No. SC97916

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

JASON RUSSELL,

Appellant.

Appeal from the Circuit Court of Lincoln County
Forty-Fifth Judicial Circuit
The Honorable James D. Beck, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

The State adopts the Defendant's Statement of Facts.

ARGUMENT

Defendant's unconditional plea of guilty waived all claims not pertaining to subject matter jurisdiction or the sufficiency of the charging document. The sentencing court had subject matter jurisdiction. The charging document sufficiently charged a felony offense at the time it was filed, at the time of the guilty plea, and even at the time of sentencing. Defendant's exclusive remedy for his claim that he was sentenced in excess of the statutory maximum following the *Bazell* decision is therefore a post-conviction action under Rule 24.035.

Defendant's claim that he was sentenced for stealing over $500 in excess of the statutory maximum because his 2011 crime was not reduced from a felony to a misdemeanor by application of *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016), is a claim that must be brought under Rule 24.035, which provides the exclusive remedy for such claims after a voluntary plea of guilty.

As Defendant correctly recited in his Jurisdictional Statement below:

> Claims reviewable in a direct appeal following an unconditional guilty plea are limited to claims disputing the subject-matter jurisdiction of the circuit court or claims challenging the sufficiency of the charging document. *State v. Rohra*, 545 S.W.3d 344, 347 (Mo. banc 2018); *State v.*

Sparks, 916 S.W.2d 234, 237 (Mo. App. E.D. 1995); *State v. Hicks*, 221 S.W.3d 497 (Mo. App. W.D. 2007).

(App. Ct. App. Br. 3)

A. *Bazell* and its progeny

In 2016, in *Bazell*, this Court announced a new interpretation of section 570.030, RSMo, and thereby changed the law with regard to the stealing statute as it existed from August 28, 2002, until December 31, 2016. *See Bazell*, 497 S.W.3d at 266-67; *see also State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500, 503 (Mo. banc 2017) (making plain that the Court in *Bazell* announced "a different interpretation of a state statute"). The Court observed in *Bazell* that "the legislature, in 2002, decided to amend section 570.030.3 to add the requirement that only offenses for which 'the value of property or services is an element' may be enhanced to a felony." *Id.* at 267. The Court observed that the offense of stealing was not an offense "in which the value of property or services [was] an element," and, accordingly, the Court held—contrary to prior case law—that the felony enhancements listed in subsection three did not apply to the offense of stealing. *Id.*

Under *Bazell*'s new interpretation of § 570.030, from August 28, 2002, until December 31, 2016, the offense of stealing could not be enhanced to the

class C felony and was, instead, a class A misdemeanor. *Id*. at 266-67.[1] In announcing this new interpretation, this Court acknowledged a directly contrary decision from the Court of Appeals in *State v. Passley*, 389 S.W.3d 180 (Mo.App. S.D. 2012), and the Court stated that *Passley* "should no longer be followed." *Id*. at 267 n.3.

In the wake of *Bazell*, various individuals who had pleaded guilty to, or been found guilty of, felony stealing based on conduct committed between August 28, 2002, and December 16, 2016, challenged the validity of their sentences. *See*, *e.g.*, *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. 2017); *State ex rel. Fite v. Johnson*, 530 S.W.3d 508 (Mo. 2017). For example, in *Windeknecht*, four petitioners challenged their sentences by filing petitions for a writ of habeas corpus. All four of the petitioners had been sentenced between August 28, 2002, and December 31, 2016. 530 S.W.3d at 501 n. 2.

However, the Court declined to retroactively apply the holding of *Bazell* to the petitioners' cases. *Id*. at 503. The Court contrasted *Bazell*'s "different interpretation" of § 570.030 with *Passley*'s previous interpretation and observed that "[t]he Supreme Court of the United States has held a state supreme court is not constitutionally compelled to make retroactive a different

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[1] As this Court noted in *Bazell*, subsection 3 was again amended, effective January 1, 2017, to remove the requirement that the offense include "value" as an element. 497 S.W.3d at 267 n.2.

interpretation of a state statute." *Id*. at 502-03 (citing *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973)). The Court continued, " 'A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.' " *Id*. at 503.

The Court then held, "Exercising this authority, the Court orders the *Bazell* holding only applies forward, except those cases pending on direct appeal." *Id*. The Court concluded, "Petitioners received a sentence that was authorized by a different interpretation of section 570.030 without objection and should not receive the benefit of retroactive application of this Court's decision in *Bazell*." *Id*.

