

IN THE CIRCUIT COURT OF SALINE COUNTY, MISSOURI

[REDACTED])	
)	
Movant,)	
)	
-vs-)	[REDACTED]
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

AMENDED MOTION
TO VACATE, SET ASIDE, OR CORRECT JUDGMENT AND SENTENCE

1. **PLACE OF DETENTION:** Crossroads Correctional Center, 1115 East Pence Road, Cameron, MO 64429.

2. **NAME AND LOCATION OF COURT WHICH IMPOSED SENTENCE:** Circuit Court of Saline County, Marshall, Missouri.

3. **CASE NUMBER AND OFFENSE OR OFFENSES FOR WHICH SENTENCE WAS IMPOSED:** Case number: **[REDACTED]**
Offense: One count of stealing.

4. **DATE SENTENCE WAS IMPOSED AND TERMS OF SENTENCE:** Sentenced on March 9, 2015, to twelve years in prison as a prior and persistent offender.

5. **THE FINDING OF GUILTY WAS MADE:** After a plea of not guilty and a jury trial.

6. **DID YOU APPEAL FROM THE JUDGMENT OF CONVICTION?** Yes.

Under Section 570.030.1, a person commits the crime of stealing by appropriating property or services of another, with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion. *Bazell*, Slip op. at 2, 4-6. Section 570.030.3 “provides for the enhancement to a class C felony of ‘any offense in which the value of property or services is an element’ if certain conditions are met.” Slip op. at 2, 4-6. The Supreme Court held in *Bazell* that the definition of stealing in Section 570.030.1 is clear and unambiguous and does not include the value of the property appropriated as an element of the offense. Slip op. at 2, 4-6. The Court thus found that enhancement under Section 570.030.3 does not apply to stealing under Section 570.030.1. Slip op. at 2, 4-6. The Supreme Court held that *Bazell*’s two felony convictions for stealing firearms must be classified as misdemeanors, because they could not be enhanced under Section 570.030.3. Slip op. at 2, 4-6.

The state charged ██████████ with stealing under Section 570.030 for taking property from the Saline County farm belonging to ██████████ ██████████. The state alleged that ██████████ took property of a value of over \$500.00. The indictment referred to the charge as a class C felony. A jury found ██████████ guilty, and this Court sentenced ██████████ as a prior and persistent offender to a term of twelve years in prison.

Under *Bazell*, the offense charged against ██████████ did not constitute a felony. The elements of the crime of stealing are set out in Section 570.030.1. That section does not set out the value of the property taken as an element of the

offense of stealing. Because Section 570.030.3 does not enhance the punishment for offenses charged under Section 570.030.1, ██████████ could not be convicted of or sentenced for a class C felony. Under Section 570.030.9, ██████████ is guilty of a class A misdemeanor, not a class C felony.

Missouri Supreme Court Rule 29.15(a) sets out the nature of the remedy available under the Rule, as follows:

A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, **or 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 29.15.

(emphasis added).

The sentence imposed on ██████████ in case number ██████████ is in excess of the maximum sentence authorized by law, under Section 570.030.1 and .9 and *Bazell, supra*. ██████████ is now serving a sentence that is eleven years longer than that authorized under Section 570.030. ██████████ was denied his right to due process of law when this Court sentenced him in excess of the maximum sentence authorized by law. ██████████ conviction must be classified as a misdemeanor. *Bazell*, Slip op. at 2, 4-6. ██████████ respectfully requests that this Court vacate the judgment and sentence in *State v. ██████████*.

██████████ and remand this case to the trial court to enter a judgment and sentence for misdemeanor stealing.

8(B). ██████████ was denied his rights to effective assistance of trial counsel, effective assistance of appellate counsel, and due process of law, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. Trial counsel failed to object to the trial court allowing the state to prosecute Mr. ██████████ for a class C felony, rather than a class A misdemeanor. Trial counsel also failed to object to the court sentencing ██████████ to a term of years authorized for a class C felony as a prior and persistent offender. Appellate counsel failed to argue on appeal that ██████████ was improperly tried, convicted, and sentenced for stealing as a class C felony. Under *State v. Bazell*, SC95318 (Slip op., August 23, 2016), ██████████ should only have been convicted of and sentenced for a class A misdemeanor. Neither trial nor appellate counsel objected to ██████████ being subjected to a sentence that is in excess of the maximum sentence authorized by law.

