SC96187

IN THE

SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. SCARLETT R. ADAMS,

Petitioner,

v.

ANGELA MESMER, WARDEN

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

REPLY BRIEF OF PETITIONER

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Reply of the Appellant

In her opening brief, Ms. Adams demonstrated how this Court's holding in Bazell makes it clear that the trial court in the case of State v. Adams, Case No. 12DE-00212-01, Circuit Court of Dent County, Missouri, exceeded its jurisdiction by sentencing her to 7 years in the Missouri Department of Corrections on a misdemeanor stealing charge. Ms. Adams further demonstrated in her opening brief that she was entitled to the relief sought in her Petition for Writ of Habeas Corpus and pointed out to the Court the curious circumstances surrounding the denial of relief sought in the case of Adams v. Mesmer, Case No. 16AU-CC00048, Circuit Court of Audrain County, Missouri.

In response, the Respondent in this case fails to address this Court's holding in Bazell, other than to argue that the case was wrongly decided and that this Court did not actually mean what it said and did in Bazell. This is a pattern the Respondent follows in her Brief.

The Respondent further argues that even if the trial court in Ms. Adams' underlying criminal case exceeded its jurisdiction, she cannot now complain in her habeas corpus proceedings. As will be shown below, the Respondent's arguments are without merit. For the Court to accept the Respondent's positions, it would have to disregard the facts of this case, including the Respondent's own judicial admissions, and the law of Missouri as it relates to §570.030, R.S.Mo., including this Court's decision in Bazell. This Court should not be persuaded by the Respondent's confusion of the issues or by her insertion of absent wording in the pertinent stealing statute.

I. The trial court in Ms. Adams' underlying criminal case exceeded its jurisdiction by finding her guilty of felony stealing and sentencing her to 7 years in the Missouri Department of Corrections.

The first issue raised in these proceedings is whether the trial court in the case of State v. Adams, Case No. 12DE-00212-01, Circuit Court of Dent County, Missouri, exceeded its jurisdiction on November 13, 2012, when it sentenced Ms. Adams to serve 7 years in the Missouri Department of Corrections for stealing. As the Respondent suggests in her Brief (Resp. Brief, Page 4), "this is not a close question" and the answer is "yes."

That is so because in the case of State v. Bazell, 497 S.W.3d 263 (Mo. banc 2016), this very Court held that the relevant statute, §570.030(3)[1], at one time referred to as the "felony enhancement provision" of Missouri's stealing statute, "by its own terms, only applies if the offense is one 'in which the value of the property or services is an element.'" As this Court noted in Bazell, "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." As a result, a stealing offense charged under section 570.030.1 may not be enhanced to a felony under the terms of subsection 570.030.3, and any such felony conviction exceeds the jurisdiction of the trial court.

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[1] Unless otherwise noted, all references to §570.030, R.S.Mo., and each sub-part thereof, refer to the Missouri statute that was in effect from 2002 to 2017.

In this case, Ms. Adams entered a guilty plea to stealing (i.e. violating the provisions of §570.030.1) and the trial court relied upon the provisions of §570.030.3 to then sentence her to 7 years, even though, as this Court held in Bazell, the trial court had no jurisdiction to do so as her offense was a misdemeanor, for which the maximum sentence was 1 year.

The Respondent argues that this Court incorrectly decided Bazell because value is an element of stealing, even though this Court found otherwise. The Respondent argues that because the provisions of §570.030.3 purported to enhance misdemeanor stealing to felony stealing, based on the value of the property or services appropriated, somehow value then becomes an element of stealing. In short, the Respondent wishes to conflate §570.030.3 with §570.030.1, so as to add "value" as an element of stealing, even though this Court rejected that exact same argument in Bazell.

