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IN THE
SUPREME COURT OF MISSOURI
No. SC97916

STATE OF MISSOURI,

Respondent,

vs.

JASON RUSSELL,

Appellant.

Appeal from the Circuit Court of Lincoln County, Missouri
Forty-Fifth Judicial Circuit, Lincoln County No. 13L6-CR00841-01
The Honorable James D. Beck, Judge

SUBSTITUTE BRIEF OF APPELLANT

Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977 (telephone)
(573) 777-9974 (facsimile)
Craig.Johnston@mspd.mo.gov (email)

Attorney for Appellant

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JURISDICTIONAL STATEMENT

Appellant appeals his judgment and seven-year prison sentence for felony stealing by deceit of at least $500, § 570.030.[1] On October 21, 2013, Appellant pleaded guilty to the offense and was given a suspended imposition of sentence and was placed on probation (D3, 4; Tr. 3-12).[2] On December 7, 2017, Appellant's probation was revoked and he was sentenced to serve seven years in prison, to run concurrently with another sentence (D8, 9). On April 13, 2018, the Eastern District granted Appellant leave to file a late notice of appeal within 15 days after receipt of that order by the circuit clerk; on that same day, that notice of appeal was timely filed within that time period (D11, 12).

In criminal cases, § 547.070 provides that "[i]n all cases of final judgment rendered upon any indictment or information, an appeal to the proper appellate court shall be allowed to the defendant. …" In accord, Rule 30.01(a) ("After the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by

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[1]All statutory references are to RSMo (2000) unless otherwise indicated, except that all references to § 570.030, are to RSMo Supp. 2009. References to the Record on Appeal are to a transcript (Tr.), and to the system-generated legal file, which will be referenced first by the document number followed by the page number (e.g., "D1 p. 1;" if the entire document is referenced, then the citation will only be to the document, "D1.").

[2] Because the imposition of sentence was suspended, the judgment was not final and Appellant could not appeal it until after judgment and sentence was entered on December 7, 2017. *State v. Lynch*, 679 S.W.2d 858, 860 (Mo. banc 1984), overruled on other grounds by *Yale v. City of Independence*, 846 S.W.2d 193 (Mo. banc 1993).

law.”).” Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, Section 3, Mo. Const.; section 477.050. This Court thereafter granted Appellant’s application for transfer, so this Court has jurisdiction. Article V, Sections 3 and 10, Mo. Const. and Rule 83.03.

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STATEMENT OF FACTS

Jason Russell (Appellant) was charged by information with stealing, § 570.030 (D2). It was alleged that between March 26, 2011 and October 29, 2011, Appellant appropriated at least $500 from the State of Missouri, by deceit, and with the purpose to deprive the State, when he falsely claimed that he was unemployed (D2). On October 21, 2013, Appellant pleaded guilty to that charge, imposition of sentence was suspended, and he was placed on probation for four years (D3, 4; Tr. 3-12). On June 16, 2015, Appellant's probation was suspended (D6).

On August 23, 2016, this Court decided *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016), which reversed the defendant's two convictions for stealing firearms, holding that the plain language of § 570.030.3 barred it from being used to enhance the defendant's stealing offenses from misdemeanors to felonies. On July 11, 2017, this Court held that *Bazell* applied to cases involving stealing more than $500, and that a stealing offense could *not* be enhanced to a felony by operation of § 570.030.3(1) based on the value of the property at issue. *State v. Smith*, 522 S.W.3d 221, 230 (Mo. banc 2017).

On October 19, 2017, Appellant confessed that he violated his probation (D7; Tr. 13-14). On December 7, 2017, Appellant filed a written objection "to being sentenced to a felony due to Bazel (sic)" (D10; Tr. 16). On that same day, the circuit court overruled the objection and sentenced Appellant to serve seven years in prison, to run concurrently with another sentence (D8, 9, 10; Tr. 17, 21).

