc July 11, 2017) citing *State v. McMillian*, No. WD79440, 2016 WL 6081923, at (Mo. App. Oct. 18, 2016) (application for transfer filed December 7, 2016) (holding a charge for stealing property valued at more than $500 could not be enhanced to a felony under section 570.030.3(1) because "*Bazell* made no distinction between the various ways the enhancement provision could be triggered"); *State v. Filbeck*, 502 S.W.3d 764, 765 (Mo. App. 2016) (reversing and remanding a defendant's felony stealing convictions for the theft of cattle under section 570.030.3(3)(j) for resentencing as misdemeanors); *State v. Turrentine*, No. SD34257, 2016 WL 6818938, (Mo. App. Nov. 18, 2016) (application for transfer filed December 22, 2016) (holding a sentence for a defendant charged with stealing property worth more than $500 could not be enhanced to a felony); *State v. Metternich*, No. WD79253, 2016 WL 7439121, (Mo. App. Dec. 27, 2016) (transferred by order of the Supreme Court of Missouri on April 7, 2017) (section 570.030.3(1) did not apply to enhance a defendant's charge for stealing property worth more than $500); *State v. Bowen*, No. ED103919, 2017 WL 361185, (Mo. App. Jan. 24, 2017) (application for transfer filed March 10, 2017) (holding "the *Bazell* decision bars all § 570.030.3 enhancements from being applied to a stealing offense charged under § 570.030"). *But see State v. Shockley*, 512 S.W.3d 90, 93 (Mo. App. 2017) (indicating that, had the

defendant been charged with felony stealing under section 570.030.3(1), which "expressly includes value as an element of the crime for stealing property or services valued at $500 or more," his conviction for felony stealing could have been affirmed after *Bazell*).

D. LEDFORD WOULD BE ENTITLED TO RELIEF 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.

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).

Ledfords's five-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 Johnson could have found that a manifest injustice had resulted as a result of Ledford's five-year prison sentence, and appropriately

resentenced him to a punishment that did not exceed the maximum sentence for the offense. This relief would also have been available to Ledford.

Ledford's prior judgment and sentence resulted in a manifest injustice. Rule 29.12(b) gives the sentencing court discretion to remedy a manifest injustice. There remains the issue of whether the sentencing court would still had the authority to grant relief under Rule 29.12(b).

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: Would the court still have jurisdiction or the authority under Rule 29.12(b) at this time. 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).

But Ledford'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. *Bazell* had not yet been decided by the time Ledford's 24.035 rights would have run.

Ledford'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 Ledford'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 sentence is not entered in compliance with the law, the sentence is void and can be corrected. 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.

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*.

Thus, Judge Johnson would be 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).

Ledford's five-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 Johnson would still have the authority or jurisdiction to subsequently render a sentence that conformed to the law under 29.12(b). This Court should quash the preliminary writ and deny the petition.

E. LEDFORD WOULD BE ENTITLED TO A WRIT OF HABEAS CORPUS (RULE 91.06)

When Ledford 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 Ledford was not entitled to proceed under Rule 29.07(d) and that those prior cases should be overruled, Judge Johnson was authorized to grant relief to Ledford on his claim under a writ of habeas corpus (Rule 91.06); in fact, this Court also could grant relief to Ledford and issue a writ of habeas corpus.

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 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 Ledford'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, Ledford's five-year prison sentence was in excess of the statutory maximum for a misdemeanor stealing offense. This is patent upon the face of the record. Ledford 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. Judge Johnson and this Court, have evidence that Ledford was illegally confined or restrained of his liberty, Ledford is within the jurisdiction of Judge Johnson and this Court, and thus it was Judge Johnson's duty, and it would be this Court's duty, to issue a writ of habeas corpus granting Ledford relief from a three-year prison sentence for misdemeanor stealing. If Ledford is entitled to the same relief under a habeas corpus as was granted under Ledford's Rule 29.07(d) 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.

CONCLUSION

Mr. Ledford was given a five-year prison sentence for felony stealing. But the offense Ledford pleaded guilty to (stealing over $500) is only a misdemeanor with the maximum sentence of one year in jail. Judge Johnson correctly found that such a sentence, which exceeded the sentence authorized by law, resulted in a manifest injustice, and resentenced Ledford accordingly. Because Judge Johnson's actions are authorized by Rule 29.07(d), Rule 29.12(b) and Rule 91.06, and Judge Johnson 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,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing brief were served upon all attorneys of record by: (x) e-filing ( ) hand delivering, ( ) overnight mailing, ( ) facsimile transmission and/or ( ) mailing a copy to their respective offices via First Class, U.S. Mail, postage prepaid on this 25th day of August, 2017, as prescribed by law to the following person(s):

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Rule 84.06(b) Certification

The undersigned counsel for Respondent certified that the foregoing brief includes the information required by Missouri Rule of Civil Procedure 55.03, complies with limitations contained in Rule 84.06(b), and contains 6,081 words.

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