Undaunted, the Respondent has also argues in this case and others that the holding in Bazell only applies to stealing offenses involving firearms. This argument is flawed for several reasons. First, while it is true that in Bazell this Court set aside felony convictions for the stealing firearms, it did so not because only stealing offenses involving firearms were deemed to be misdemeanors. Rather, it did so because Ms. Bazell did not seek relief from her felony conviction for stealing jewelry until she filed a supplemental brief. Second, the Respondent's argument that Bazell only applies to stealing offenses involving firearms has been raised and soundly rejected by every District of the Missouri Court of Appeals in the following cases:

a. State v. Tatum McMillian, Missouri Court of Appeals, Western District, Case No. WD79440 (Decided October 18, 2016) (items stolen: unemployment benefits);

b. State v. Garry Filbeck, Missouri Court of Appeals, Southern District, Case No. SD 33951 (Decided November 17, 2016) (items stolen: livestock);

c. State v. Thomas Turrentine, Missouri Court of Appeals, Southern District, Case No. SD34257 (Decided November 18, 2016) (item stolen: computer) ;

d. State v. Ann Metternich, Missouri Court of Appeals, Western District, Case No. WD79253 (Decided December 27, 2017) (items stolen: clothing); and

e. State v. William Bowen, Missouri Court of Appeals, Eastern District, Case No ED103919 (Decided January 24, 2017) (items stolen: video games and equipment).[2]

While the Respondent may believe that value should be an element of the crime of stealing, such a belief is contrary to the clear and unambiguous language of §570.030.1, as well as this Court's holding in Bazell. Where, as here, the language of §570.030.1 has been found by this Court to be clear and unambiguous "this Court employs the primary rule of statutory interpretation, which is to give effect to the plain and ordinary meaning of the statutory language." Bazell, *supra* at 266.

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[2] In her Brief, the Respondent argues that each and every one of these cases was wrongly decided by all three districts of the Missouri Court of Appeals. (Resp. Brief, Page 13-14).

From this, the Respondent cites to other statues, including statutes from other states, for the proposition that elements of a criminal offense may come from other sub-sections of the same statute. However, the Missouri statutes upon which the Respondent relies in this regard do not contain the same "condition precedent" language found in §570.030.3,and statutes from other states, while perhaps interesting, are neither at issue in this case, nor provide any binding authority upon which Court.

By way of example, in §566.100.2, R.S.Mo., which is relied upon by the Respondent to support her position in this case, there is no "condition precedent" language. Rather, this particular statute categorizes the type of victim or action that is already an element of the criminal offense under §566.100.1, for which enhancement will apply. In this case, the penalty enhancement provision of §570.030.3, by its plain language, provides the enhancement may only be applied where "the value of the property or services is an element" of the crime. As this Court has already determined in Bazell that "value" is not an element of the offense of stealing, §570.030.1 cannot be relied upon to supply "value" as an element, nor could it be properly used to enhance Ms. Adams' misdemeanor stealing conviction to a felony.

In a last ditch effort to convince this Court that it wrongly decided Bazell, the Respondent analyzes a hypothetical statute that involves the weight of turkey and somehow differentiating the definitions of "dinner" and a "feast" depending on the weight of the turkey eaten. Given the seriousness of the issues involved in this case and the fact that there are Missouri citizens that have been improperly convicted of and imprisoned for felony stealing offenses, Ms. Adams will not dignify the Respondent's analysis using the

weight of a turkey to interpret the same statute this Court previously reviewed in Bazell. In like fashion, the Respondent suggests to this Court that Ms. Adams' position is that one may steal property or service worth up to $25,000 and the crime is still a misdemeanor.

Of course, that is not Ms. Adams' position at all, nor was it the finding of this Court in Bazell. While the Respondent wants to speculate in her Brief about the "probable intention" of the legislature in enacting §570.030.3, what this Court has found in that regard is the following:

> **We cannot know why the legislature, in 2002, decided to amend section 570.030.3 to add the requirement that only offenses for which "the value of property or services is an element" may be enhanced to a felony, but that is what the legislature clearly and unambiguously did. As a result, section 570.030.3 does not apply here**.