On April 13, 2018, the Eastern District granted Appellant leave to file a late notice of appeal within 15 days after receipt of that order by the circuit clerk; on that same day, that notice of appeal was timely filed within that time period (D11, 12). On appeal, the Eastern District

affirmed the trial court, finding that: (1) instead of a direct appeal, Appellant should bring his *Bazell* challenge in a Rule 24.035 proceeding; and, (2) even if Appellant's claim was cognizable on direct appeal, Appellant was not entitled to *Bazell* relief. *State v. Jason Russell*, Slip Op., No. ED 106570 (April 23, 2019). Subsequently, this Court granted transfer on Appellant's motion. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

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POINT RELIED ON

The circuit court erred in overruling Appellant's objection under *State v. Bazell*,[3] in entering judgment on the class C felony of stealing, and in sentencing Appellant to seven years' imprisonment, because this violated Appellant's right to due process as guaranteed by the 14th Amendment to the United States Constitution, and Article I, § 10 of the Missouri Constitution, in that the sentencing enhancement factors contained in section 570.030.3, including the "value of five hundred dollars or more" factor, only applied to "any offense in which the value of property or services is an element," and since value is not an element of stealing, the sentencing enhancement factors under section 570.030.3 did not apply; thus, Appellant could only be convicted of, and sentenced for, misdemeanor stealing. As a result, his seven-year prison sentence for felony stealing resulted in manifest injustice since he could not have been convicted of felony stealing and the greatest sentence he should have received was one year in jail for misdemeanor stealing.

State v. Bazell, 497 S.W.3d 263 (Mo. banc 2016);

State ex rel. Windeknecht v. Mesmer, 530 S.W.3d 500 (Mo. banc 2017);

Kansas City v. Stricklin, 428 S.W.2d 721 (Mo. banc 1968);

State v. Baker, 551 S.W.3d 68 (Mo. App. W.D. 2018);

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[3] *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016).

U.S. Const., Amend. 14;

Mo. Const., Art. I, § 10;

Sections 547.070, 570.030; and

Rules 24.035, 29.15, 30.01, and 30.20.

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Summary of Argument:

Missouri allows appeals in criminal cases in "*all* cases of final judgment rendered upon any indictment or information." § 547.070; Rule 30.01(a) ("After the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law.")." Thus, Appellant was entitled to an appeal even though he pleaded guilty.

Appellant's guilty plea did not waive his right to an appeal. Although an appeal of a guilty plea is generally limited to subject matter jurisdiction and the sufficiency of the pleadings, Missouri appellate courts have also allowed, or explicitly held, that some matters arising *after* the plea can be litigated on a direct appeal after a guilty plea, including when a circuit court enters a sentence that is excessive or contrary to law. *Kansas City v. Stricklin*, 428 S.W.2d 721 (Mo. banc 1968) (claim that the "sentence was excessive"); *State v. Baker*, 551 S.W.3d 68 (Mo. App. W.D. 2018) (a component of the sentence exceeded the maximum allowed by law); *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 231 (Mo. banc 2017) (When there is a challenge to a sentence contrary to the law, "the appropriate remedy is a direct appeal").

Appellant raised a *Bazell* objection prior to being sentenced for felony stealing, but the circuit court entered a sentence that was contrary to plain language of § 570.030, as held by *Bazell*. Thus, a direct appeal is permissible because if a circuit court "enters a sentence that is contrary to law," then "the appropriate remedy is a direct appeal," *Van Amburg*, 533 S.W.3d at 231. Moreover, a claim that a sentence exceeds the maximum allowed by law is not waived by a guilty plea, and an appellate court may consider that argument on a direct appeal, *Baker*, 551 S.W.3d at 70.

The existence of Rule 24.035 does not preclude Appellant from raising such a claim on direct appeal because although it is the exclusive post-conviction remedy after a guilty plea, it does not supplant a defendant's right to a direct appeal, and, as noted above, Missouri courts have allowed or explicitly stated that defendants who have pleaded guilty can litigate on direct appeal claims that the sentence is contrary to the law or exceeds the maximum sentence authorized by law.

