IN THE SUPREME COURT OF MISSOURI
AT JEFFERSON CITY

In re: JOSHUA A. HOLMAN, Petitioner, v. JENNIFER SACHSE, in her official capacity as Warden, Missouri Eastern Correctional Center Respondent.	)	No. SC96160

PETITIONER JOSHUA A. HOLMAN'S BRIEF

IN SUPPORT OF WRIT OF HABEAS CORPUS

Respectfully submitted,

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I. JURISDICTIONAL STATEMENT

The action is one involving the question of whether a person currently serving a sentence for the crime of stealing, when the sentence was enhanced to a felony under RSMo. § 570.030.3 of the "old code" (before the new code that went into effect on January 1, 2017) may obtain a writ of habeas corpus and hence involves the construction and applicability of § 570.030, Article I § 12 of the Missouri Constitution, and *State v. Bazell* (Mo. banc 2016). Petitioner seeks an original remedial writ pursuant to Article V § 4.1 of the Missouri Constitution.

II. STATEMENT OF FACTS

Mr. Holman pleaded guilty to stealing used clothes and purses from a storage facility. On July 26, 2008, the Circuit Court of Livingston County, Missouri, sentenced Petitioner Joshua A. Holman to consecutive seven-year sentences for Burglary 2nd Degree, a Class C Felony, and Stealing, which it asserted was also a Class C. Felony. (Pet. Ex. 1 at 2-3). The sentencing court further suspended the execution of the sentence and placed Mr. Holman on probation. (*Id.*). Then, on December 13, 2010, the sentencing revoked Mr. Holman's probation, ordered the consecutive seven-year sentences to be executed, and remanded Mr. Holman to the Department of Corrections. (Pet. Ex. 2 at 7-9). Mr. Holman has remained in custody since then, and he is currently an inmate at the Missouri Eastern Correctional Center in Pacific, Missouri, where the Warden is Respondent Jennifer Sachse. (Pet. ¶¶ 1-2; Ans. ¶¶ 1-2).

Mr. Holman served his sentence for Burglary 2nd Degree first, as Burglary 2nd Degree was Count 1, and he is now past his parole eligibility date for that offense. (Pet. ¶

6; Ans. ¶ 6). Therefore, Mr. Holman is currently serving his sentence for Stealing Over $500. (*Id.*). Mr. Holman has served more than one year in custody for the offense of Stealing Over $500, (Pet. ¶ 7; Ans. ¶ 7), and in fact, has now served more than two years (Resp.'s Ex. A at 3 (showing a calculation start date for Stealing of 01/28/2015)). Mr. Holman's maximum discharge date (his "1212 date") is May 27, 2024. (Ans. ¶ 5 & Resp.'s Ex. A at 1).

On August 23, 2016, this Court held in *State v. Bazell* that almost all stealing offenses are misdemeanors with a maximum sentence of one year. *Bazell* was based on the statutory language of the felony enhancement provision of the stealing statute, § 570.030.3. Respondent has indicated that there are currently 12,000 people either in custody at the Department of Corrections or under supervision (presumably either probation or parole) for a stealing offense enhanced pursuant to § 570.030.3. (Resp.'s Ex. B). Based on *Bazell*, Mr. Holman filed a Petition for Writ of Habeas Corpus in the Circuit Court of Saint Louis County, Case No. 16SL-CC03822, which denied all relief on December 9, 2016. Mr. Holman then filed a Petition for Writ of Habeas Corpus in the Eastern District of the Missouri Court of Appeals, Case No. ED105091, which denied all relief on January 6, 2017.

III. POINTS RELIED ON

Point 1: Petitioner is entitled to a writ of habeas corpus ordering Respondent to release and discharge him, amending his felony conviction to a misdemeanor, and crediting his excess time served to his other sentence because Petitioner's conviction of a felony for the offense of Stealing Over $500 was illegal, and his seven-year prison

sentence exceeded the maximum sentence allowed by law, in that *State v. Bazell* bars all § 570.030.3 enhancements from being applied to a stealing offense charged under § 570.030, including Stealing Over $500.