In *Fite*, a movant sought resentencing for felony stealing by filing a Rule 29.07(d) motion to withdraw his guilty plea. The trial court granted the motion, and the State sought a writ of prohibition. In issuing the writ and making it permanent, this Court observed that "[a] criminal judgment becomes final when a sentence is entered." *Fite,* 530 S.W.3d at 510. The Court then observed that, while the trial court had jurisdiction to adjudicate the Rule 29.07(d) motion, the court lacked authority to sustain the motion. *Id*. The Court stated that "Rule 24.035 . . . was the exclusive procedure by which [the movant] could have collaterally attacked the final judgment based on his claim his sentence exceeds the maximum sentence authorized by law." *Id*.

The Court also made plain, however, that the movant would not have

prevailed on his claim if he had asserted it under Rule 24.035. The Court observed that the trial court had "compounded" its error in granting relief, in that the movant's claim was "substantively meritless." *Id.* at 511. The Court cited to *Windeknecht* and stated that "this Court's interpretation of § 570.030.3(1) first enunciated in *Bazell* applies prospectively only, except in those cases pending on direct appeal." *Id.* In other words, the circuit court had "erroneously assumed *Bazell* applie[d] retroactively." *Id.*

Consistent with *Windeknecht* and *Fite*, the Court of Appeals has held in several cases that *Bazell* does not retroactively apply in post-conviction cases where the movant was sentenced for felony stealing before *Bazell* was decided. *See Amsden v. State*, 567 S.W.3d 241, 246 (Mo.App. S.D. 2018); *Valley v. State*, 563 S.W.3d 159, 161 (Mo.App. S.D. 2018); *Harris v. State*, 562 S.W.3d 363, 365-66 (Mo.App. S.D. 2018); *Whittley v. State*, 559 S.W.3d 401, 403-05 (Mo.App. E.D. 2018); *Bosworth v. State*, 559 S.W.3d 5, 9-10 (Mo.App. E.D. 2018); *May v. State*, 558 S.W.3d 122, 126 (Mo.App. S.D. 2018); *Abrams v. State*, 550 S.W.3d 557, 558 (Mo.App. S.D. 2018); *Watson v. State*, 545 S.W.3d 909, 915-16 (Mo.App. W.D. 2018). The conclusion in *Watson* is representative of the holdings in these cases: "As was the case with the habeas petitioner in *State ex rel. Windeknecht*, "[Watson] received a sentence that was authorized by a different interpretation of section 570.030 without objection and should not receive the benefit of retroactive application of this Court's decision in *Bazell*."

Id. at 916.

B. Defendant's unconditional guilty plea waived his right to a direct appeal of his statutory and due process claims.

"There is no right to appeal without statutory authority." *State v. Larson*, 79 S.W.3d 891, 892-93 (Mo. banc 2002)).

"In the context of a direct appeal following a guilty plea, however, the right to a direct appeal" conferred by Section 547.070, RSMo (2000), and Rule 30.01(a) "is limited." *State v. Hopkins*, 432 S.W.3d 208, 211 (Mo. App. W.D. 2014). "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *State v. Rohra*, 545 S.W.3d 344, 347 (Mo. banc 2018); *United States v. Broce*, 488 U.S. 563, 569 (1989). "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *Rohra*, 545 S.W.3d at 347.

"In Missouri, the general rule is that a guilty plea waives all nonjurisdictional defects, ***including statutory*** and constitutional guarantees." *Garris v. State*, 389 S.W.3d 648, 651 (Mo. banc 2012) (emphasis added); *Rohra*, 545 S.W.3d at 347.

"Because an unconditional guilty plea waives 'any challenge to the merits of the underlying conviction,' review is generally limited to a Rule

24.035 motion for post-conviction relief to determine if the plea was entered knowingly and voluntarily." *Rohra*, 545 S.W.3d at 347 (quoting *State v. Craig*, 287 S.W.3d 676, 679 (Mo. banc 2009)).