Additionally, this Court in *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500, 503 (Mo. banc 2017), held that "the *Bazell* holding only applies forward, except those cases pending on direct appeal," and a defendant who "received a sentence authorized by a different interpretation of section 570.030 without objection … should not receive the benefit of retroactive application of" *Bazell*. But here, Appellant is entitled to the forward application of *Bazell* because his case was not yet final since he had not been sentenced until a year after *Bazell* was decided. *Also see*, the Attorney General's brief in the court of appeals in *Heather Hamilton v. State*, No. ED106540, now pending in this Court after transfer was granted, SC97881, which conceded, "… any defendant who had not been sentenced before *Bazell* was decided would be entitled to the new rule. Accordingly, here, because [defendant] was sentenced after the decision in *Bazell* was handed down, she was entitled to its forward application."

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ARGUMENT

The circuit court erred in overruling Appellant's objection under *State v. Bazell*,[4] in entering judgment on the class C felony of stealing, and in sentencing Appellant to seven years' imprisonment, because this violated Appellant's right to due process as guaranteed by the 14th Amendment to the United States Constitution, and Article I, § 10 of the Missouri Constitution, in that the sentencing enhancement factors contained in section 570.030.3, including the "value of five hundred dollars or more" factor, only applied to "any offense in which the value of property or services is an element," and since value is not an element of stealing, the sentencing enhancement factors under section 570.030.3 did not apply; thus, Appellant could only be convicted of, and sentenced for, misdemeanor stealing. As a result, his seven-year prison sentence for felony stealing resulted in manifest injustice since he could not have been convicted of felony stealing and the greatest sentence he should have received was one year in jail for misdemeanor stealing.

Issues presented:

(1) Is Appellant entitled to *Bazell* relief if his case was not final when *Bazell* was decided, since he was not sentenced until more than a year after *Bazell* was decided, and Appellant raised a specific *Bazell* objection *prior to* being sentenced to a seven-year prison sentence?

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[4] *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016).

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This Court in *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500, 503 (Mo. banc 2017) held that "the *Bazell* holding only applies forward, except those cases pending on direct appeal," and a defendant who "received a sentence authorized by a different interpretation of section 570.030 without objection … should not receive the benefit of retroactive application of" *Bazell*.

By holding that "we decline to create an exception that would allow defendant to reap the benefit of the forward application of *Bazell* merely because he was sentenced after *Bazell* was decided," (Slip Op. at 11), the Eastern District's opinion is contrary to this Court's opinion in *Windeknecht*. Appellant is entitled to the forward application of *Bazell* because his case was not yet final since he had not been sentenced until after *Bazell* was decided. In a related case, the Attorney General conceded that "… any defendant who had not been sentenced before *Bazell* was decided would be entitled to the new rule. Accordingly, here, because [defendant] was sentenced after the decision in *Bazell* was handed down, [defendant] was entitled to its forward application." *Heather Hamilton v. State*, No. ED106540 (now pending in this Court after transfer was granted, SC97881).

(2) Is a direct appeal after a guilty plea available for a defendant who claims that his sentence was excessive, particularly when the defendant objects to the sentence prior to sentencing?

Section 547.070 provides that "[i]n all cases of final judgment rendered upon any indictment or information, an appeal to the proper appellate court shall be allowed to the defendant …", and Rule 30.01(a) provides that "[a]fter the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law." Neither statute nor rule limits appeals in a criminal cases to only final

judgments occurring after trials. Further, Rule 24.035 contemplates that a direct appeal of a guilty plea can be taken because the timing requirements set out in Rule 24.035(b) includes time limits for such a motion after "an appeal of such judgment or sentences … is taken …."

By holding that Appellant could not raise on a direct appeal after a guilty plea a claim that his sentence was excessive, the Eastern District's opinion is contrary to this Court's opinions in *Kansas City v. Stricklin*, 428 S.W.2d 721 (Mo. banc 1968) and *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 231 (Mo. banc 2017). In *Stricklin*, this Court allowed such claims to be raised on direct appeal after a guilty plea, *Stricklin*, 428 S.W.2d at 726, whereas in *Van Amburg*, this Court specifically stated that if a circuit court "enters a sentence that is contrary to law," then "the appropriate remedy is a direct appeal." *Van Amburg*, 533 S.W.3d at 231. The Eastern District's opinion also conflicts with the Western District's opinion in *State v. Baker*, 551 S.W.3d 68 (Mo. App. W.D. 2018), which allowed such a claim to be raised on direct appeal.