At the same time, we also know that the Missouri legislature re-wrote the provisions of §570.030, effective January 1, 2017, to address the very same issues which this Court raised in Bazell, particularly the language of §570.030.3. If, as the Respondent now suggests, there were no issues with the felony enhancement language of §570.030.3, why then was it so drastically re-written? The Respondent provides no answer in her Brief.

THE CASES UPON THE REPONDENT RELIES ARE ALL INAPPOSITE AS THEY PRE-DATE THIS COURT'S HOLDING IN BAZELL

The Respondent argues that contrary to this Court's holding in Bazell, value is an element of stealing, but in doing so, cites the Court to cases which all pre-date Bazell, including State v. Miller, 466 S.W.3d 635 (Mo. App. S.D. 2015), State v. Slocum, 420 S.W.3d 685 (Mo. App. E.D. 2014) and State v. Calicote, 78 S.W.3d 790 (Mo. App. S.D. 2002). By doing so, the Respondent not only relies on cases that were decided before Bazell, but also ignores cases that have been decided by this same courts since Bazell.

APPELLATE CASES THAT HAVE BEEN DECIDED SINCE BAZELL

The appellate cases that were decided after Bazell, all support Ms.Adams' position in this writ proceeding and, perhaps more importantly, soundly reject the arguments again advanced by the Respondent. For example, in State v. McMillian, Missouri Court of Appeals, Western District, Case No. WD79440 (Decided October 18, 2016), the Court stated the following:

> **At oral argument, the State argued that Bazell only applies where the felony enhancement is based on the stealing of a firearm, motor vehicle, or other item and not where, as here, the enhancement is based on the stealing property or services with a value of over five hundred dollars. The State identifies in support the verdict director for the offense when the enhancement is sought, which includes as an element of the offense the stealing of property or services valued at over five hundred dollars.**

We see no support in Bazell for the interpretation advocated by the State. Bazell made no distinction between the various ways the enhancement provision could be triggered. Bazell found that the statute under which McMillian was charged, section 570.030.1, does not contain as an element "the value of property or services." Id. Therefore, section 570.030.3, which only applies where "the value of property or services" is an element of the offense, is inapplicable. The specific character of the enhancement sought under section 570.030.3 is irrelevant because the enhancement simply does not apply to section 570.030.1. What a verdict director incorporates as an element of the offense for the jury's deliberation is inconsequential, as the law does not provide for the enhancement sought by the State.

In State v. Thomas Turrentine, Missouri Court of Appeals, Southern District, Case No. SD34257 (Decided November 18, 2016) the Court stated the following:

In this case, the State attempts to factually distinguish Bazell by arguing that "[i]n Bazell, the defendant was charged with separate class C felony stealing charges for: (1) stealing firearms; and (2) stealing jewelry worth over $500, but the Bazell court reversed only the firearms conviction and refused to reverse the jewelry conviction."(Citations omitted). We conclude, as the western district of our court recently did in State v. McMillian, that "Bazell made no distinction between the various ways the enhancement provision could be triggered." State v. McMillian, No.

WD 79440, 2016 WL 6081923, at *2 (Mo.App. Oct. 18, 2016). "The specific character of the enhancement sought under section 570.030.3 is irrelevant because the enhancement simply does not apply to section 570.030.1." Id.

In State v. Ann Metternich, Missouri Court of Appeals, Western District, Case No. WD79253 (Decided December 27, 2017), the Court stated the following:

Metternich was charged under section 570.030, Missouri's stealing statute. In its indictment, the State enhanced Metternich's charges to a felony pursuant to subsection 570.030.3…. However, our Supreme Court recently held that misdemeanor stealing charges may not be enhanced to a felony under the terms of subsection 570.030.3 because that subsection only applies if the offense is one in which "the value of property or services" is an element, and the value of property or services appropriated is not an element of "stealing" as that crime is generally defined in subsection 570.030.1. Bazell, 497 S.W.3d at 266. Accordingly, a stealing offense charged under section 570.030 may not be enhanced to a felony under the terms of subsection 570.030.3, and any such felony conviction must be reversed and the case remanded.

