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

PETITIONER'S BRIEF

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TABLE OF CONTENTS

SCARLETT R. ADAMS IS ENTITLED TO THE HABEAS CORPUS RELIEF SOUGHT IN THIS CASE AS SHE HAS BEEN DEPRIVED AND RESTRAINED OF HER LIBERTY IN VIOLATION OF THE UNITED STATES AND MISSOURI CONSTITUTION AS WELL AS THE LAWS OF MISSOURI IN THAT THE TRIAL COURT IN DENT COUNTY, MISSOURI, EXCEEDED ITS JURISDICTION IN SENTENCING HER TO SEVEN (7) YEARS IN THE MISSOURI DEPARTMENT OF CORRECTIONS FOR A STEALING OFFENSE PURSUANT TO SECTION 570.030.1, RSMO. BECAUSE THIS COURT HELD IN THE CASE OF STATE V. BAZELL, 497 S.W.3d 262 (MO BANC 2016) THAT THE "FELONY ENCHANCEMENT" PROVISIONS OF SECTION 570.030.3, RSMO. ONLY APPLY IF THE STEALING OFFENSE IS ONE IN WHICH THE VALUE OF THE PROPERTY OR SERVICES IS AN ELEMENT AND THAT VALUE IS NOT AN ELEMENT OF THE CRIME OF STEALING UNDER SECTION 570.030.1. THEREFORE, THE TRIAL COURT ACTED IN

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES:

RULES:

JURISDICTIONAL STATEMENT

Pursuant to Article V, §4 (1) of the Missouri Constitution, this Court has the jurisdiction to "issue and determine original remedial writs," including writs of habeas corpus. Further, "a writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of Missouri or the United States. State ex rel. Woodworth v. Denney, 396 S.W.3d 330, 337 (Mo. banc 2013). This matter is presented to this Court for determination pursuant to §532.010, *et seq.*, RSMo. and Missouri Supreme Court Rules 91.01, *et seq*. and 84.24(h).

STATEMENT OF THE CASE

This case is a petition for a writ of habeas corpus by a person in the custody of the Missouri Department of Corrections. On November 13, 2012, in the case of State of Missouri v. Scarlett R. Adams, Case No. 12DE-CR00212-01, in the Circuit Court of Dent County, Missouri, Ms. Adams was sentenced to a term of incarceration of seven (7) years for the class C felony of stealing under §570.030, RSMo.

The question presented in this matter is whether, under this Court's holding and analysis in State v. Bazell, the so-called "felony enhancement" provision of §570.030.3, could be used to keep Mrs. Adams incarcerated on a stealing conviction beyond one (1) year.

STATEMENT OF THE FACTS[1]

Mrs. Adams, is presently confined by the Respondent in the Women's Eastern Reception, Diagnostic and Correctional Center (hereinafter "WERDCC") located in Vandalia, Audrain County, Missouri. Ms. Adams has been in custody of the Missouri Department of Corrections since at least September 18, 2012, on a stealing conviction in the case of State v. Adams, Case No. 12DE-00212-01, in the Circuit Court of Dent County, Missouri.

On April 4, 2012, an Information was filed against Ms. Adams in the Circuit Court of Dent County, Missouri, charging her under §570.030, RSMo. with the class C felony of stealing property of a value of more than $500, but less than $25,000.00. Specifically, the Information alleged the following:

> In violation of Section 570.030, RSMo, committed the class C felony of stealing, punishable upon conviction under Sections 558.011 and 560.011, RSMo, in that on or about December 12, 2011, in the County of Dent, State of Missouri, the defendant in concert with another, appropriated merchandise of a value of at least five hundred dollars, which property was owned by Wal-Mart, and the defendant appropriated such property without the consent of Wal-Mart and with the purpose to deprive them thereof.

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[1] In the "Return to Preliminary Writ of Habeas Corpus" filed in this matter, the Respondent admits these facts are all true.

Punishable upon conviction by a term of not less than 2 years not to exceed 7 years in the Missouri Department of Corrections, or by a special term in the county jail, not to exceed 1 year, or by a fine not to exceed $5000, or by both fine and incarceration.

(See, Appellant's Appendix Page A-1).

The Probable Cause Statement that accompanied the Information states that on December 12, 2011, Ms. Adams, along with at least two (2) others, shoplifted computer software from the Wal-Mart Store in Salem, Missouri, and that the value of the shoplifted property was $2,160.00. (See, Appellant's Appendix Pages A-2 to A-11).