"The only exceptions to the Rule 24.035 procedure, and the only claims reviewable in a direct appeal following an unconditional guilty plea, are claims disputing the subject-matter jurisdiction of the circuit court or claims challenging the sufficiency of the charging document." *Id.*

Challenges to either the voluntariness of the plea or the legality of the sentence imposed may be considered only in response to a Rule 24.035 motion." *State v. Onate*, 398 S.W.3d 102, 105 (Mo. App. W.D. 2013); *State v. Klaus*, 91 S.W.3d 706 (Mo. App. E.D. 2002). *See also*, *State v. Craig*, 287 S.W.3d 676, 679 (Mo. banc 2009). "Rule 24.035 is based on the principle of waiver; a guilty plea serves as a waiver of any challenge to the merits of the underlying conviction." *Craig*, 287 S.W.3d at 679.

Rule 24.035(a) provides:

> A person convicted of a felony in a plea of guilty and delivered to the custody of the department of corrections who claims that … the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 24.035. This Rule 24.035 provides the ***exclusive procedure*** by

which such person may seek relief in the sentencing court for the claims enumerated.

Id. (emphasis added).

In *State v. Hopkins*, 432 S.W.3d 208 (Mo. App. W.D. 2014), the Court of Appeals held that the defendant waived the right to a direct appeal alleging court error at the sentencing hearing by pleading guilty. *Id*. at 209. In *Hopkins*, the defendant contended that he was not permitted allocution and was then sentenced to the maximum penalty. *Id*. at 211. The State argued that by pleading guilty, Defendant "waived his direct appeal, except for challenges related to subject matter jurisdiction and the sufficiency of the charging document." *Id*. The Court agreed. *Id*.

Errors in sentencing after pleas of guilty must be raised "not in a direct appeal, but in a Rule 24.035 motion." *Hopkins*, 432 S.W.3d at 212-213 (lack of allocution); *State v. Carter*, 62 S.W.3d 569, 570 (Mo. App. S.D. 2001) (alleged error in pre-sentence investigation report resulting in harsher sentence than defendant claimed he should have received); *Taylor v. State*, 392 S.W.3d 477, 486-487 (Mo. App. W.D. 2012) (claim of retaliatory sentencing); *State v. Sharp*, 39 S.W.3d 70, 72 (Mo. App. E.D. 2001) (alleged error in sentencing as a prior and persistent offender); *State v. Brooks*, 394 S.W.3d 454, 455-56 (Mo. App. E.D. 2013) (dismissing a direct appeal because the proper vehicle for a defendant's challenge to a sentencing court's evidentiary ruling was a Rule

24.035 motion); *State v. Klaus*, 91 S.W.3d 706, 706-707 (Mo. App. E.D. 2002) (dismissing a direct appeal following a guilty plea in which defendant claimed the court erroneously refused to consider probation because challenges to the legality of the sentence imposed may be considered only in response to a Rule 24.035 motion).

Hence, as in the above cases, the direct appeal must be dismissed and relief sought in a Rule 24.035 action. *State ex rel. Fite v. Johnson*, 530 S.W.3d at 510 (defendant's "claim that his sentence was in excess of the maximum authorized by law" under the holding of *Bazell* "was within the purview of Rule 24.035" and the circuit court therefore lacked authority to grant relief by another procedure).

Defendant's attempts to shoehorn the claim into one or both of the two permissible grounds for a direct appeal following a guilty plea are unavailing. First, the sentencing court had subject matter jurisdiction over this criminal case. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009). As recognized in *Webb*, "ARTICLE V, SECTION 14 [OF THE MISSOURI CONSTITUTION] sets forth the subject matter jurisdiction of Missouri's circuit courts in plenary terms, providing that '[t]he circuit courts shall have original jurisdiction over *all* cases and matters, civil and criminal….'" *Id.* at 253 (emphasis added in *Webb*). "Authority concerns a court's power to render a particular judgment or take a particular action in a particular case based on

the existing law, while jurisdiction concerns a court's power to render *any* judgment or take *any* action in a particular case." *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 231 n.5 (Mo. banc 2017). Although he contested this below, Defendant appears to have abandoned that claim in this Court in his Substitute Brief.