Under Section 570.030.1, a person commits the crime of stealing by appropriating property or services of another, with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion. *Bazell*, Slip op. at 2, 4-6. Section 570.030.3 “provides for the enhancement to a class C felony of ‘any offense in which the value of property or services is an element’ if certain conditions are met.” Slip op. at 2, 4-6. The Supreme Court held in *Bazell* that the

definition of stealing in Section 570.030.1 is clear and unambiguous and does not include the value of the property appropriated as an element of the offense. Slip op. at 2, 4-6. The Court thus found that enhancement under Section 570.030.3 does not apply to stealing as charged under Section 570.030.1. Slip op. at 2, 4-6. The Supreme Court held that Bazell's two felony convictions for stealing firearms must be classified as misdemeanors, because they could not be enhanced under Section 570.030.3. Slip op. at 2, 4-6.

The state charged ██████████ with stealing under Section 570.030 for taking property from the Saline County farm belonging to ██████████ ██████████. The state alleged that ██████████ took property of a value of over \$500.00. The indictment referred to the charge as a class C felony. A jury found ██████████ guilty, and this Court sentenced ██████████ as a prior and persistent offender to a term of twelve years in prison.

Under *Bazell*, the offense charged against ██████████ did not constitute a felony. The crime of stealing is set out in Section 570.030.1, and that section does not set out the value of the property taken as an element of the offense. Because Section 570.030.3 does not enhance the punishment for offenses charged under Section 570.030.1, ██████████ could not be convicted of or sentenced for a class C felony. Consequently, under Section 570.030.9, ██████████ is guilty not of a class C felony, but of a class A misdemeanor.

Trial counsel did not object on this basis to either the state trying ██████████ ██████████ for class C felony stealing, or to this Court sentencing ██████████ as a

prior and persistent offender for a class C felony. Appellate counsel did not argue on appeal that this Court plainly erred in permitting ██████████ to be tried for a class C felony and in sentencing him to a felony term in prison. Under *Bazell*, this Court lacked the authority to sentence ██████████ to a felony term of imprisonment.

An unauthorized sentence affects substantial rights and results in manifest injustice. *State v. Anderson*, 294 S.W.3d 96, 98 (Mo. App., E.D. 2009). A sentence that is in excess of that authorized by law is beyond the jurisdiction of the sentencing court. *Id.* It is plain error for the trial court to impose a sentence in excess of that authorized by law. *Id.* Both trial counsel and appellate counsel were ineffective for failing to carefully read Section 570.030.1 and Section 570.030.3, to determine whether ██████████ could properly be tried, convicted, and sentenced for a class C felony. Both counsel were ineffective for failing to argue that the sentence imposed on ██████████ exceeded the sentence authorized by law and was beyond the jurisdiction of this Court. If either trial or appellate counsel had raised this issue, ██████████ would have been granted relief by being sentenced to a class A misdemeanor term of punishment.

The sentence imposed on ██████████ in case number ██████████ is in excess of the maximum sentence authorized by law, under Section 570.030.1 and .9 and *Bazell, supra*. ██████████ has been denied the effective assistance of trial and appellate counsel, when they failed to argue that the twelve year sentence imposed is in excess of the maximum authorized. ██████████ has been prejudiced

by the ineffectiveness of trial and appellate counsel, because he is now serving a sentence that is eleven years longer than that authorized under Section 570.030. [REDACTED]'s conviction must be classified as a misdemeanor. *Bazell*, Slip op. at 2, 4-6. [REDACTED] therefore respectfully requests that this Court vacate the judgment and sentence in *State v. [REDACTED]*, and remand this case to the trial court to enter a judgment and sentence for misdemeanor stealing.

8(C). This Court was without jurisdiction to sentence [REDACTED] for stealing as a prior and persistent offender for a class C felony. [REDACTED] was charged under Section 570.030, RSMo with stealing property with a value of at least \$500.00. Under *State v. Bazell*, SC95318 (Slip op., August 23, 2016), [REDACTED] [REDACTED] should only have been convicted of and sentenced for a misdemeanor.

Under Section 570.030.1, a person commits the crime of stealing by appropriating property or services of another, with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion. *Bazell*, Slip op. at 2, 4-6. Section 570.030.3 “provides for the enhancement to a class C felony of ‘any offense in which the value of property or services is an element’ if certain conditions are met.” Slip op. at 2, 4-6. The Supreme Court held in *Bazell* that the definition of stealing in Section 570.030.1 is clear and unambiguous and does not include the value of the property appropriated as an element of the offense. Slip op. at 2, 4-6. The Court thus found that enhancement under Section 570.030.3 does not apply to stealing as charged under Section 570.030.1. Slip op. at 2, 4-6.

The Supreme Court held that Bazell's two felony convictions for stealing firearms must be classified as misdemeanors, because they could not be enhanced under Section 570.030.3. Slip op. at 2, 4-6.