Facts and preservation:

Appellant was charged by information with stealing, § 570.030 (D2).[5] It was alleged that between March 26, 2011 and October 29, 2011, Appellant appropriated at least $500 from the State of Missouri, by deceit, when he falsely claimed that he was unemployed (D2). On October 21, 2013, Appellant pleaded guilty to that charge, imposition of sentence was suspended, and he was placed on probation for four years

[5] All references to § 570.030, are to RSMo (Supp. 2009). Section 570.030 has been amended, and effective January 1, 2017, no longer contains the language addressed in *Bazell*. *State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 511 n.6 (Mo. banc 2017).

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(D3, 4; Tr. 3-12). Because the imposition of sentence was suspended, the judgment was not final, and Appellant could not appeal until after judgment and sentence was entered. *State v. Lynch*, 679 S.W.2d 858, 860 (Mo. banc 1984), overruled on other grounds by *Yale v. City of Independence*, 846 S.W.2d 193 (Mo. banc 1993).

On August 23, 2016, this Court decided *Bazell*. It reversed the defendant's two felony stealing convictions, holding that the plain language of § 570.030.3 barred defendant's stealing offenses from being enhanced from misdemeanors to felonies. *Bazell*, 497 S.W.3d at 266-67. On July 11, 2017, this Court held that *Bazell* applied to cases involving stealing more than $500. *State v. Smith*, 522 S.W.3d 221, 230 (Mo. banc 2017).

On December 7, 2017, more than a year after *Bazell*, Appellant objected to being sentenced to a felony based on *Bazell* (D10). That objection was denied by the circuit court, and Appellant was sentenced to serve seven years in prison for felony stealing over $500 (D8, 9, 10). After Appellant was sentenced, a final judgment issued, and Appellant appealed his final judgment and seven-year prison sentence, as allowed by § 547.070 and Rule 30.01(a).

The Eastern District affirmed the trial court's judgment, finding that: (1) Appellant could not appeal his guilty plea; instead, he was required to raise his *Bazell* challenge in a Rule 24.035 proceeding; and, (2) even if Appellant's claim was cognizable on direct appeal, Appellant was not entitled to *Bazell* relief. *State v. Jason Russell*, Slip Op., No. ED106570 (April 23, 2019). Subsequently, this Court granted Appellant's application for transfer.

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Standard of Review:

Questions of law and the interpretation of statutes are subject to *de novo* review. *State v. Luster*, 544 S.W.3d 263, 265 (Mo. App. E.D. 2017). Correspondingly, whether an information fails to state an offense is a question of law, which appellate courts review *de novo*. *State v. Metzinger,* 456 S.W.3d 84, 89 (Mo. App. E.D. 2015).[6]

Analysis:

A. Appellant is entitled to *Bazell* relief because he was sentenced after *Bazell*, and under *Windeknecht*, Appellant was entitled to the forward application of *Bazell*:

Section 570.030.1 provided that 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." Section 570.030.8 provided that the crime of stealing is a class A misdemeanor unless otherwise specified. Because the information alleged that Appellant appropriated at least $500, the state presumably relied upon section 570.030.3 to charge Appellant with felony stealing. That section stated:

> 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:
>
> (1) The value of the property or services appropriated is five

[6] Even if Appellant had not raised this issue in the circuit court, plain error review under Rule 30.20 would be appropriate since a defendant being sentenced to a punishment greater than the maximum sentence for an offense results in manifest injustice. *State v. Severe*, 307 S.W.3d 640, 642 (Mo. banc 2010); *State v. Bowen*, 523 S.W.3d 483, 485 (Mo. App. E.D. 2017) (applying *Severe* to a *Bazell* claim).

hundred dollars or more but less than twenty-five thousand dollars.

(Emphasis added). Thus, "[i]n § 570.030.3, the legislature clearly and unambiguously stated only offenses for which the value or property or services was an element could be enhanced to a felony." *State v. Cotner*, 540 S.W.3d 436, 438 (Mo. App. E.D. 2018).