Second, the charging document was sufficient to charge felony stealing under the governing law at the time it was filed and at the time of the guilty plea in 2013. "The purpose of an indictment or information is to inform the accused of charges against him so that he may prepare an adequate defense and to prevent retrial on the same charges in case of an acquittal." *Rohra*, 545 S.W.3d at 347 (quoting *State v. O'Connell*, 726 S.W.2d 742, 746 (Mo. banc 1987) with internal citation omitted). "A challenge to the sufficiency of a charging document tests whether it alleges the essential elements of the offense an clearly apprises the defendant of facts constituting the offense." *Id.* "As a general rule, it is enough to charge the offense in the language of the statute alleged to be violated if the statute states all the constituent elements of the offense." *Id.*

This Court held in *Windeknecht, supra*, in the course of denying relief by *habeas corpus* to defendants serving felony sentences for stealing under Section 570.030, that each defendant "received a sentence authorized by a different interpretation of section 570.030 without objection and should not

receive the benefit of retroactive application of this Court's decision in *Bazell*." *Id*., 530 S.W.3d at 503. Such a result would not have been possible if the charging documents for stealing offenses committed during that era were insufficient as a matter of law because they purported to charge a felony rather than a misdemeanor.

In *May v. State*, 558 S.W.3d 122 (Mo. App. S.D. 2018), the Court held that "had Movant chosen to go to trial and been sentenced to 30 years' imprisonment, his 30-year sentence would stand unless his direct appeal remained pending when *Bazell* was decided in August 2016." *Id*., 558 S.W.3d at 126. Based on the clear precedents, "the trial court in this case could permissibly enter a sentence in accord with the pre-*Bazell* interpretation of Section 570.030[.]" *Id*. At the time Movant "was charged, pleaded guilty, and was sentenced," felony enhancement for stealing was authorized under the pre-*Bazell* interpretation of Section 570.030. *Id*. at 125-126. "Under *State v. Passley*, 389 S.W.3d 180 (Mo. App. S.D. 2012), Section 570.030.3 did permit felony enhancement of" the defendant's "stealing offense and *Passley* remained the law until 2016 when it was expressly abrogated by *Bazell*." *Id*. at 125.

Hence, in the case at bar, the felony information filed in 2013, to which Defendant pleaded guilty in 2013, was sufficient to charge a felony. (LF 2). *See also, Rohra*, 545 S.W.3d at 347-348 ("substantive legal argument" that Oklahoma deferred judgement did not qualify as a "conviction" for Missouri

felon-in-possession statute waived by unconditional guilty plea and not cognizable on direct appeal; charging document sufficient because it "charged the essential fact of 'conviction' as an element of the offense of unlawful possession of a firearm as defined by § 571.070").

Defendant therefore waived his right to a direct appeal of this issue and does not fit within the exceptions.

C. Defendant's cases are inapposite.

Aside from *Bazell* and *Windeknecht*, Defendant chiefly relies on two non-felony cases (wherein Rule 24.035 does not and did not apply) and *obiter dictum* from one writ case, which was later clarified in a subsequent writ case that supports the State's position.

1. *Kansas City v. Stricklin*

First, Defendant relies on *Kansas City v. Stricklin*, 428 S.W.2d 721 (Mo. banc 1968), a municipal ordinance case more than half-a-century old which predated Rule 24.035. *See, id.* at 723. This Court cited, as statutory authority for the direct appeal, a 1959 version of Section 512.020 (originally passed in 1943), which pertains to judgments in civil cases. *Id.* at 723, 724; Section 512.020, RSMo (1959). This Court held that: "Proceedings in municipal courts against persons for violations of city ordinances are civil actions to recover a debt due the city or to impose a penalty for infraction of such ordinances; such proceedings are not pr[o]sections for crime in a constitutional sense." *Id.* at

724, 725-726. Thus, the case in no way stands for any proposition concerning the statutory right of appeal in a criminal prosecution.

Moreover, the holding of *Stricklin* was that a direct appeal was available, in spite of the defendant's plea of guilty, because it presented "issues relating to the jurisdiction of the court and to the sufficiency of the pleading charging violation of the ordinance." *Id*. at 725. At the time, the Court noted that the sentence was "not in excess of the court's jurisdiction[,]" phraseology which is now an anachronism in light of *Wyciskalla*. *Id*. at 726. *Stricklin* is not on point.

2. *State v. Baker*

Second, Defendant cites a Western District Court of Appeals opinion in *State v. Baker*, 551 S.W.3d 68 (Mo. App. W.D. 2018). *Baker* involved a misdemeanor conviction and therefore did not address Rule 24.035 as the appropriate remedy. *Id*. at 69. The defendant claimed that 180 days of "shock time" as a condition of probation exceeded the statutory maximum sentence. *Id*. The Court held that the jurisdiction exception to waiver applied despite *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253-254 (Mo. banc 2009), which made plain that such claims were not jurisdictional, because "cases involving unauthorized sentences were traditionally viewed as raising 'jurisdictional' issues" and because no waiver occurs in cases "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 70.