On May 31, 2012, Ms. Adams waived her right to a preliminary hearing and on September 18, 2012, she entered a guilty plea to the stealing charge. A Pre-Sentence investigation was ordered and sentencing was set for November 13, 2012. On the date of her sentencing, Ms. Adams was sentenced to seven (7) years in the Missouri Department of Corrections. (See, Appellant's Appendix Pages A-12 to A-14).

On August 23, 2016, this Court issued its opinion in State v. Bazell, 497 S.W.3d 262 (Mo. banc 2016) and that opinion was subsequently modified and re-issued on September 20, 2016. In Bazell, this Court was presented with the opportunity to examine the provisions of §570.030, RSMo., particularly the so-called "felony enhancement" provision found in §570.030.3, RSMo., and upon doing so concluded that the felony enhancement provision did not apply to stealing offenses under §570.030, RSMo. Subsequently, the Courts of Appeals for the Eastern, Southern and Western District of

Missouri have all approvingly followed Bazell both with regard to direct appeals as well as cases involving extraordinary relief.

On October 14, 2016, Ms. Adams filed her Petition for Writ of Prohibition in the Circuit Court of Audrain County, Missouri.[2] On December 15, 2016, following a December 5, 2016, hearing, the trial court in that case sustained her Motion and entered "Findings of Fact, Conclusions of Law and Judgment." (See, Appellant's Appendix Pages A-15 to A-27).

Then, less than 24 hours later, when Ms. Adams called the Respondent to coordinate transportation for Ms. Adams release, the same trial court entered an "Order Granting Stay." (See, Appellant's Appendix Page A-28). That "Order" contained the following language:

> The Court grants this motion/stay and the Motion to Reconsider, as the court inadvertently signed the wrong proposed Order.

Within minutes after entering the "Order Granting Stay," the trial court entered a "Memorandum, Order and Judgment" denying the habeas corpus relief sought by Mrs. Adams. (See, Appellant's Appendix Pages A-29 to A-33).

Thereafter, on January 10, 2017, Mrs. Adams filed her Petition for Writ of Habeas Corpus with the Eastern District Court of Appeals in the case of Adams v. Mesmer, Case

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[2] Ms. Adams filed her Petition for Writ of Prohibition in the Circuit Court of Audrain County, Missouri, because at the time she was incarcerated in the Women's Eastern Reception, Diagnostic and Correctional Center in Vandalia, Audrain County, Missouri.

No. ED105171 and that Petition was summarily denied less than 24 hours after it was filed. (See, Appellant's Appendix Page A-34).

On January 27, 2017, Ms. Adams filed her Petition for Writ of Habeas Corpus and Prohibition and Mandamus with this Court[3] and on February 28, 2017, this Court issued its Preliminary Writ of Habeas Corpus and ordering the Respondent to file a "Return" no later than March 10, 2017. Upon information and belief, this Court has also issued Preliminary Writs of Habeas Corpus in the following cases which involve identical legal issues:

a. SXR Stephanie Windeknecht v. Angela Mesmer, Case No. SC96159;

b. SXR Joshua Holman v. Jennifer Sachse, Case No. SC96160; and

c. SXR Summer Johnson v. Angela Mesmer, Case No. SC96165.

In filing this matter, Ms. Adams seeks to be released from WERDCC as she has completed the maximum sentence allowed by law for her offense of stealing (i.e. 1 year) and for other, ancillary relief. The Respondent concedes, as she must, that she has held Ms. Adams in custody for more than one year and also concedes, again as she must, that she is not presently holding Ms. Adams on any other offense, other than her Dent County stealing conviction. The sole question presented in this proceeding is whether Ms. Adams' Dent County stealing conviction is a felony or a misdemeanor. In State v. Bazell, 497

[3] Ms. Adams requests this Court to take judicial notice of the pleadings filed in this case as well as the underlying case of Adams v. Mesmer, Case No. 16AU-CC00048, Circuit Court of Audrain County, Missouri.

S.W.3d 263 (Mo. banc 2016), the Missouri Supreme Court answered that question and the answer is that Ms. Adams' stealing conviction is a misdemeanor, not a felony. Because the Respondent admits that Ms. Adams is presently being incarcerated in the Missouri Department of Corrections on the stealing conviction only and that Ms. Adams has been incarcerated for more than one (1) year, she is entitled to the relief sought in this case.