- *State v. Bazell* (the citation to the official reporter is not available yet, but a copy of the case is filed with the Petition as Exhibit 4) (Mo. banc 2016)
- RSMo. § 570.030
- *State v. McMillian* (the citation to the official reporter is not available yet, but a copy of the case is filed with the Petition as Exhibit 5) (Mo. App. W.D. 2016)
- *State v. Bowen* (the citation to the official reporter is not available yet, but a copy of the case is filed being filed contemporaneously herewith as Exhibit 12) (Mo. App. E.D. 2017)

Point 2: Petitioner is entitled to a writ of habeas corpus ordering Respondent to release and discharge him, amending his felony conviction to a misdemeanor, and crediting his excess time served to his other sentence because a sentencing defect may be raised by a petition for writ of habeas corpus in that *Thornton v. Denny* issued a writ of habeas corpus to correct a nearly identical sentencing defect, and where a later judicial decision clarifies the meaning of a statute in effect at the time of conviction, there is no issue of retroactivity.

- *Thornton v. Denny*, 467 S.W.3d 292 (Mo. App. W.D. 2015)
- *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008)

- *State v. Bazell* (the citation to the official reporter is not available yet, but a copy of the case is filed with the Petition as Exhibit 4) (Mo. banc 2016)
- *Culp v. Lawrence* (the citation to the official reporter is not available yet, but a copy of the case is filed with the Petition as Exhibit 8) (Mo. App. W.D. 2017)

IV. STANDARD OF REVIEW

This is a Petition for Writ of Habeas Corpus brought pursuant to Rule 91 of the Missouri Supreme Court Rules. In such a proceeding, "If no legal cause is shown for the restraint, the court shall forthwith order the person discharged." Mo. Sup. Ct. R. 91.18. "Whenever 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 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 . . .." Mo. Sup. Ct. R. 91.06. "A court to which a petition for a writ of habeas corpus is presented shall forthwith grant the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the petition that the person restrained is not entitled thereto." Mo. Sup. Ct. R. 91.05.

"'Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as "a bulwark against convictions that violate fundamental fairness."'" *State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 639 (Mo. banc 2011) (quoting *Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. banc 2003) (in turn quoting *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982))). "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 the state or federal government." *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 125 (Mo. banc 2010). Habeas proceedings, are "limited to determining the facial validity of confinement, which is based on the record of the proceeding that resulted in the confinement." *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 513 (Mo. banc 2010) (quoting *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001)).

V. ARGUMENT

Petitioner Joshua Holman seeks nothing more than to be released from the Department of Corrections upon completion of the maximum sentence allowed by law for his offense. Respondent has held Mr. Holman in custody for more than two years for the offense of Stealing Over $500, and Respondent is not detaining Mr. Holman for any other offense. On August 23, 2016, this Court held in *State v. Bazell* that almost all stealing offenses are misdemeanors with a maximum sentence of one year. As such, Respondent's continued detention of Mr. Holman for the offense of Stealing Over $500 is illegal, and this Court should issue a writ of habeas corpus and order Respondent to release Mr. Holman on the Stealing charge immediately. Alternatively, to prevent this case from becoming moot upon completion of Petitioner's sentence, this Court may issue a provisional writ of habeas corpus during the pendency of these proceedings and release Petitioner on bond. This Court should further order that Petitioner's record of conviction be amended to reflect a conviction for a Class A misdemeanor, rather than a felony. Petitioner further requests that this Court order Respondent to credit all time that Petitioner has served in excess of one year on the Stealing charge toward his sentence on

Burglary 2nd Degree and further order Respondent to consider Petitioner for parole on the charge of Burglary 2nd Degree in the normal manner.

A. PETITIONER IS ENTITLED TO A WRIT OF HABEAS CORPUS ORDERING RESPONDENT TO RELEASE AND DISCHARGE HIM, AMENDING HIS FELONY CONVICTION TO A MISDEMEANOR, AND CREDITING HIS EXCESS TIME SERVED TO HIS OTHER SENTENCE BECAUSE PETITIONER'S CONVICTION OF A FELONY FOR THE OFFENSE OF STEALING OVER $500 WAS ILLEGAL, AND HIS SEVEN-YEAR PRISON SENTENCE EXCEEDED THE MAXIMUM SENTENCE ALLOWED BY LAW, IN THAT *STATE V. BAZELL* BARS ALL § 570.030.3 ENHANCEMENTS FROM BEING APPLIED TO A STEALING OFENSE CHARGED UNDER § 570.030, INCLUDING STEALING OVER $500.