Rule 24.035 and its "exclusive remedy" language does not apply to misdemeanor cases, so *Baker* is inapposite. Supreme Court Rule 24.035.

Furthermore, *Baker*'s attempt to shoehorn a "without power" claim into a claim that the circuit court lacked "jurisdiction" is unavailing after *Wyciskalla*. This Court's landmark holding in *Wyciskalla* had the "salutary effect of confining the use of 'jurisdiction' to its constitutional context." *Hoskins v. State*, 329 S.W.3d 695, 697 n.2 (Mo. banc 2010). This action was in circuit court and, as *Wyciskalla* counsels and the Court of Appeals held below, the circuit court has original jurisdiction over all criminal cases. *Wyciskalla*, 275 S.W.3d at 253.

In *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 231 (Mo. banc 2017), this Court explicitly rejected as "untenable" an argument for application of *Bazell* which contended that a circuit court acts "without jurisdiction when it enters a judgment not authorized by statute" because it rested on "the antiquated concept of 'jurisdictional competence'" roundly rejected by *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. banc 2009). *Zahnd* expressly recognized in the context of the application of *Bazell* to prior pleas that "the courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction; there is no third category of jurisdiction called

'jurisdictional competence.'" *Id*. at 231. *Baker* is therefore in direct conflict with this Court's controlling authority on this point. *See, id*.

Moreover, *Baker* attempted to extend the application of a limited double-jeopardy exception to the rule that direct appeals are waived after a guilty plea except for jurisdiction and sufficiency of the charging document, which referenced the "face of the record," beyond its unique parameters. This Court has recognized that the double-jeopardy exception is "somewhat of an anomaly." *Feldhaus v. State*, 311 S.W.3d 802, 805 (Mo. banc 2010). It is based upon the principle that the right to be free from double jeopardy "is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of trial" and therefore would be inherently violated if a defendant had to be hauled into court and tried prior to an appeal. *See, Hagan v. State*, 836 S.W.2d 459, 461 (Mo. banc 1992); *id*.

This is not a double-jeopardy case. The Court below properly recognized the inapplicability of that exception. Moreover, any other interpretation conflicts with the Rule 24.035 "exclusive remedy" holding of this Court in *Rohra*, *supra*.

3. *State ex rel. Zahnd v. Van Amburg* dicta

Finally, Defendant relies upon *obiter dictum* in *State ex rel. Zahnd v. van Amburg*, *supra*, a writ case in which this Court held that the circuit court "lacked jurisdiction to adjudicate" Rule 29.12(b) motions and amend judgments

based upon the *Bazell* decision and therefore made permanent its preliminary writs of prohibition. *Id.*, 533 S.W.3d at 229. The Court held that "[u]nlike Rule 24.035 or Rule 29.15, the plain language of Rule 29.12(b) does not provide for an independent post-sentence procedure." *Id.* at 230. "The only action the circuit court could take was to exercise its inherent power to dismiss the motions for lack of jurisdiction." *Id.*

In determining whether the circuit court retained jurisdiction over the case where the sentence was erroneous, such that it could amend the judgment under Rule 29.12(b), this Court overruled prior cases and held that "if a circuit court with personal jurisdiction over the defendant and subject matter jurisdiction over the case enters a sentence that is contrary to law, that sentence is merely erroneous—not void[.]" *Id.*, 533 S.W.3d at 231. This much of the holding was necessary to the decision that the circuit court had exhausted its jurisdiction when it entered a sentence, erroneous or not. *Id.* at 231-232.

However, Defendant hangs his hat on the next sentence fragment which completes the previous quote but is not necessary to the decision: "and the appropriate remedy is a direct appeal." *Id.* Whether the appropriate remedy was a direct appeal or a Rule 24.035 action was not the issue in *Zahnd*. *See, id.* The issue was whether the trial court had exhausted its jurisdiction prior

to entering the Rule 29.12(b) judgments and whether they were, as a consequence, "void" or merely "erroneous."

Later, in *State ex rel. Fite v. Johnson*, 530 S.W.3d 508 (Mo. banc 2017), this Court expressly held that "Rule 24.035 … was the exclusive procedure by which [the movant] could have collaterally attacked the final judgment based on his claim his sentence exceeds the maximum sentence authorized by law." *Id*. at 510.

