



5. Upon information and belief, Petitioner's sentence is currently scheduled to expire in October 2017.

6. Petitioner has served more than one year in custody on this sentence and more than three years of his sentence, counting parole time.

7. On August 23, 2016, the Missouri Supreme Court issued its decision in *State v. Bazell*, in which it held that most stealing charges are misdemeanors with a maximum possible penalty of one year in jail. A copy of *Bazell* is attached hereto.

8. *Bazell* applies to Petitioner's case because Stealing Over \$500 was one of the types of stealing charges declared to be a misdemeanor.

9. Therefore, Petitioner's sentence is illegal, as is Respondent's continued detention of Petitioner.

10. The allegations in this Petition have not been the subject of any other legal proceedings.

11. Accordingly, Petitioner respectfully requests that this Court issue a Writ of Habeas Corpus ordering Respondent to release him.

Respectfully submitted,

/s/ W. Scott Rose

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**I. THE ESCAPE RULE DOES NOT AUTHORIZE THE STATE TO HOLD A PAROLE ABSCONDER FOR LONGER THAN THE MAXIMUM SENTENCE ALLOWED BY LAW.**

The State contends that this Court should not even reach the merits in this case because of the Escape Rule. Several considerations suggest otherwise, however.

First, it is important to understand exactly what the Escape Rule is. The Escape Rule is not contained in a statute, the Missouri Constitution, the United States Constitution, or the Missouri Supreme Court Rules. Rather, Missouri courts appellate courts candidly concede that the Escape Rule is a “judicially created doctrine.” *State v. Boone*, 409 S.W. 3d 595, 597 (Mo. App. 2013). Missouri appellate courts have not advised as to the source of their authority in criminal cases to “judicially create doctrine” not contained in statutes, rules, or the Constitution.

Nonetheless, it must at least be acknowledged that applying “judicially created doctrine” to a particular case is, at most, discretionary. And Missouri courts do acknowledge that application of the Escape Rule in a particular case is purely discretionary. *See, e.g., Wagner v. State*, 172, S.W.3d 922, 924 (Mo. 2005). When courts discuss the Escape Rule, they say that it “can” or “may” be invoked. *See, e.g., Boone*, 409 S.W.3d at 597 (“The escape rule *may* be applied where . . .” (emphasis added)); *Nichols v. State*, 131 S.W. 3d 863, 865 (Mo. App. 2004) (“The escape rule *can* be invoked to dismiss post-conviction appeals ...” (emphasis added)). No Missouri court has ever held that the “judicially created doctrine” known as the Escape Rule *must* be applied in a particular case.

Second, it is not clear that absconding from parole status is an “escape” for purposes of the Escape Rule. Generally, the Escape Rule is invoked when the

Defendant misses a court date, especially sentencing. Courts describe the Escape Rule in that context: "The escape rule may be applied where, as is the case here, the defendant has attempted to escape justice by absconding *from the courthouse.*" *Boone*, 409 S.W.3d at 597 (citing *State v. Troupe*, 891 S.W.2d 808, 809 (Mo. 1995) and *Holmes v. State*, 92 S.W.3d 193, 195 (Mo. App. 2002)). The State has not provided any authority for the proposition that absconding from parole can constitute an "escape" for the purposes of the Escape Rule, and the undersigned's research has not revealed any such authority either.

Third, the Escape Rule only bars review of errors before the escape. *Id.* In this case, Petitioner is not claiming that the error is limited to the Judgment in his criminal case. Rather, the error is ongoing and continues to this day because Respondent is detaining Petitioner after he has served his maximum sentence. The State has produced no authority for the proposition that it can hold an absconder longer than the maximum sentence authorized by law. The point is this: no matter what Petitioner has done, whether he has absconded or otherwise, the most the State and courts can do to him is to make him serve the maximum sentence allowed by law. "Application of the escape rule requires a relationship between the escape and prejudice to the criminal justice system," *Echols v. State*, 168 S.W.3d 448, 453 (Mo. 2005), but how can the criminal justice system be prejudiced when it has already inflicted the maximum punishment the law allows?

Finally, to the extent that Petitioner's claim constitutes a challenge to the Judgment of the sentencing court, it is not the typical error that is asserted on direct appeal or in post-conviction proceedings. Rather, Petitioner is alleging a sentencing

defect, i.e., that the sentencing court imposed a sentence in excess of that allowed by law. Missouri courts have granted writs of habeas corpus in sentencing defect cases several times. See, e.g., *State ex rel. Zinna v. Steel*, 301 S.W.3d 510, 516-17 (Mo. 2010); *Thornton v. Denny*, 467 S.W.3d 292, 295-96 (Mo. App. 2015); *State ex rel. Koster v. Jackson*, 301 S.W.3d 586, 590 (Mo. App. 2010); *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. 1995); *Merriweather v. Grandison*, 904 S.W.2d 485, 486 (Mo. App. 1995); *Thomas v. Dormire*, 923 S.W.2d 533, 534 (Mo. App. 1996). Sentencing defects have previously been 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. 2009). In this case, the State cites no authority for the proposition that the Escape Rule can be applied in a sentencing defect case. And it would be a perversion of the notion of a “maximum sentence” if sentencing courts can exceed the maximum “just in case” the defendant absconds on probation or parole.