On August 23, 2016, in *State v. Bazell*, this Court reduced two felony convictions for Stealing a Firearm to misdemeanors, based on the wording of the Stealing statute, § 570.030, and its felony enhancement provision, § 570.030.3 (a copy of which was filed with the Petition as Exhibit 3). Based on *Bazell*, the Western District of the Missouri Court of Appeals held in *State v. McMillian* on October 18, 2016, that the offense of Stealing Over $500 is also a misdemeanor, as it cannot be enhanced to a felony under the language of the Stealing statute. The Western District reaffirmed *McMillian* in *State v. Metternich* (a copy of which was filed by motion on February 6, 2017, as Exhibit 11) on

December 27, 2016, and again on January 10, 2017, in *Culp v. Lawrence*. The Southern District followed *McMillian* on November 18, 2016, in *State v. Turrentine* (a copy of which was filed with the Petition as Exhibit 6). And the Eastern District made it unanimous on January 24, 2017, in *State v. Bowen.* Although those cases are obviously not binding on this Court, Petitioner submits that they correctly apply this Court's decision in *Bazell* and were correctly decided.

Nonetheless, Respondent persists in its quarrel with all three divisions of the Court of Appeals, contending that *Bazell* does not apply to the offense of Stealing Over $500. It should be noted that, in addition to the other *Bazell* habeas cases docketed for oral argument with the case at bar, this issue is currently the subject of litigation in this Court in *State v. James Calvin Smith*, Case No. SC95461.

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 a firearm, *see* § 570.030.3(3)(d). The ruling in *Bazell* is that, even though the property appropriated consisted of a firearm, "the value of property or services" is not an element of Stealing, as defined in Subsection 1. *Bazell* at 5. This 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, this Court gave effect to the plain and ordinary meaning of the statutory language. *Id.* 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.

Although *Bazell* concerned the offense Stealing a Firearm, it would appear to apply to all 18 conditions present in the felony enhancement provision. The Western District of the Missouri Court of Appeals read *Bazell* the same way in *McMillian*:

> *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. . . .
>
> 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.

McMillian at 5-6. The Southern District of the Court of Appeals agreed in *Turrentine*, holding, "Because Defendant was sentenced to a punishment greater than the maximum

sentence, the sentence constitutes a manifest injustice and, therefore, plain error." Petitioner's Ex. 7 at 26-27. And as the Eastern District reasoned in *Bowen*, "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." *Bowen* at 5.

In support of its position that *Bazell* does not apply to the offense of Stealing Over $500, Respondent notes that, in *Bazell* itself, this Court left undisturbed a 12-year sentence for Stealing Over $500. But this Court did so because Ms. Bazell had not raised the issue in the Court of Appeals or in her original briefs to this Court:

> Although Defendant, in her supplemental brief to this Court, now argues that her felony conviction for the rings stolen should also be reduced to a misdemeanor, she did not seek such relief in the court of appeals or in her original briefs to this Court. On transfer to this Court, a party may not "alter the basis of any claim that was raised in the court of appeals brief." Rule 83.08(b); *see also Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc 1997) (denying claims raised in a party's substitute brief that were not raised in the brief before the court of appeals). As a result, the Court will not consider this newly added request for relief.

Bazell at n.4 (Petitioner's Ex. 4 at 17). In the case at bar, however, Mr. Holman did raise the issue in the Court of Appeals and his original briefs to this Court, and furthermore, this case is an original proceeding anyway, so Rule 83.08(b) does not apply. In any

event, Petitioner submits that this Court left unresolved in *Bazell* whether its holding would apply to the offense of Stealing Over $500. Now that this Court is called upon to answer that question, the logic of *Bazell* and the plain and ordinary meaning of the "clear and unambiguous" language in the Stealing statute demand that this Court hold that *Bazell* does apply to the offense of Stealing Over $500, for all of the reasons explained in *McMillian*, *Metternich*, *Culp*, *Turrentine,* and *Bowen*.