The state charged ██████████ with stealing under Section 570.030 for taking property from the Saline County farm belonging to ██████████ ██████████ Strootman. The state alleged that Mr. Shaffer took property of a value of over \$500.00. The indictment referred to the charge as a class C felony. A jury found ██████████ guilty, and this Court sentenced ██████████ as a prior and persistent offender to a term of twelve years in prison.

Under *Bazell*, the offense charged against ██████████ did not constitute a felony. The crime of stealing is set out in Section 570.030.1, and that section does not set out the value of the property taken as an element of the offense. Consequently, under Section 570.030.9, ██████████ was guilty not of a class C felony, but of a class A misdemeanor. The sentence of twelve years for a class C felony as a prior and persistent offender exceeded the maximum sentence allowed under Section 570.030.1 and 570.030.9.

An unauthorized sentence affects substantial rights and results in manifest injustice. *State v. Anderson*, 294 S.W.3d 96, 98 (Mo. App., E.D. 2009). A sentence that is in excess of that authorized by law is beyond the jurisdiction of the sentencing court. *Id.* It is plain error for the trial court to impose a sentence in excess of that authorized by law. *Id.* The sentence imposed on ██████████ in this

case exceeded the sentence authorized by law and was beyond the jurisdiction of this Court.

This claim is cognizable under Missouri Supreme Court Rule 29.15. Rule 29.15(a) states:

A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, **that the court imposing the sentence was without jurisdiction to do so**, or 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 29.15.

(emphasis added).

The sentence imposed on [REDACTED] in case number [REDACTED] is in excess of the maximum sentence authorized by law, under Section 570.030.1 and .9 and *Bazell, supra*. The Court exceeded its jurisdiction in sentencing [REDACTED] to twelve years as a class C felony/prior and persistent offender. [REDACTED] is now serving a sentence that is eleven years longer than that authorized under Section 570.030. [REDACTED]'s conviction must be classified as a misdemeanor, *Bazell*, Slip op. at 2, 4-6. [REDACTED] therefore respectfully requests that this Court vacate the judgment and sentence in *State v. [REDACTED]* and remand this case to the trial court to enter a judgment and sentence for misdemeanor stealing.

9. STATE CONCISELY AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN QUESTION (8), AND THE NAMES AND ADDRESSES OF THE WITNESSES OR OTHER EVIDENCE UPON WHICH YOU INTEND TO RELY TO PROVE SUCH FACTS.

9(A). To prove claim 8(A), [REDACTED] will present evidence including, but not limited to, the trial and sentencing transcript from *State v. [REDACTED]*, [REDACTED] documents, pleadings, and exhibits from the court files in *State v. [REDACTED]*; the testimony of trial counsel [REDACTED]; and the testimony of Movant, [REDACTED] will also present any other relevant evidence that may be discovered following further investigation.

9(B). To prove claim 8(B), [REDACTED] will present evidence including, but not limited to, the trial and sentencing transcript from *State v. [REDACTED]*, [REDACTED] documents, pleadings, and exhibits from the court files in *State v. [REDACTED]*; the testimony of trial counsel [REDACTED]; and the testimony of Movant, [REDACTED] will also present any other relevant evidence that may be discovered following further investigation.

9(C). To prove claim 8(C), [REDACTED] will present evidence including, but not limited to, the trial and sentencing transcript from *State v. [REDACTED]*, [REDACTED] documents, pleadings, and exhibits from the court files in

State v. [REDACTED] the testimony of trial counsel [REDACTED] and the testimony of Movant, [REDACTED] will also present any other relevant evidence that may be discovered following further investigation.

10. PRIOR TO THIS MOTION HAVE YOU FILED WITH RESPECT TO THIS CONVICTION:

(A) ANY MOTION TO VACATE JUDGMENT UNDER MISSOURI SUPREME COURT RULE 24.035, 27.26, OR 29.15? No.

(B) ANY PETITIONS IN STATE OR FEDERAL COURTS FOR HABEAS CORPUS? No.

(C) ANY PETITIONS IN THE UNITED STATES SUPREME COURT FOR CERTIORARI? No.

(D) ANY OTHER PETITIONS OR APPLICATIONS IN THIS OR ANY OTHER COURT? No.

11. IF YOU ANSWERED "YES" TO ANY PART OF QUESTION (10), LIST WITH RESPECT TO EACH PETITION, MOTION, OR APPLICATION:

(A) THE SPECIFIC NATURE THEREOF: Not applicable.

(B) THE NAME AND LOCATION OF THE COURT IN WHICH EACH WAS FILED: Not applicable.