POINTS RELIED ON

SCARLETT R. ADAMS IS ENTITLED TO THE HABEAS CORPUS RELIEF SOUGHT IN THIS CASE AS SHE HAS BEEN DEPRIVED AND RESTRAINED OF HER LIBERTY IN VIOLATION OF THE UNITED STATES AND MISSOURI CONSTITUTION AS WELL AS THE LAWS OF MISSOURI IN THAT THE TRIAL COURT IN DENT COUNTY, MISSOURI, EXCEEDED ITS JURISDICTION IN SENTENCING HER TO SEVEN (7) YEARS IN THE MISSOURI DEPARTMENT OF CORRECTIONS FOR A STEALING OFFENSE PURSUANT TO SECTION 570.030.1, RSMO. BECAUSE THIS COURT HELD IN THE CASE OF STATE V. BAZELL, 497 S.W.3d 262 (MO BANC 2016) THAT THE "FELONY ENCHANCEMENT" PROVISIONS OF SECTION 570.030.3, RSMO. ONLY APPLY IF THE STEALING OFFENSE IS ONE IN WHICH THE VALUE OF THE PROPERTY OR SERVICES IS AN ELEMENT AND THAT VALUE IS NOT AN ELEMENT OF THE CRIME OF STEALING UNDER SECTION 570.030.1. THEREFORE, THE TRIAL COURT ACTED IN EXCESS OF ITS JURISDICTION WHEN IT ENTERED A JUDGMENT AGAINST SCARLETT R. ADAMS FOR THE FELONY OF STEALING AND THEN SENTENCED HER TO SEVEN (7) YEARS IN THE MISSOURI DEPARTMENT OF CORRECTIONS AND THE MISSOURI DEPARTMENT OF CORRECTIONS, IN

CONTINUING TO ILLEGALLY INCARCERATE SCARLETT R. ADAMS, IS WRONGFULLY DEPRIVING AND RESTRAINING MS. ADAMS OF HER LIBERTY.

State v. Bazell, 497 S.W.3d 262 (Mo. banc 2016)

Thornton v. Denny, 467 S.W.3d 292 (Mo. App. W.D. 2015)

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

§570.030 *et seq.*, RSMo.

ARGUMENT

POINT I

SCARLETT R. ADAMS IS ENTITLED TO THE HABEAS CORPUS RELIEF SOUGHT IN THIS CASE BECAUSE SHE HAS BEEN DEPRIVED AND RESTRAINED OF HER LIBERTY IN VIOLATION OF THE UNITED STATES AND MISSOURI CONSTITUTION AS WELL AS THE LAWS OF MISSOURI IN THAT THE TRIAL COURT IN DENT COUNTY, MISSOURI, EXCEEDED ITS JURISDICTION IN SENTENCING HER TO SEVEN (7) YEARS IN THE MISSOURI DEPARTMENT OF CORRECTIONS FOR A STEALING OFFENSE PURSUANT TO SECTION 570.030.1, RSMO. BECAUSE THIS COURT HELD IN THE CASE OF STATE V. BAZELL, 497 S.W.3d 262 (MO BANC 2016) THAT THE "FELONY ENCHANCEMENT" PROVISIONS OF SECTION 570.030.3, RSMO. ONLY APPLY IF THE STEALING OFFENSE IS ONE IN WHICH THE VALUE OF THE PROPERTY OR SERVICES IS AN ELEMENT AND THAT VALUE IS NOT AN ELEMENT OF THE CRIME OF STEALING UNDER SECTION 570.030.1. THEREFORE, THE TRIAL COURT ACTED IN EXCESS OF ITS JURISDICTION WHEN IT ENTERED A JUDGMENT AGAINST SCARLETT R. ADAMS FOR THE FELONY OF STEALING AND THEN SENTENCED HER TO SEVEN (7) YEARS IN THE MISSOURI DEPARTMENT OF

CORRECTIONS AND THE MISSOURI DEPARTMENT OF CORRECTIONS, IN CONTINUING TO ILLEGALLY INCARCERATE SCARLETT R. ADAMS, IS LIKEWISE DEPRIVING AND RESTRAINING HER OF HER LIBERTY.

Standard of Review

In Article V, § 4 of the Missouri Constitution, this Court is vested with the authority "to issue and determine original remedial writs,' including writs of habeas corpus. State ex rel. Zinna v. Steele, 301 S.W.3d 510, 513 (Mo. banc 2010). As this Court noted in Zinna, *supra* at 513, "habeas corpus relief is the final judicial inquiry into the validity of a criminal conviction and functions to relieve defendants whose convictions violate fundamental fairness."