But under the stealing statute in effect at the time of Appellant's charged offense, the value of the property or services appropriated was *not* an element of the crime of stealing, § 570.030.1. *Id*. A stealing offense charged under § 570.030 could *not* be enhanced to a felony under the terms of subsection § 570.030.3. Thus, this Court in *Bazell* held that the plain language of § 570.030.3 barred defendant's stealing offenses from being enhanced from misdemeanors to felonies. Under such circumstances, the circuit court "was without power to enter judgment" against the defendant for felony stealing. *Bowen*, 523 S.W.3d at 486.

The Eastern District erroneously held that Appellant is not entitled to relief under *Bazell* based upon this Court's holding in *Windeknecht*. *Windeknecht* held that "the *Bazell* holding only applies forward, except those cases pending on direct appeal" (Slip Op. at 11). In other words, *Windeknecht* held that *Bazell* does not apply to cases that were already final, but it would apply to all other cases that were still subject to direct appellate review.

Yet the Eastern District held, "we decline to create an exception that would allow defendant to reap the benefit of the forward application of *Bazell* merely because he was sentenced after *Bazell* was decided." (Slip Op. at 11). In essence, The Eastern District, contrary to this Court's opinion in *Windeknecht*, held that it would not apply *Bazell*

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forward to Appellant, even though his sentencing occurred *after Bazell*, and even though *Windeknecht* held that *Bazell* would be applied forward. *Windeknecht* did not hold that *Bazell* would only be applied forward to those cases that went to trial. All defendants are entitled to the forward application of *Bazell* as long as they were not final or were still on direct appeal.

Appellant's case is not foreclosed by *Windeknecht*, rather it is supported by it. *Windeknecht* held that a defendant who "*received a sentence* authorized by a different interpretation of section 570.030 *without objection* … should not receive the benefit of retroactive application of" *Bazell*; emphasis added); 530 S.W.3d at 503. Here, *Bazell* was decided *before* Appellant was sentenced, and Appellant *did object* to being sentenced to a felony after *Bazell* had been decided and before he was sentenced (D10; Tr. 16). He is entitled to the forward application of *Bazell*, as held by *Windeknecht*, because his case was not yet final since he had not been sentenced until after *Bazell* was decided. *See*, *State v. Thompson*, 134 S.W.3d 32, 33 (Mo. banc 2004) (applying change in case law to all future cases "and to those not yet final or still on direct appeal."); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (new rule is to be applied to all cases pending on direct review or not yet final; a case is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied, *id*. at 321).

The Eastern District's holding that Appellant is not entitled to the forward application of *Bazell* would result in the illogical outcome that Appellant would not get *Bazell* relief even though he raised a specific *Bazell* objection *prior to sentencing*, whereas Missouri appellate courts have routinely granted *Bazell* relief on direct appeal, even

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though in all but one of those cases, the defendants did not raise a *Bazell* objection prior to sentencing, rather the issue was raised for the first time on appeal. E.g., *Cotner*, *supra*; *Bowen*, *supra*; cf. *Luster*, *supra*, applying *Bazell* to a case where the issue was raised in a motion filed after jury verdict but before sentencing (thus, *Luster* is the trial version of Appellant's situation where the issue was not raised prior to a determination of guilt, but it was raised prior to sentencing).

The Attorney General's Office in *Heather Hamilton v. State*, No. ED106540 has so far agreed with Appellant's interpretation of *Windeknecht*. On page 8 of their brief, they wrote the following:

> Here, by contrast, the court sentenced Ms. Hamilton on March 16, 2017, several months *after* the decision in *Bazell* was handed down …. As such, this case does not involve a retroactive application of *Bazell*; rather, it involves a forward application.
>
> In *Windeknecht*, the Missouri Supreme Court exercised its authority to order that "the *Bazell* holding only applies forward, except those cases pending on direct appeal." 530 S.W.3d at 503. This meant that *Bazell* would apply retroactively to a limited number of cases where sentence had been entered before *Bazell* was decided—but only if an appeal was still pending when *Bazell* was decided. On the other hand, any defendant who had not been sentenced before *Bazell* was decided would be entitled to the new rule. Accordingly, here, because Ms. Hamilton was sentenced after the decision in *Bazell* was handed down, she was entitled to its forward application.