(C) THE DISPOSITION THEREOF AND THE DATE OF SUCH DISPOSITION: Not applicable.

(D) IF KNOWN, CITATIONS OF ANY WRITTEN OPINIONS OR ORDERS ENTERED PURSUANT TO EACH SUCH DISPOSITION: Not applicable.

12. HAS ANY GROUND SET FORTH IN QUESTION (8) BEEN PREVIOUSLY PRESENTED TO THIS OR ANY OTHER COURT, STATE OR FEDERAL, IN ANY PETITION, MOTION, OR APPLICATION WHICH YOU HAVE FILED? No.

13. IF YOU ANSWERED “YES” TO QUESTION (12), IDENTIFY:

(A) WHICH GROUNDS HAVE BEEN PREVIOUSLY PRESENTED: Not applicable.

(B) PROCEEDINGS IN WHICH EACH GROUND WAS RAISED:
Not applicable.

14. IF YOU HAVE FILED PRIOR PROCEEDINGS IN ANY STATE OR FEDERAL COURT INVOLVING THIS SAME SENTENCE BUT DID NOT RAISE THEREIN ONE OR MORE OF THE GROUNDS YOU NOW LIST IN QUESTION (8), STATE WHICH WERE NOT RAISED IN THE EARLIER PROCEEDINGS AND WHY THEY WERE NOT RAISED IN THOSE PROCEEDINGS: Not applicable.

15. WERE YOU REPRESENTED BY AN ATTORNEY AT ANY TIME DURING THE COURSE OF:

(A) YOUR PRELIMINARY HEARING? Indicted.

(B) YOUR ARRAIGNMENT AND PLEA? Yes.

(C) YOUR TRIAL, IF ANY? Yes.

(D) YOUR SENTENCING? Yes.

**(E) YOUR APPEAL, IF ANY, FROM THE JUDGMENT OF
CONVICTION OR THE IMPOSITION OF SENTENCE?** Yes.

**(F) PREPARATION, PRESENTATION, OR CONSIDERATION
OF ANY PETITIONS, MOTIONS, OR APPLICATIONS WITH RESPECT
TO THIS CONVICTION, WHICH YOU FILED?** Not applicable.

**16. IF YOU ANSWERED "YES" TO ONE OR MORE PARTS OF
QUESTIONS (15), LIST:**

**(A) THE NAME AND ADDRESS OF EACH ATTORNEY WHO
REPRESENTED YOU:**

i) [REDACTED] Assistant Public Defender, 110 South Limit, Sedalia,
Missouri, 65301.

ii) [REDACTED] Assistant Public Defender, current address 110 South
Limit, Sedalia, Missouri, 65301.

**(B) THE PROCEEDINGS AT WHICH EACH ATTORNEY
REPRESENTED YOU:**

i) [REDACTED] represented [REDACTED] at all pretrial proceedings and at
trial and sentencing.

ii) [REDACTED] represented [REDACTED] on direct appeal.

**17. ARE YOU NOW UNDER SENTENCE FROM ANY OTHER
COURT THAT YOU HAVE NOT CHALLENGED?** Yes.

18. **IF YOU ARE SEEKING TO PROCEED IN FORMA PAUPERIS, HAVE YOU COMPLETED THE SWORN AFFIDAVIT SETTING FORTH THE REQUIRED INFORMATION?** Yes.

REQUEST FOR AN EVIDENTIARY HEARING

██████████ Shaffer requests that this Court grant him an evidentiary hearing allowing him to present evidence in support of the allegations contained in this amended motion. Mr. Shaffer also requests to be present at such an evidentiary hearing.

REQUEST FOR RELIEF

After this Court holds an evidentiary hearing, ██████████ requests that this Court vacate the judgment and sentence in *State v. ██████████, ██████████ ██████████*, and remand this case to the trial court to enter a judgment and sentence for misdemeanor stealing.

Respectfully submitted,

/s/ Susan L. Hogan

SUSAN L. HOGAN #33194
APPELLATE DEFENDER
Office of the Public Defender
Western Appellate Division
920 Main Street, Suite 500
Kansas City, MO 64105
816/889-7699
Fax: 816/889-2001
Susan.Hogan@mspd.mo.gov

Counsel for Movant

CERTIFICATE OF SERVICE

I, Susan L. Hogan, certify that on August 24, 2016, an electronic copy of the foregoing was sent via the Missouri E-Filing System to the Saline County Prosecutor's Office at n, Senior Assistant Greene County Prosecutor, at donaldgstouffer.scpa@mmuonline.net.

/s/ Susan L. Hogan

Susan L. Hogan
Counsel for Movant