**II. THORNTON V. DENNY IS CONTROLLING BECAUSE WHERE A LATER JUDICIAL DECISION INTERPRETS THE MEANING OF A PRE-EXISTING STATUTE, THERE IS NO ISSUE OF RETROACTIVITY.**

In its second point, the State argues that *Bazell* should not be applied retroactively, i.e., to cases that have completed direct review. However, *Thornton v. Denny*, 467 S.W.3d 292 (Mo. App. 2015) (attached hereto as Exhibit A), which is cited in the State’s brief, forecloses the State’s position. As it is materially identical to the case at bar, *Thornton* is controlling.

Like this case, *Thornton* was an original proceeding on a petition for writ of habeas corpus, and like this case, Thornton had been convicted of a felony when he

should have only been convicted of a misdemeanor. 467 S.W.3d at 293. Specifically, 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 294. While serving his term, the Missouri Supreme Court decided *Turner v. State*, 245 S.W.3d 826 (Mo. 2008), in which it held, based on its reading of the DWI statute in effect at the time of 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 Thornton’s prior offenses was a “prior municipal offense resulting in an SIS,” so he filed a petition for writ of habeas corpus. And just as the State now argues that *Bazell* should not be applied retroactively, the State in *Thornton* argued that *Turner* should not be applied retroactively. *Thornton*, 467 S.W.3d at 296.

In rejecting the State’s position, the Court of Appeals held, “In these circumstances, where Thornton’s petition relies on a judicial opinion interpreting a statute which was in effect at the time of his conviction, and that judicial opinion ‘created no new law,’ no retroactivity issue arises.” *Id.* at 298. Put another way, the petitioner does not seek retroactive application of a new rule of law; rather, the petitioner seeks application of the statute – properly construed -- that was in effect at the time of his plea. *Id.* at 298 & 299. The Court of Appeals further noted 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.

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 Missouri Supreme Court decision that clarified the meaning of a statute (*Thornton* involved *Turner*, which clarified the DWI statute, and this case involves *Bazell*, which clarified the Stealing statute). *Turner* and *Bazell* are similar in that they “merely clarified the language of an existing statute.” *Id.* at 298. Accordingly, *Thornton* is controlling on the issue of retroactivity, and Mr. ██████ need not seek retroactive application of a new rule of law.

**III. BAZELL APPLIES TO ALL 18 CONDITIONS OF THE FELONY ENHANCEMENT PROVISION (SUBSECTION 3), INCLUDING THE OFFENSE OF STEALING OVER \$500.**

The State concedes that *Bazell* applies to the offense Stealing A Firearm. But the State will go no farther, contending that *Bazell* did not address any of the other 17 conditions of Subsection 3 of the Stealing statute and therefore, according to the State, *Bazell* does not apply to those 17 conditions. The problem with the State’s position is that the Supreme Court’s logic in *Bazell* is just as applicable to the other 17 conditions, including the condition at issue in this case, namely that the value of the property or services appropriated is \$500 or more.

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 firearms, see § 570.030(3)(3)(d).

The ruling in *Bazell* is that, even though the property appropriated consisted of a firearm, which is one of the 18 conditions in the felony enhancement provision, “the value of property or services” is not an element of Stealing, as defined in Subsection 1. *Bazell* at 5. The Supreme 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, the Court is to give 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.

Any fair reading of the *Bazell* opinion and the Stealing statute will demonstrate that the *Bazell* holding is applicable to entire felony enhancement provision, i.e., all of Subsection 3 – not just stealing a firearm. Nothing in the *Bazell* opinion suggests that the holding is limited to its facts. “The value of property or services” is not an element of the offense of stealing – period – no matter what is stolen.

The State cites several cases for the proposition that value is an essential element of the offense Stealing Over \$500. But the State conflates an element of the offense (Subsection 1) with an element of the felony enhancement provision (Subsection 3). When a defendant is charged with Stealing Over \$500, value is an element of the felony enhancement provision. But *Bazell*'s holding is that value is not an element of the offense of stealing:

[The State's] reading of section 570.030.3, however, critically ignores the fact that the felony enhancement provision, by its own terms, only applies if the offense is one "in which the value of the property or services is an element." Stealing is defined in section 570.030.1 as "appropriat[ing]

property or services of another with the purpose to deprive him or her thereof, either without his consent or by means of deceit or coercion." *The value of the property or services appropriated is not an element of the offense of stealing.*

*Bazell* at 5 (emphasis added). And since the value of the property or services appropriated is not an element of the offense of stealing (Subsection 1), the felony enhancement provision (Subsection 3) can *never* be applicable – no matter which of the 18 conditions in Subsection 3 is present in a particular case.

#### IV. 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, and this Court should issue the writ of habeas corpus.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 3<sup>rd</sup> day of October, 2016, 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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