Mr. Holman was charged with and pleaded guilty to the offense of stealing, and as indicated in the Sentence and Judgment from Livingston County (a copy of which was filed with the Petition as Exhibit 1), his offense was enhanced to a felony, and he was sentenced to seven years in prison. But, as a matter of law, his offense could not be enhanced to a felony. Instead, as a matter of law, his offense was a class A misdemeanor, with a maximum sentence of one year in jail. Mr. Holman has now served more than two years in custody for stealing. Mr. Holman's original conviction and sentence were therefore illegal – as is Respondent's continued detention of him. Simply put, Mr. Holman's criminal case resulted in a sentencing defect, as the sentencing court imposed a sentence that exceeded the maximum sentence allowed by law. Therefore, this Court should issue a writ of habeas corpus to correct the sentencing defect and order Respondent to release Mr. Holman on the stealing charge immediately.

B. PETITIONER IS ENTITLED TO A WRIT OF HABEAS CORPUS ORDERING RESPONDENT TO RELEASE AND DISCHARGE HIM, AMENDING HIS FELONY CONVICTION TO A MISDEMEANOR, AND CREDITING HIS EXCESS TIME SERVED TO HIS OTHER SENTENCE BECAUSE A SENTENCING DEFECT MAY BE RAISED BY A PETITION FOR WRIT OF HABEAS CORPUS IN THAT *THORNTON V. DENNY* ISSUED A WRIT OF HABEAS CORPUS TO CORRECT A NEARLY IDENTICAL SENTENCING DEFECT, AND WHERE A LATER JUDICIAL DECISION CLARIFIES THE MEANING OF A STATUTE IN EFFECT AT THE TIME OF CONVICTION, THERE IS NO ISSUE OF RETROACTIVITY.

1. Sentencing defects may be corrected by habeas corpus, as the Court in *Thornton v. Denny* issued a writ of habeas corpus to correct a sentencing defect essentially identical to the case at bar.

A very similar situation was presented to the Western District of the Missouri Court of Appeals in 2015 in *Thornton v. Denny*, 467 S.W.3d 292 (Mo. App. W.D. 2015) (a copy of which was filed with the Petition as Exhibit 7). Like this case, *Thornton* was an original proceeding on a petition for writ of habeas corpus, and like this case, the petitioner in *Thornton* had been convicted of a felony when he should have been convicted of a misdemeanor. 467 S.W.3d at 293. Specifically, Mr. 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 293-94. While serving his sentence, this Court decided *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), in which it held, based on its reading of the DWI statute in effect at the time of Mr. Thornton's plea, "the use of prior municipal offenses resulting in an SIS cannot be used to enhance punishment under section 577.023." 245 S.W.3d at 829. One of Mr. Thornton's prior offenses was a "prior municipal offense resulting in an SIS," so he filed a petition for writ of habeas corpus. *Thornton*, 467 S.W.3d at 294-95. The Western District of the Missouri Court of Appeals granted Mr. Thornton's petition for writ of habeas corpus, explaining as follows:

> Thornton was given a sentence which exceeded the statutory punishment for a Class A misdemeanor. Thornton filed a petition for writ of habeas corpus, arguing that, as a result of the Missouri Supreme Court's decision in *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), one of the convictions on which the circuit court relied to find him to be a persistent offender could not be used for enhancement purposes. We agree, and conclude that under *Turner*, Thornton could be classified only as a prior, rather than a persistent, offender. We accordingly grant Thornton's petition for writ of habeas corpus, vacate his 2007 conviction of a felony offense, and order that the record of Thornton's 2007 conviction be amended to reflect a conviction of Class A misdemeanor driving while intoxicated.

467 S.W.3d at 293.

In so holding, the Western District of the Missouri Court of Appeals observed, "[I]t is settled that the imposition of a sentence beyond that permitted by the applicable statute or rule may be raised by way of a writ of habeas corpus." *Id.* at 293-94 (citing *Zinna*, 301 S.W.3d at 517; *State ex rel. Koster v. Jackson*, 301 S.W.3d 586, 590 (Mo. App. W.D. 2010)). Such unauthorized sentences are known as "sentencing defects." *Id.* at 294. Missouri courts have granted writs of habeas corpus in sentencing defect cases several times. *See, e.g., Zinna*, 301 S.W.3d at 516-17; *Koster*, 301 S.W.3d at 590; *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995); *Merriweather v. Grandison*, 904 S.W.2d 485, 486 (Mo. App. W.D. 1995); *Thomas v. Dormire*, 923 S.W.2d 533, 534 (Mo. App. W.D. 1996). Sentencing defects used to be described as a "jurisdictional" because the sentencing court purported to impose a sentence it did not have the authority to impose. *Zinna*, 301 S.W.3d at 517; *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009).