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Id. (Footnote omitted).[7]

Appellant is entitled to the forward application of *Bazell*. Under *Bazell*, *supra*, and its progeny, Appellant's *felony* stealing conviction and its corresponding seven-year prison sentence must be reversed and remanded so that the circuit court may enter a conviction and sentence for misdemeanor stealing.

B. If a court enters a sentence that is contrary to law, then a direct appeal is an appropriate remedy, even after a guilty plea:

The Eastern District's opinion held that, after a guilty plea, Appellant's remedy for a claim that his sentence was excessive, here because it was contrary to *Bazell*, must be sought through a Rule 24.035 proceeding instead of a direct appeal (Slip Op. at 1, 9). The Eastern District's opinion is contrary to two decisions of this Court, one decision of the Western District, and a Missouri statute.

First, the Eastern District's opinion conflicts with *Van Amburg*, a *Bazell* case where two defendants had pleaded guilty. This Court clearly mandated that if a circuit court "enters a sentence that is contrary to law," then "the appropriate remedy is a direct appeal." *Van Amburg*, 533 S.W.3d at 231.

The Eastern District avoided this Court's explicit direction in *Van Amburg* by saying that "the issue there was whether the sentence was erroneous or void," slip op. at 9. But the Eastern District ignored that whether a sentence is erroneous or void is also a sentencing issue.

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[7] In *Heather Hamilton v. State*, No. SC97881, this Court granted transfer, and the record on appeal in ED106540 was transferred to this Court. Appellant requests this Court take judicial notice of the record in that case, including the Respondent's brief.

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Thus, the Eastern District's attempt to distinguish *Van Amburg* is inapt.

Second, the Eastern District's opinion conflicts with *Stricklin*, which was also a direct appeal of a guilty plea, yet this Court reviewed the defendant's contentions that the "sentence was excessive," it was imposed for a different offense, and it "was the result of bias and prejudice of the court." *Stricklin*, 428 S.W.2d at 723, 726. Although this Court ultimately rejected these sentencing claims on the merits, it did address them. Thus, contrary to the Eastern District opinion, this Court allowed sentencing claims to be raised on direct appeal after a guilty plea.

The Eastern District attempted to distinguish *Stricklin* by saying that it was decided before the inception of Rule 24.035, but a similar post-conviction rule at the time of *Stricklin*, Rule 27.26, also covered claims that the sentence was imposed in violation of the laws of this state, yet this Court allowed the defendant to raise sentencing claims on direct appeal.

Third, the Eastern District's opinion conflicts with *Baker*. There, the Western District allowed an appeal after a guilty plea regarding the defendant's claim that part of his sentence exceeded the maximum authorized by law. The *Baker* court followed Missouri precedent in holding that a guilty plea does not waive such errors where it can be determined on the face of the record that the court had no power to enter the conviction or impose the sentence. *Id*. at 69-70. Because Baker claimed that a component of his sentence exceeded the maximum allowed by law, "his claim was not waived by the entry of his guilty plea and we may consider his argument on the merits." *Id*. at 70.

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Not only did the Western District consider the issue, it granted plain error review and reversed and remanded for re-sentencing.

The Eastern District attempted to distinguish *Baker*, by holding that in *Baker*, "it was clear on the face of the record" that the defendant was sentenced over the maximum allowed, whereas "that is not the case here." (Slip Op. at 9). But at the time Appellant was sentenced, which was more than a year after *Bazell*, it was clear on the face of the record that Appellant's seven-year prison sentence was more than the maximum allowed under *Bazell*.

Finally, the Eastern District's opinion violates Section 547.070, which provides that "[i]n *all cases of final judgment* rendered upon any indictment or information, *an appeal* to the proper appellate court *shall be allowed* to the defendant …" (emphasis added), and Rule 30.01(a) ("After the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law.")." Neither statute nor rule limit an appeal in a criminal case to only final judgments occurring after a trial. Appeals after guilty pleas are allowed under both statute and rule as long as there is a final judgment. This is consistent with the language of Rule 24.035, which contemplates that a direct appeal of a guilty plea can be taken because the timing requirements set out in Rule 24.035(b) includes time limits for such a motion after "an appeal of such judgment or sentences … is taken …."