In light of the Bazell decision, it is clear that sub-section 570.030.3 could not apply to enhance Metternich's stealing charge to a felony, the trial court had no power to enter judgment against Metternich for felony

stealing, and thus, the trial court plainly erred in doing so. Metternich's felony stealing conviction must be reversed and the case remanded.

Finally, in State v. William Bowen, Missouri Court of Appeals, Eastern District, Case No ED103919 (Decided January 24, 2017) the Court found as follows:

While the State is correct that the appellant in Bazell and Appellant in the present case had their stealing offenses enhanced under different subsections of § 570.030.3, we conclude that the Bazell decision bars all § 570.030.3 enhancements from being applied to a stealing offense charged under § 570.030. The clear language of Bazell, as well as recent decisions in the Southern and Western District Appellate Courts, support our determination.

Similar language and a similar holding can also be found in the decision reached in State v. Garry Filbeck, Missouri Court of Appeals, Southern District, Case No. SD 33951 (Decided November 17, 2016).

II. Bazell was correctly decided and provides authority for the relief sought by Ms. Adams in this case.

The second issue presented by these proceedings is whether Ms.Adams can raise Bazell by way of writ proceedings. As this Court's holding in Bazell bars all § 570.030.3 enhancements from being applied to a stealing offense charged under § 570.030, and as Ms.Adams was charged, convicted and a judgment entered against her under § 570.030 for felony stealing, the answer to that question is clearly "yes." "A sentence which is in excess of that authorized by law is beyond the jurisdiction of the sentencing court." Merriweather

v. Grandison, 904 S.W.2d 485, 486 (Mo. App. W.D. 1995). Not only is the judgment in such a case erroneous, but it "is absolutely void and subject to collateral attack on habeas corpus." Id. A petitioner can assert a jurisdictional defect, where, as here, he or she receives a sentence that is greater than what the law permits. Brown v. State, 66 S.W.3d 721, 731 (Mo. banc 2002). "A sentence which is in excess of that authorized by law is beyond the jurisdiction of the sentencing court." Merriweather, *supra* at 486. Not only is the judgment in such a case erroneous, but it "is absolutely void and subject to collateral attack on habeas corpus." Id.

Realizing that these cases are fatal to her arguments, the Respondent argues that Bazell only applies to cases that were pending when it was decided because:

1. Bazell overruled Passley and therefore cannot have retroactive application;
2. Bazell did not actually state it had retroactive application;
3. Retroactivity is determined by Stewart; and
4. Thornton was incorrectly decided by the Court of Appeals.

In Passley, it was the type of property, not its value that was one of several determining factors in the court's decision to affirm a felony stealing conviction

In Passley, the defendant stole a credit device, was convicted of a class C felony, and sentenced to 10 years as a prior and persistent offender. On appeal, the defendant raised the question as to whether the provisions of section 570.030.3 enhanced his offense from a class A misdemeanor to a class C felony, but readily conceded that this issue was

not presented to the trial court, nor was it otherwise preserved for appellate review. As a result, the defendant in that case could only seek plain error review under Rule 30.20.

In affirming the conviction, the Court found that the type of property stolen (i.e. a credit device) was specifically mentioned in section 570.030.3 and as a result, the Court found that by doing so, the Legislature "in listing it among the types of property the theft of which would enhance punishment" was put at issue by the allegation in the Information that the defendant was charged with a class C felony by stealing a credit device. The Court in Passley was not asked to determine if the provisions of section 570.030.3 applied by reason of the value of the property stolen; but only the type of property.