There are no material differences between *Thornton* and the case at bar. Both are habeas petitions. Both involve a defendant who pleaded guilty to a felony that should have been a misdemeanor. Both involve a prior decision of this Court that clarified the meaning of a felony enhancement statute (*Thornton* involved *Turner*, which clarified the felony enhancement provision of DWI statute, and this case involves *Bazell*, which clarified the felony enhancement provision of the Stealing statute). Both involved sentencing defects, as both Mr. Thornton and Mr. Holman were both given a sentence that exceeded the maximum sentence allowed by law. Accordingly, Mr. Holman is entitled to the same relief that the Missouri Court of Appeals granted in *Thornton*: declare

his sentence discharged after having served the maximum sentence allowed by law and order the record of conviction to be amended to reflect conviction of a Class A misdemeanor. *See Thornton*, 467 S.W.3d at 300.

Thornton was the critical case in the Western District's decision on January 10, 2017, in *Culp v. Lawrence*, which is now before this Court on appeal. *Culp* is in all respects identical to the case at bar: the petitioner was convicted of the Class C Felony of Stealing Over $500, the petitioner should have been convicted of only a Class A Misdemeanor because of *Bazell*, the petitioner has served more than one year in custody, and the petitioner seeks to be released on a petition for writ of habeas corpus. Relying on *Thornton*, the Western District granted the petition for writ of habeas corpus and ordered that Mr. Culp be released immediately. (Petitioner's Ex. 7 at 35-37). Although *Thornton* and *Culp* are obviously not binding on this Court, Petitioner submits that their reasoning is sound and they were correctly decided.

2. Where a later judicial decision clarifies the meaning of a statute in effect at the time of conviction, there is no issue of retroactivity.

Respondent argues that *Bazell* should not be applied "retroactively," i.e., to cases that have completed direct review. However, the Western District considered and rejected an identical argument in *Thornton*, reasoning as follows:

> [W]e now turn to the State's alternative argument: that *Turner* should not be applied "retroactively" to Thornton's case.

> Thornton is not seeking the "retroactive" application of *Turner*. Instead, Thornton's argument is that under § 577.023 (as interpreted in *Turner*), the State failed to prove the requisite number of prior convictions necessary to support a finding that Thornton was a "persistent offender." Section 577.023 was in effect at the time of Thornton's guilty plea – it is not being applied retroactively. Moreover, the Missouri Supreme Court has held that "[i]n *Turner*, this Court made no new law; it merely clarified the language of an existing statute." *State v. Severe*, 307 S.W.3d 640, 642–43 (Mo. banc 2010). The Court held that – even before the *Turner* decision – "[t]he state was on notice by the plain language of section 577.023.16 that a guilty plea followed by a suspended imposition of sentence in 'municipal court' was not to be treated as a prior conviction." *Id.* at 644. . . .
>
> *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 (emphasis added). The Western District went on to explain 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.

Like the petitioner in *Thornton*, Mr. Holman does not seek retroactive application of a new rule of law; rather, Mr. Holman seeks application of the Stealing statute – properly construed -- that was in effect at the time of his plea. There is nothing new

about the Stealing statute. It has been in effect since 2002. This Court called the Stealing statute "clear and unambiguous" in *Bazell*, as it declined to resort to canons of statutory interpretation beyond the plain and ordinary meaning of the statutory language. Accordingly, as in *Thornton*, there is no issue of retroactivity. The Western District concisely explained the point in *Culp* as follows:

> Warden Lawrence also argues that, even if *Bazell* is otherwise applicable, it should not apply retroactively to Culp's stealing conviction, because his conviction was final before *Bazell* was decided. We reject this argument for the reasons fully explained in *State ex rel. Thornton v. Denney*, 467 S.W.3d 292 (Mo. App. W.D. 2015).
>
> . . .
>
> Culp seeks to rely on a later judicial interpretation of a statute which was in effect at the time of his offense and conviction. Like the *Turner* decision at issue in *Thornton*, the Missouri Supreme Court's decision in *Bazell* did not create a new rule of law – it merely interpreted and applied the plain meaning of § 570.030.3. The Court stated that "there is no need to resort to tools of interpretation because the language of section 570.030.3 is clear"; it also held that "the legislature clearly and unambiguously" specified that the enhancement provisions contained in § 570.030.3 did not apply to the offense of stealing. 497 S.W.3d at 266, 267. Because *Bazell* merely clarified the interpretation of a pre-existing statute, it did not create "new law" which would be subject to retroactivity analysis. We reject

> Warden Lawrence's argument that *Bazell's* interpretation of § 570.030.3 cannot be applied to Culp's conviction.