Additionally, in the Eastern District, Respondent argued that a *Bazell* claim is one that must be brought under Rule 24.035 because that rule is the exclusive remedy for a claim that the sentence was in excess of the statutory maximum (Resp. Br. at 6). Respondent's position is contrary to *Van Amburg*, 533 S.W.3d at 231, wherein this Court

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stated that if a circuit court "enters a sentence that is contrary to law," then "the appropriate remedy is a direct appeal."

Also, Respondent read too much into the language used in Rule 24.035. That rule does provide that a person convicted of a felony after a plea of guilty, who claims that the sentence imposed was in excess of the maximum sentence authorized by law, may seek relief in the sentencing court under Rule 24.035, and that Rule 24.035 "provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated." Rule 24.035(a). But in looking at the history of Missouri's post-conviction proceedings, it is clear that this language is there to warn defendants that they cannot bypass Rule 24.035 and later proceed under some other post-conviction remedy, such as Rule 29.07 or a habeas corpus, to collaterally attack a final judgment. See *Wiglesworth v. Wyrick*, 531 S.W.3d 713, 719-20 (Mo. banc 1976) (former Rule 27.26), recognizing the need for and the logic of the establishment of a single, unitary, post-conviction remedy, to be used in place of other remedies, "except direct review appeal."

Clearly Rule 24.035 does not mean that the claims it enumerates *cannot* be raised on direct appeal, because that rule also lists as a permissible claim "that the court imposing the sentence was without jurisdiction to do so," Rule 24.035(a). Yet, existing case law, including those cited by Respondent, clearly provides that such a claim can always be raised on a direct appeal from a guilty plea.

Similarly, Rule 29.15(a) enumerates as permissible claims under that rule "that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States." But such claims are routinely raised on direct appeals after trial even though Rule 29.15(a) contains language similar to Rule

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24.035(a): "Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated." In fact, not only can the person raise some of these claims on direct appeal, often they must raise them on direct appeal because a person cannot bypass raising them on direct appeal or else they are barred from later raising them in a Rule 29.15 motion. E.g., *State v. Tolliver*, 839 S.W.2d 296, 298 (Mo. banc 1992), where this Court held that the failure to raise issues on direct appeal precludes their being raised in post-conviction motions "except where fundamental fairness requires otherwise and only in rare and exceptional circumstances."

The existence of Rule 24.035 does not change that Appellant can raise some claims on direct appeal because, although it is the exclusive postconviction remedy after a guilty plea, it does not supplant a defendant's right to a direct appeal. In fact, Rule 24.035 contemplates that a direct appeal of a guilty plea can be taken because the timing requirements set out in Rule 24.035(b) include time limits for such a motion after "an appeal of such judgment or sentence sought to be vacated, set aside or corrected is taken…." If a defendant could not file a direct appeal after a guilty plea because of Rule 24.035, then there would be no need for that rule to have a timing requirement contemplating such an appeal.

C. Even if a direct appeal generally is not allowed after a guilty plea, the information was not sufficient to support a felony stealing conviction, which can be raised on direct appeal for the first time after a guilty plea.

If this Court rejects the view that, after a guilty plea, a defendant can raise on direct appeal a claim that the defendant's sentence was excessive and beyond that allowed by law, contrary to the cases cited

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above, Missouri case law still allows a direct appeal if there is a challenge to the sufficiency of the pleading. E.g., *State v. Sparks,* 916 S.W.2d 234, 237 (Mo. App. E.D. 1995).