Missouri law provides that a writ of habeas corpus may be issued pursuant to Missouri Supreme Court Rule 91 when, as here, an individual is restrained of his or her liberty in violation of the constitution or laws of the state or federal government. State ex rel. Woodworth v. Denney, 396 S.W.3d 330, 337 (Mo. banc 2013). Generally, a petitioner cannot raise claims in a Rule 91 habeas corpus proceeding that could have been raised, but were not, on direct appeal or in a post-conviction proceeding. Clay v. Dormire, 37 S.W.3d 214 (Mo. 2000). Such claims are considered to be procedurally defaulted. State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 214 (Mo. 2001). There are exceptions, however, to the general rule that defaulted claims may not be considered in a Rule 91 proceeding. Such claims are cognizable if the petitioner, as is the case here, asserts a jurisdictional defect, which includes a situation where the petitioner received 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 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.

Questions of law, including decisions from this very Court construing state statutes, are therefore to be reviewed on a *de novo* basis. Earth Island Institute v. Union Electric Co., 456 S.W.3d 27, 32 (Mo. banc 2015).

ANALYSIS

As noted above, on June 4, 2014, Mrs. Adams was charged in the case of State v. Adams, Case No. 12DE-CR00212-01, Circuit Court of Dent County, Missouri, with the class C felony of stealing. In particular, the Information filed in the case of State of Missouri v. Scarlett Adams, Case No. 12DE-CR00212-01, alleged that in violation of Section 570.030, RSMo, Mrs. Adams committed the class C felony of stealing in that on or about December 12, 2011, in Dent County, Missouri, she, in concert with another, "appropriated merchandise of a value of at least five hundred dollars, which property was owned by Wal-Mart, and the defendant appropriated such property without the consent of

Wal-Mart and with the purpose to deprive them thereof." The appropriated merchandise at issue in the underlying criminal case against Mrs. Adams in Dent County consisted of computer software and an external hard drive that Mrs. Adams and others attempted to shoplift from the Wal-Mart Store in Salem, Dent County, Missouri.

On September 18, 2012, Mrs. Adams entered a guilty plea to and was convicted of the class C felony of stealing and the trial court in Dent County, purported pursuant to the provisions of §570.030.3, RSMo., sentenced her to seven (7) years in the Missouri Department of Corrections.

The sole question presented in this proceeding is whether Ms. Adams' Dent County stealing conviction is a felony or a misdemeanor. In Bazell, this Court answered that question and the answer is that Ms. Adams' stealing conviction is a misdemeanor, not a felony. In fact, in Bazell this Court found that that almost all stealing offenses, including the offense for which Ms. Adams is presently incarcerated, are misdemeanors and that pursuant to §558.011.1, the maximum sentence for a misdemeanor is one (1) year.

As the Respondent admits that Ms. Adams has been in custody for more than one year for her stealing conviction in the case of State v. Adams, Case No. 12DE-CR00212-01, Circuit Court of Dent County, the relief sought by Ms. Adams in her Petition for Writ of Habeas Corpus should be granted and this Court should order her immediate release from the custody of the Missouri Department of Corrections and further order that the records of said conviction be amended to reflect a conviction for the Class A misdemeanor of stealing.

There is no dispute that if Bazell is applicable to Ms. Adams' September 18, 2012, conviction for stealing in Dent County, Missouri, then a jurisdictional defect/sentencing error has occurred as Ms. Adams could not have been convicted of a Class C felony and sentenced to serve seven (7) years in the Missouri Department of Corrections for violating §570.030, RSMo.

In her Return, the Respondent argues that Ms. Adams is not being illegally confined and that she is not entitled to habeas corpus relief because Bazell does not apply to the facts of her case. The Respondent's position is best summarized in the Return filed in this case on March 10, 2017, wherein the Respondent states: "Adams' offense has value as an element of the offense, and unlike stealing a firearm, is properly a C felony under the holding in Bazell."

As will be shown below, the Respondent's argument lacks merit in the undisputed facts of this case and the well-settled law applicable thereto.

1. **Under the clear and unambiguous language of §570.030.1, RSMo. in effect at the time of Ms. Adams' conviction, value was not an element of the offense of stealing.**

The Respondent's argument that Ms. Adams' stealing offense "has value as an element" is most easily defeated by simply reviewing §570.030, RSMo., in effect on the date of her conviction.