In Bazell this Court found that the provisions of section 570.030.3 applied only to those cases in which value was an element, and since value was not an element of stealing under section 570.030.1, the type of property stolen (as set forth in section 570.030.3) did not enhance a class A misdemeanor to a class C felony. That being the case, this Court, in footnote 4 of Bazell, made it clear that Passley did not stand for the proposition that section 570.030.3 could be used to enhance a stealing charge under section 570.030.1 As the Court later noted in Turrentine, *supra*, under the analysis of Bazell, "the specific character of the enhancement sought under section 570.030.3 is irrelevant because the enhancement simply does not apply to section 570.030.1."

It was not necessary for this Court in Bazell to state that its holding was retroactive because Bazell created no new law.

The Respondent conceded in her Brief, as she must, that this Court was not obligated to state in its opinion that it was retroactive if it did not create new law. Rather, Bazell simply interpreted the provisions of section 570.030.3 and found that it did not apply to any stealing offense under section 570.030.1. Since the decision in Bazell "created no new law," no retroactivity issue arise and the Respondent's argument that this Court was required in Bazell to state that its holding was retroactive fails.

This Court's holding in Stewart is consistent with the holding in Bazell

The Respondent suggests in her Brief that under the holding in State v. Stewart, 832 S.W.2d 911 (Mo. 1992), Bazell can only be applied to cases which are on direct appeal. However, a closer reading of Stewart reveals that this is not at all the case.

In Stewart, the respondent was charged with driving while intoxicated and by an amended information he was charged as being a prior and persistent offender resulting in an enhanced punishment. As this Court noted in Stewart "the issue on appeal is whether the date of the commission or the date of conviction is the operative date in §577.023.1(2). This Court also noted that as to that particular question, there was a split in the decisions by the district courts of appeals "since the southern district's interpretation…is diametrically opposed to the western district's conclusion…"

Contrary to the holding in Bazell, in Stewart this Court found "because this opinion results in an extended burden upon the state in charging and sentencing under the intoxication-related recidivist provisions, this Court deems the decision to be substantive; therefore it has both retroactive and prospective application." There was no such finding in Bazell because it was not necessary. If anything, the holding in Stewart is consistent with the holding in Bazell and the manner in which this case should be resolved.

Thornton v. Denny was properly decided

and undermines the Respondent's legal position

in this case

As it has done with this Court's decision in Bazell and at least 5 other cases decided by each district of the Missouri Courts of Appeals, when the Respondent finds a particular case to be inconsistent with the legal positions she attempts to advance, the Respondent's reaction is to simply argue that the case was wrongly decided. This is precisely the manner in which the Respondent attempts to convince this Court to simply disregard the decision in Thornton v. Denny.

In Thornton, *supra*, an original habeas corpus proceeding like this one, Mr. Thornton, like Ms. Adams, was convicted of a felony when he should have only been convicted of a misdemeanor. In particular, again like this case, Thornton pleaded guilty to a felony of Driving While Intoxicated-Persistent Offender, based on two prior alcohol-related offences, and he was sentenced to four years in the Missouri Department of Corrections. While serving that term of imprisonment, the Missouri Supreme Court decided the case of Turner v. State, 245 S.W.3d 826 (Mo. banc 2008), wherein this Court

held that a defendant could not have been convicted of a felony because "the use of prior municipal offenses resulting in an SIS cannot be used to enhance punishment under Section 577,023." Thornton, *supra* at 829.

Because one of Thornton's prior offenses was in fact a prior municipal offense that resulted in an SIS, and therefore could not be used to enhance his punishment from a misdemeanor to a felony, he filed his Petition for Writ of Habeas Corpus and prevailed. In Thornton, just like this case, the Respondent argued that Turner could only be applied prospectively and not retroactively. However, that argument was soundly rejected in Thornton and in so doing the Court 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. Indeed, if the State were correct that Turner's construction of §577.023 cannot be applied 'retroactively' to convictions that were final when Turner was decided, that would have prevented relief in Turner itself, since Turner was decided on a motion for post-conviction relief. Thornton, *supra* at 298 (emphasis added).**