"When a defendant challenges the sufficiency of an indictment or information for the first time following a guilty plea, the indictment or information will be held to be sufficient unless (1) it does not by any reasonable construction charge the offense to which the defendant pled guilty and (2) the defendant demonstrates actual prejudice as a result of the insufficiency." *Sparks,* 916 S.W.2d at 237; *Brooks v. State*, 242 S.W.3d 705, 709 (Mo. banc 2008). The sufficiency of an indictment or information is a due process issue,[8] which can be raised for the first time on appeal. *State v. Hicks*, 221 S.W.3d 497, 502-04 (Mo. App. W.D. 2007).

Here, there is such a challenge because the pleading could not charge stealing over $500 as a felony since stealing could not be enhanced to a felony based on the value of the property at issue. *Smith*, 522 S.W.3d at 230; *Bazell*, 497 S.W.3d at 267 ("Defendant's offenses must be classified as misdemeanors because they cannot be enhanced to felonies by the terms of section 570.030.3").

Since *Bazell*, Missouri appellate courts routinely granted *Bazell* relief on direct appeal, finding that the appellants' felony stealing convictions and their corresponding prison sentences had to be reversed and remanded so that the circuit court could enter convictions and sentences for misdemeanor stealing; yet, in all of those cases, the initial charges were filed before *Bazell* was decided and alleged that the defendants had committed felonies. E.g., *Luster*, *supra*, applying *Bazell*

[8] U.S. Const., Amend. 14; Mo. Const., Art. I, § 10.

to a case where the issue was raised in a motion filed after jury verdict but before sentencing because *Bazell* was decided on the day of the trial; *Cotner*, *supra*; *Bowen*, *supra*.

These defendants would not have been entitled to such relief (resentencing for a misdemeanor) if the pleadings were sufficient to charge felonies. Although the information did include the word "felony," this does not, and cannot, change the offense from a misdemeanor to a felony. *State v. Smith*, 498 S.W.2d 595, 597 (Mo. App. Spr. D. 1973) (the fact that the information included the word feloniously, did not change the offense from a misdemeanor to a felony); *State ex rel. Parton v. Eighmy*, 524 S.W.3d 204, 207 (Mo. App. S.D. 2017) (A document titled "felony complaint," alleging that the defendant committed felony stealing, filed prior to *Bazell*, would be treated as a substantive information charging a misdemeanor stealing after *Bazell*).

In *State v. McMillian*, 524 S.W.3d 51 (Mo. App. W.D. 2016), the State charged McMillian by indictment with one count of stealing by deceit property valued over $500, § 570.030. *Id*. at 52. McMillian filed a motion to dismiss arguing that the three year statute of limitations for a felony had expired. *Id*. The circuit court granted the motion to dismiss and the State appealed. *Id*. After the case was briefed, and the parties agreed that the felony statute of limitations applied, this Court decided *Bazell*. *Id*. at 53.

The Western District held that under *Bazell*, the charge against McMillian could not be enhanced to a felony but, as a matter of law, could only be a class A misdemeanor. *Id*. at 54. As a result, the Western District affirmed the dismissal of the indictment finding that the misdemeanor one-year statute of limitations applied to stealing offense under *Bazell* even though the indictment alleged a felony stealing. This

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supports Appellant's argument that the pleading was insufficient to charge a felony because under *Bazell*, it could only charge a misdemeanor.

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CONCLUSION

Appellant's judgment on the class C felony of stealing and seven year prison sentence was improper under *Bazell*. The greatest sentence he should have received was one year in jail for misdemeanor stealing. As a result, the trial court erred when it overruled Appellant's objection and sentenced him to seven years in prison for felony stealing. Appellant requests that this Court vacate his judgment and sentence for the class C felony of stealing, and remand so that the circuit court may enter a conviction and sentence for misdemeanor stealing.

Respectfully submitted,

/s/ Craig A. Johnston

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Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 777-9977
Fax: (573) 777-9974
Email: Craig.Johnston@mspd.mo.gov

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 6,477 words as counted by Microsoft Word, excluding the cover page, the signature block, this certificate of compliance, and the appendix, which does not exceed the 31,000 words allowed for an appellant's brief.

/s/ Craig A. Johnston

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Craig A. Johnston, MOBar #32191
Assistant State Public Defender

Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 777-9977
Fax: (573) 777-9974
Email: Craig.Johnston@mspd.mo.gov