The Complaint filed against Ms. Adams on April 4, 2012, charged her with the offense of stealing, as set forth in §570.030, RSMo. Sub-section 1 of §570.030, RSMo. defines the offense of stealing as follows:

A person commits the crime of stealing if he or she appropriates property or services of another with the intent to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.

Contrary to the Respondent's argument, value is not an element of the crime of stealing and the word "value" does not even appear in §570.030.1, RSMo. That is not the conclusion of Ms. Adams. Rather, that is the conclusion of this Court in Bazell. Even so, the so-called "felony enhancement" provision of §570.030.3, RSMo. provided as follows:

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 the 18 conditions is present. (Emphasis added).

From the very language of §570.030, RSMo. this Court concluded:

[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 or her consent by means of deceit or coercion.' Bazell, 497 S.W.3d at 266.

This Court then went on in Bazell to state:

We cannot know why the legislature, in 2002, decided to amend 570.030.3 to add the requirement that only offenses for which 'value of property or services is an element' may be enhanced to a felony, but this 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 570.030.3. Bazell, 497 S.W.3d 266-267. (Emphasis added).

The Respondent's argument here that Ms. Adams' stealing conviction was properly enhanced to a felony because of the value of the property she shoplifted from Wal-Mart exceeded $500.00 is the exact same argument made by the State in Bazell and firmly rejected by this Court. Undaunted and determined to keep Ms. Adams illegally incarcerated, the Respondent continues to make the same arguments. Those same arguments were rejected by this Court in Bazell and should likewise be rejected once again here.

Realizing that her argument is fatally undermined by the very provisions of §570.030, RSMo., the Respondent next suggests that the holding in Bazell is limited only to stealing offenses involving firearms. In fact, in the Return the Respondent filed in this case, she argues "Amanda Bazell remains incarcerated on a 12-year sentence for stealing over $500. (Respondent's Return, Page 13). Like the rest of the Respondent's arguments, this particular argument is most easily defeated by this Court's ruling in Bazell, particularly Footnote 4, which specifically addressed the fact that in a supplemental brief Ms. Bazell first raised an argument as to whether her felony conviction for the rings stolen should also be reduced to misdemeanors. This Court refused to reduce the stealing conviction for the rings to a misdemeanor not because of any substantive issue. Instead, the stealing conviction for the rings was not reduced to a misdemeanor because procedurally Ms. Bazell

violated the letter and spirit of Supreme Court Rule 83.08(b) by seeking relief in a supplemental filing that was not raised previously.

Ms. Adams would also draw this Court's attention to the case of State v. Filbeck, in which the Missouri Attorney General's Office agreed that the so-called "enhancement" provision of §570.030.3 "is not in any meaningful way distinguishable from the enhancement provision for firearms relied on in Bazell. Thus, under Bazell, appellant is entitled to remand to be resentenced to class A misdemeanors for his two counts of stealing." (See, Appellant's Appendix Page A-37). This concession is important to the present case for several reasons.

First, the concession was made by the Missouri Attorney General's Office, which is the same office representing the Respondent in the present case. Even so, the Missouri Attorney General's Office is taking a position in this case (i.e. that Bazell only applies when the property stolen is a firearm) that is entirely inconsistent with the position it took in Filbeck.

Second, the Respondent argues here that Bazell only applies to cases in which the property stolen was a firearm and yet the property that was stolen in Filbeck was livestock. Even so, the Missouri Attorney General's Office conceded that Bazell applied so as to entitle Mr. Filbeck to a remand to be resentenced to class A misdemeanors for his two counts of stealing livestock.

This Court's holding in Bazell makes is abundantly clear that in this case Ms. Adams' shoplifting at Wal-Mart was misdemeanor stealing and that §570.030.3, RSMo., could not be used to enhance it to a felony and the Missouri Attorney General's Office, in

Filbeck, agreed. Since the Respondent also agrees that Ms. Adams is presently incarcerated by the Missouri Department of Corrections on the Dent County stealing charge only, and that she has been incarcerated for a period far in excess of one (1) year, her continued incarceration is illegal and she is entitled to the habeas corpus relief she seeks in this case.

2. Ms. Adams could not have raised her current claims in either an appeal and/or a motion for post-conviction relief.

The Respondent next argues that Bazell does not apply to this case since Ms. Adams did not raise Bazell in 2012. Like the other arguments advanced by the Respondent, this argument is likewise fatally flawed by the undisputed facts of this case and the law applicable thereto.