The issue of a defendant's proper remedy was before this Court in *Fite* and should be applied here, as it was in *Fite,* where it has been fully briefed and is the fulcrum on which the case turns.

D. Plain language argument concerning Rule 24.035

Defendant contends that the plain language of Rule 24.035 permits his sentencing claim to be raised on direct appeal in that the "exclusive procedure" language of that Rule applies either only to remedies sought in the sentencing court or to postconviction actions other than direct appeals. But if defendants were permitted to assert such claims on direct appeal, the result would be—contrary to *Fite*—that defendants could not assert such claims in a Rule 24.035 motion. This Court "has stated 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.'" *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993) (quoting *State v. Tolliver*, 839 S.W.2d 296, 298 (Mo. banc 1992)).

Instead of creating this additional avenue for asserting such claims on direct appeal after a guilty plea, the Court should adhere to the longstanding rule. Through his unconditional plea of guilty, Defendant has waived his right to a direct appeal other than on jurisdiction or insufficiency of the charging document (and in some limited cases double jeopardy), as the previously cited authorities make plain.

E. Application of Section 1.160, RSMo, and its public policy

The general rule in criminal cases is that "a defendant must be tried for the offense as defined by the law that existed at the time of the offense." *State v. Pierce*, 433 S.W.3d 424, 427 n.1 (Mo. banc 2014); *see*, Section 1.160, RSMo (Supp. 2005). Here, under the law that existed at the time of the offense, Defendant's conduct constituted a class C felony. Accordingly, the State charged him with a class C felony, he pleaded guilty to a class C felony, and the trial court found him guilty of a class C felony.

In imposing a sentence consistent with the earlier finding of guilt, the trial court merely followed the general rule that the trial and punishment of an offense shall not be affected by an intervening change in the law. *See,* Section 1.160, RSMo (Supp. 2005) ("No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at

the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial ***and punishment*** of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except that all such proceedings shall be conducted according to existing procedural laws.") (emphasis added).

Bazell and *Windeknecht* did not plainly alter this principle except for cases then pending on direct appeal. Because those who plead guilty have waived it, the intent was seemingly to encompass those who had been tried and convicted and had not waived the issue for appeal. This interpretation is further buttressed by the fact that this Court did not include cases then pending under the postconviction rules, including Rule 24.035 (which would involve guilty pleas in which the claim had been waived).[2] This interpretation is also buttressed by this Court's pointed refusal to apply its holding to a second count where the claim was unpreserved and therefore waived in *Bazell* itself.

This Court should follow the public policy of Section 1.160, RSMo (Supp. 2005), that: "No offense committed and no fine, penalty or forfeiture incurred,

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[2] As noted *supra*, consistent with *Windeknecht* and *Fite*, the Court of Appeals has held that *Bazell* does not retroactively apply in post-conviction cases where the movant was sentenced for felony stealing before *Bazell* was decided.

or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial ***and punishment*** of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except that all such proceedings shall be conducted according to existing procedural laws." (emphasis added). This public policy counsels against permitting otherwise unauthorized direct appeals in order to apply *Bazell* to cases in which defendants had already waived their claims by pleading guilty and thereby assumed criminal liability for the punishment scheme in place at the time.

F. Defendant's claim should be dismissed.

Because direct appeal is not a remedy for the claim at issue, and the exclusive remedy is a timely-filed Rule 24.035 motion, this case should be dismissed. *State v. Brooks*, 394 S.W.3d at 455-56 (dismissing a direct appeal because the proper vehicle for a defendant's challenge to a sentencing court's evidentiary ruling was a Rule 24.035 motion); *State v. Klaus*, 91 S.W.3d at 706-707 (dismissing a direct appeal following a guilty plea in which defendant claimed the court erroneously refused to consider probation because challenges to the legality of the sentence imposed may be considered only in response to a Rule 24.035 motion); *State v. Hopkins*, 432 S.W.3d at 213 (because no Court of

Appeals had "no authority to review" arguments on direct appeal related to court error at a sentencing hearing, "the appeal is dismissed").

In the alternative, Defendant's conviction and sentence should be affirmed.

CONCLUSION

The appeal of this case should be dismissed. In the alternative, Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains 5,245 words, as determined by Microsoft Word 2010 software, excluding the cover page, signature bloc, and this certificate, and that opposing counsel was served with a copy of this brief electronically via the e-filing system on October 1, 2019.

/s/ Gregory L. Barnes
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