Culp at 6-7 (Petitioner's Ex. 8 at 46-47). The fact that the Department of Corrections has and continues to detain more than 12,000 people, when the General Assembly "clearly" and "unambiguously" deprived it of the authority to do so, while shocking, does not mean this Court created new law in *Bazell*.

Respondent cites *State v. Erwin*, 848 S.W.2d 476 (Mo. 1983), *State v. Ferguson*, 887 S.W.2d 585 (Mo. 1994), *Johns v. Bowersox*, 208 F.3d 724 (8th Cir. 2000), *State v. Hayes*, 23 S.W.3d 783 (Mo. App. W.D. 2008), and *State v. Wurzburger*, 40 S.W.3d 893 (Mo. 2001) for the proposition that substantive decisions of this Court are generally not applied to cases that have completed direct review. But none of Respondent's cases involve sentencing defects, i.e., a sentence that exceeded the maximum sentence allowed by law. As the Court of Appeals concluded in *Culp*, "In these circumstances, where [the] 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." *Culp* at 6 (Petitioner's Exhibit 7 at 46) (quoting *Thornton*, 467 S.W.3d at 298). As in *Thornton* and *Culp*, Mr. Holman relies "on a later judicial interpretation of a statute which was in effect at the time of his offense and conviction." *Id.* In short, none of the cases cited by Respondent address the scenario at issue in this case: a decision of this Court properly construing a statute in effect at the time of the petitioner's conviction has revealed that the petitioner was given a sentence that exceeds the maximum sentence allowed by law. Only *Thornton* and *Culp* address that scenario.

Specifically, *Erwin* dealt with an improper jury instruction, not a legislatively enacted statute. And the statement that *Erwin* would apply "only in cases tried in the future and cases now subject to direct appeal where the issue is preserved" was dicta and does not appear to have been briefed by the parties. *See* 848 S.W.2d at 484. *Ferguson* involved instructional error in a post-conviction proceeding, and this Court applied prior decisions retrospectively in that case. *See* 887 S.W.2d at 587. The concurring opinions cited in *Johns v. Bowersox*, 208 F.3d 724 (8th Cir. 2000), cite *Ferguson* for the general rule about retrospective application and, again, do not address sentences that exceed the statutory maximum. *Hayes* also dealt with a jury instruction issue, not a legislatively enacted statute and also applied its own rule retrospectively, remanding the case for a new trial. *See* 23 S.W.3d at 791-792. In *Wurzburger*, the Court found that the instructional rule applied retrospectively but that the Defendant had not shown prejudice sufficient to merit reversal under plain error review. *See* 40 S.W.3d at 897-898. None of the cases deal with the issue before the Court here – where a court ruling made clear that the very statute in effect at the time of sentencing did not authorize the disposition imposed. Again, only *Thornton* and *Culp* deal with that issue.

VI. CONCLUSION

Petitioner does not seek a new trial. Rather, he seeks only the acknowledgment that he has served the maximum sentence allowed by law for the offense of Stealing, namely one year. Accordingly, Respondent has no basis to continue to detain Petitioner on the charge of Stealing Over $500, and this Court should issue the writ of habeas corpus and order Respondent to release Petitioner on that charge immediately. This

Court should also order Respondent to credit all time that Petitioner has served in excess of one year on the Stealing charge toward his sentence on Burglary 2nd Degree and further order Respondent to consider Petitioner for parole on the charge of Burglary 2nd Degree in the normal manner. This Court should further order that Petitioner's record of conviction be amended to reflect a conviction for a Class A misdemeanor, rather than a felony.

CERTIFICATE REGARDING LENGTH

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b) in that, not counting the cover, Certificate of Service, this Certificate, signature block, and appendix, it contains 5,708 words, according to the word processing software used to draft it.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of April, 2017, a true and correct copy of the foregoing was served through the Missouri e-Filing System or via first-class mail to each of the following:

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