Under well-established Missouri law, a petitioner's failure to raise a claim in a direct appeal or in a post-conviction relief motion typically bars the petitioner from subsequently raising the claim in a petition for writ of habeas corpus, State ex rel. Zinna v. Steel, 301 S.W.3d 510, 516 (Mo. banc 2010). However, under the undisputed facts of this case, Ms. Adams was unable to do so because she entered her guilty plea in the Circuit Court of Dent County, on September 18, 2012, and this Court decided the Bazell case nearly four (4) years later, on August 23, 2016. Legally speaking, even a defendant who fails to challenge his or her conviction on direct appeal or in a timely-filed post-conviction proceeding can still raise a jurisdictional claim in a habeas corpus proceeding. Ferguson v. Dormire, 413 S.W.3d 40, 52 (Mo. App. W.D. 2013).

In Missouri, a "jurisdictional defect" has been found to exist where, as here, a person receives a sentence that was greater than permitted by law as this is more accurately a "sentencing defect" that is subject to review in habeas corpus proceedings. See, e.g., J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009). As a result, the argument that the relief sought herein by Ms. Adams is legally foreclosed, is incorrect because it is contrary to the facts of this case and the well-established law applicable thereto.

To support her argument that Bazell does not apply to cases that have completed direct review, the Respondent relies exclusively upon this Court's holding in State v. Ferguson, 887 S.W.2d 585 (Mo. banc 1994). However, a closer reading of the facts of that case show otherwise and the Respondent's argument should be rejected by this Court.

In Ferguson, the defendant was convicted of first degree murder and abiding by the jury's recommendation, the trial court imposed the death sentence. The defendant filed a motion for post-conviction relief under Rule 29.15, which was heard and overruled. The defendant contended that the trial court committed reversible error in submitting a verdict director that allowed the jury to find the defendant guilty without a finding that he deliberated as required under §565.020 RSMo. The defendant's position was supported by this Court's holdings in State v. Ervin, 835 S.W.2d 905 (Mo. banc 1992) and State v. O'Brien, 857 S.W.2d 212 (Mo. banc 1993), but it was argued that those cases were decided after the defendant's trial and were therefore inapplicable.

In rejecting that argument, this Court held that under the holding in State v. Walker, 616 S.W.2d 48 (Mo. banc 1981), if Ervin and O'Brien pertained to substantive matters,

which they did, then the cases could be applied both prospectively and retrospectively. This Court then held in Ferguson that the holdings in Ervin and O'Brien were "undisputably substantive" and therefore provided legal support for this Court's decision to reverse the defendant's conviction and remand the case for a new trial. Ferguson, 887 S.W.2d at 588.

The essence of the Respondent's argument in this regard is that this Court's holding in Bazell can be ignored and is best summarized by the following words found on page 11 of the Respondent's Return:

> It should be immaterial that the Court professes its holding is based only on its reading of the applicable statute when the effect of that holding overrules earlier precedent.

By making such an argument, the Respondent's stated position is that she, and not this Court, is in a better position to know what this Court meant when it handed down the Bazell decision. In fact, the Respondent cites to a several cases which affirmed felony stealing offenses. However, those decisions all pre-date this Court's holding in Bazell and are therefore of little, if any, value in supporting the Respondent's argument in this case. This also holds true for the Respondent's argument that "prosecutors, defense attorneys, defendants and trial courts have all relied on the prior interpretations of Section 570.030.3" and that "no one was on notice of the result reached in Bazell." (Respondent's Return, page 9). From this, the Respondent argues, erroneously, that Bazell should be ignored and the fruits of the misinterpretations of §570.030, RSMo., cannot be remedied.

The Respondent's position flatly ignores the rulings of this Court as set out herein. While the Respondent should not be faulted for illegally holding Ms. Adams in prison before this Court handed own its decision in Bazell, the Respondent's failure to do so after Bazell is inexcusable and tantamount to contempt.

3. This Court's ruling in Bazell did not involve the retroactive application of §570.030, R.S.Mo.

Having clearly established that this Court has the authority to hear Ms. Adams' claims in this habeas corpus proceeding, the Respondent next argues that Bazell cannot be applied retroactively to Ms. Adams' case. However, that argument is most quickly and directly defeated by a review of the holding in Thornton v. Denny, 467 S.W.3d 292 (Mo. App. W.D. 2015).

In Thornton, *supra*, an original habeas corpus proceeding like this one, 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).

Indeed, in deciding Thornton, the Court further observed that its decision was consistent with the United States Supreme Court decisions in Flore v. White, 531 U.S. 225 (2001) and Bunkley v. Florida, 538 U.S. 835 (2003) and granted the relief sought by Mr. Thornton. Id.