Like the defendant in Thornton, Ms. Adams here seeks to rely on a later judicial interpretation of a statute which was in effect at the time of her stealing offense and conviction. Like this Court's decision in Turner, which was at issue in Thornton, this Court's decision in Bazell did not create any new rule of law; it merely interpreted and applied the plain meaning of §570.030.3. In that regard, this Court stated that "there is no

need to resort to tools of interpretation because the language of section 570.030.3 is clear." This Court also held that "the legislature clearly and unambiguously specified the enhancement provisions contained in §570.030.3 did not apply to the offense of stealing. Bazell, 497 S.W.3d at 266. Because Bazell merely clarified the interpretation of a pre-existing statute, it did not "create new law" which would be subject to the retroactive analysis now suggested by the Respondent.

In sum, all of the Respondent's arguments concerning Ms. Adams ability to rely upon Bazell in this writ proceeding can be rejected by looking no further than this Court's decision in Bazell and the following language:

> **We cannot know why the legislature, in 2002, decided to amend section 570.030.3 to add the requirement that only offenses for which 'the value of the property or service is an element,' may be enhanced to a felony, but that is what the legislature clearly and unambiguously did. As a result, section 570.030.3 does not apply here. Defendant's offenses must be classified as misdemeanors because they cannot be enhanced to felonies by the terms of section 570.030.3.**

Unlike Stewart, there is no split among the divisions of the Courts of Appeal on the inapplicability of section 570.030.3 to a stealing charge. In fact, following Bazell, this Court's analysis was accepted and the Respondent's arguments rejected in each district of the Missouri Courts of Appeals in the following cases:

a. State v. Tatum McMillian, Missouri Court of Appeals, Western District, Case No. WD79440 (Decided October 18, 2016);

b. State v. Garry Filbeck, Missouri Court of Appeals, Southern District, Case No. SD 33951 (Decided November 17, 2016);

c. State v. Thomas Turrentine, Missouri Court of Appeals, Southern District, Case No. SD34257 (Decided November 18, 2016);

d. State v. Ann Metternich, Missouri Court of Appeals, Western District, Case No. WD79253 (Decided December 27, 2017); and

e. State v. William Bowen, Missouri Court of Appeals, Eastern District, Case No ED103919 (Decided January 24, 2017).

CONCLUSION

The Respondent's arguments are that this Court incorrectly decided Bazell and that in deciding that case, the Court did not actually mean what it said. The Respondent also takes issue with the analysis which this Court employed in deciding Bazell, even though every case that has been decided in the Eastern, Southern and Western District Courts of Appeal have concluded otherwise. In sentencing Ms. Adams to 7 years imprisonment for misdemeanor stealing, the trial court exceeded its jurisdiction and by doing so, Ms.Adams is able to raise such issues by these writ proceedings. Ms.Adams is entitled to all of the relief that she sought from the trial court with the filing of her Petition for Writ of Habeas Corpus.

This Court need look no further than its holding in Bazell and the language of §570.030, RSMo. in effect at the time of Ms. Adams' stealing conviction, to see that under the undisputed facts of this case, her stealing conviction could not be a felony, but, rather, was a misdemeanor. As a result, the Respondent's incarceration of the Ms. Adams is illegal and contrary to Missouri law and she is therefore entitled to all of the habeas corpus relief sought in this matter. Accordingly, the Court should make permanent its Preliminary Writ of Habeas Corpus and grant the other relief sought by Ms. Adams in her Petition for Writ of Habeas Corpus.

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CERTIFICATION OF SERVICE AND COMPLIANCE

The undersigned does hereby certify that on this 27th day of April, 2017, one true and correct copy of the foregoing Reply Brief was filed using the Court's Electronic Filing System, which then served a copy on the following:

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The undersigned does hereby further certify that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the Reply Brief contains 4,579 words and has been scanned for viruses using "AVG 2016" anti-virus software. The Reply Brief also complies with Supreme Court Rules 55.03 and 84.06(c).

/s/ Danieal H. Miller