In the present case, the Respondent does her best to argue that Thornton should not apply to this case and further obfuscates the matter by citing to cases that are inapposite to the facts and/or law of this case. However, in the end the Respondent concedes, as she must, that Thornton does apply to this case. The Respondent then "pivots" on the issue

and suggests that the decision in Thornton was just plain wrong and the Court should use the present case to "overrule Thornton's holding." (Return, Page 10).

Of course, the Respondent's suggestion about Thornton is simply wrong and if this Court truly believed that the Western District's decision in Thornton was incorrectly decided, then this Court had the opportunity remedy that situation and would have done so, by accepting transfer of the case back in 2015. Of course this Court did not do so because Thornton was correctly decided by the Western District Court of Appeals and was an accurate statement of Missouri then and remains so today.

So it is here in Ms. Adams' case, using the language of Thornton, *supra*, where the Petition filed by Ms. Adams' relies not on a new law, but, rather, on a judicial opinion (Bazell) interpreting a statute (§570.030, R.S.Mo.) which was in effect at the time of her conviction. Simply stated, Bazell created no new law. Thus, no retroactivity issue arise. Stated differently, by the filing of her Petition in this matter, Ms. Adams is not seeking the retroactive application of a new rule of law. Instead, she is seeking the application of a 2002 statute, in effect at the time of her plea, which has since been scrutinized and properly interpreted by this Court to recognize that in circumstances such as those present in the pending case, a felony conviction for stealing is not possible and Ms. Adams continued incarceration is illegal. This case involves a "sentencing defect" that this Court can hear and remedy in this habeas corpus proceeding.

All in all, there are no material differences between the present case and Thornton. Both are original Habeas Corpus proceedings. Both involve a defendant who pleaded guilty to a felony that was later judicially determined could have only been a misdemeanor.

Both involve decisions by the Missouri Supreme Court that "merely clarified the language of an existing statute." Thornton, *supra* at 298. Finally, both involved "sentencing defects" wherein the defendant received a sentence greater than that permitted by law.

For these reasons, the Respondent's argument that Bazell does not apply to this case is simply wrong. Not only does Bazell apply, but having done so, then this Court should grant to Ms. Adams the relief she seeks herein.

4. The Respondent's argument that Ms. Adams stealing conviction was a felony based on the nature of the property shoplifted, as opposed to its monetary value, ignores the facts of the case as well as the language of §570.030, RSMo.

The Respondent's final argument is that Ms. Adams stealing conviction was proper because of the nature of the property she shoplifted (i.e. computer software) as opposed to the value of the property stolen. This argument is faulty for several reasons.

First, the Respondent is asking this Court to disregard the facts of this case. In particular, the Complaint that was filed against her on April 4, 2012, wherein Ms. Adams was charged under §570.030, RSMo. with the class C felony of stealing property of a value of more than $500, but less than $25,000.00. (See, App. Ex. A). The Probable Cause Statement that accompanied the Complaint states that on December 12, 2011, Ms. Adams, along with at least two (2) others, shoplifted computer software from the Wal-Mart Store in Salem, Missouri, and that the value of the shoplifted property was $2,160.00. (See, App. Ex. B). While the Respondent wishes to now argue that it was the "nature" of the property shoplifted, not its "monetary value," that made Ms. Adams stealing offense a felony, as

opposed to a misdemeanor, that position is fatally undermined by the very language used in the Complaint.

Second, the Respondent has not, nor can she, point to any provision of §570.030, RSMo. that makes the stealing of computer software a felony while the stealing of other items are, by their nature only, a misdemeanor. In this case, it is undisputed that the property that Ms. Adams shoplifted was computer software and not anhydrous ammonia, nor any other materials with the intent to use those materials to manufacture methamphetamine. Were that the case, then the Respondent's argument that the "nature" of the property taken, as opposed to its "monetary value," would make the offense a felony, would perhaps make some sense. However, that clearly is not the case here and the Respondent's suggestions to the contrary must be disregarded.

Third, the Respondent conveniently ignores the concession made in the Filbeck case that the entirety of the §570.030.3, RSMo. does not apply to the criminal offense of stealing, regardless of the nature of the item stolen.

The State argued in Bazell, quite unsuccessfully, that the condition that was present in Bazell was the appropriation of firearms, which was one of the alleged "felony enhancement" circumstances. However, this Court quickly rejected that argument and noted that "the value of property or services" is not an element of the offense of stealing, as defined in Sub-section 1. This Court held in Bazell that the words of the "felony enhancement provision" were clear and unambiguous, and therefore the canons of construction were unnecessary. Therefore, because the "felony enhancement provision" only applied to offenses "in which the value of the property or services is an element," and

since stealing was not such an offense, even the crime of stealing a firearm was a misdemeanor and not a felony. So it should be here where Ms. Adams was wrongly convicted of the felony of stealing over $500.

The Respondent's undue, highly tortured, and narrow reading of Bazell is defeated by a fair reading of Bazell itself and the clear and unambiguous provisions of §570.030. There is absolutely nothing in that case which suggests that the holding is limited only to stealing of firearms. To the contrary, this Court made it abundantly clear that "the value of property or services" is not an element of stealing, no matter what is stolen, and that as a result, until January 1, 2017, stealing is a misdemeanor offense and cannot be a felony.

The Respondent, undaunted by Bazell, goes on in her Return to cite to several cases for the proposition that value is an essential element of the offense of Stealing Over $500. However, in order to get to that conclusion the Respondent necessarily combines an element of the offense of stealing (Sub-section 1) with an element of the felony enhancement provision (Sub-section 3) when the teaching of Bazell is directly contrary.

Again, what has been at times been described as a "legislative blunder" in §570.030 has apparently been corrected as of January 1, 2017, but such a correction cannot change the fact that when Ms. Adams was convicted in 2012 in the underlying case of the felony of stealing, there was no felony of stealing per the holding in Bazell and she is therefore entitled the relief she seeks in this habeas corpus case.

5. Ms. Adams is being illegally incarcerated by the Respondent.

The Respondent admits in her Return, which she must, that not only is Ms. Adams presently being incarcerated in the Missouri Department of Corrections solely on her Dent Count stealing offense, but that she has been incarcerated on that offense for far more than one (1) year. These admissions are significant to this case because if Bazell does apply to this case and this Court determines that Ms. Adams' Dent County stealing conviction was a misdemeanor, rather than a felony, then under §558.011.1(6), the maximum sentence for a misdemeanor is one (1) year. The Respondent admits that she has served that sentence and her continued incarceration beyond one (1) year is therefore illegal.

In addition, the Respondent's continued incarceration of Ms. Adams is illegal because pursuant to §558.011.3(2), RSMo., the Missouri Department of Corrections has no jurisdiction to incarcerate individuals such as Ms, Adams for misdemeanor convictions.

6. This Court's analysis in Bazell has been approvingly applied by every other Appellate Court in Missouri.

While the Respondent continues to challenge the holding and analysis of this Court in Bazell, all three (3) districts of the Courts of Appeal in Missouri in the following decisions, have repeatedly and approvingly applied Bazell:

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).

In its recent holding in State v. McMillian[4], WD79440, the Western District Court not only agreed with the Petitioner's analysis herein, but also soundly rejected the positions taken here by the Respondent. In so doing, the McMillian Court stated:

> 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

[4] The "property" allegedly stolen by the defendant in McMillian consisted of unemployment benefits.

> 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.
>
> McMillian was charged under Section 570.030 with stealing, by deceit, property valued at over $500. Pursuant to Bazell, the charge against McMillian may not be enhanced to a felony but, as a matter of law, can only be a class A misdemeanor. (Emphasis added).

In like manner, the Eastern District Court of Appeals in Missouri decided the case of State of Missouri v. William Bowen, Case No. ED103919 (Opinion filed January 24, 2017) wherein the Court reversed the defendant's felony stealing conviction. In doing so, the Eastern District Court of Appeals stated:

> The State asserts that Bazell does not prohibit a stealing offense from being enhanced to a felony when the enhancement if premised on the stolen property being valued at more than $500… 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. (emphasis added).

As a result, the legal reasoning and analysis Ms. Adams has advanced to support the relief she is requesting in this case has been accepted by this Court as well as the Eastern, Southern, and Western District Courts of Appeal. As the Court noted in Bowen, *supra*, "[B]eing sentenced to a punishment greater than the maximum sentence for an offense constitutes plain error resulting in manifest injustice." (citing to this Court's holding in State v. Severe, 307 S.W.3d 640, 642 (Mo. banc 2010).

CONCLUSION

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 continued incarceration of the Ms. Adams is illegal as it is 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 16th day of March, 2017, one true and correct copy of the foregoing 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 Brief contains 7,749 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