IN THE CIRCUIT COURT OF WARREN COUNTY
STATE OF MISSOURI

STATE OF MISSOURI, Plaintiff	)	Cause No. [redacted]
	)	Division No. 1
v.	)	
[redacted]	)	
Defendant	)	

MOTION TO TERMINATE FROM PROBATION

COMES NOW defendant [redacted], by and through counsel, Katy Thoman, Assistant Public Defender, and moves this Honorable Court to terminate the defendant from probation in the above captioned cause. Continued prosecution of defendant in this cause violates defendant's rights to due process of law, to equal protection of law and to be free from cruel and unusual punishment as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, and 21 of the Missouri Constitution. In support of this motion defendant alleges and states as follows.

1. Defendant was charged with Stealing over $500 in violation of Section 570.030.3(1), RSMo, that occurred on March 10, 2011.

2. Defendant pled guilty to the above charge on February 7, 2012, and received the following disposition: Seven years in the Department of Corrections. The court suspended the execution of that sentence and placed Defendant on five years of supervised probation. On October 10, 2013 the court found that Defendant had violated probation and extended his probation for one additional year. On February

22, 2016, the state filed a motion to revoke Defendant's probation. That motion is currently pending before this court.

3. The plain language Section 570.030.1, RSMo, states 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.

4. Section 570.030.3, RSMo, states, *inter alia* , that 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 "the value of the property or services appropriated is five hundred dollars or more but less than twenty-five thousand dollars."

5. Section 570.030.9, RSMo, states that any violation of this section for which no other penalty is specified is a class A misdemeanor.

6. As recently set forth in State v. Bazell, No. SC95318 (Mo. 2016) (Opinion issued August 23, 2016), the felony enhancement provision in 570.030.3 cannot apply because "(t)he value of the property or services appropriated is not an element of the offense of stealing." As such, this court lacked the authority to accept a plea of guilty for felonies charged under 570.030.3 because a stealing "cannot be enhanced to felonies by the terms of section 570.030.3." Id.

7. Under the rule of lenity "mandates that all ambiguity in a criminal statute be resolved in a defendant's favor." Fainter v. State, 174 S.W.3d 718, 721 (Mo. App. 2005). This applies even after a plea of guilt, because under Rule 24.02(e) "The court shall not enter a judgment upon a plea of guilty unless it determines that there is a

factual basis for the plea." Id. at 720.

8. This court lacked a factual basis to accept a plea of guilty for the class C felony of stealing over $500, where the facts established on the record for the plea could not meet the elements of a felony. See generally Brazell; Fainter.

9. It should be noted that this is the first instance at which the defense could raise this issue. The defendant has never been advised of his post-conviction rights under Rule 24.035, because the defendant has never been delivered to the department of correction on the above cause. The defendant has not been advised of how to file a motion pursuant to 24.035 with the Form 40. And as such, has had no to timely ask the court to vacate, set aside, or correct the judgment or sentence in this cause.

10. Finally, this court lacks the statutory authority to proceed with a probation violation hearing while the above cause remains a felony. The court derives its sentencing authority from the statute under which the defendant is charged. See Bazell. Here, the court lacked the factual basis to accept a plea to a felony under the charged statute. Id. Thus, the court has only ever had the authority to to place the defendant on a term of misdemeanor probation for a period not to exceed two years. 559.016.1 RsMO. The court lacks the statutory authority for any action in this cause beyond a two year period of probation. See State ex rel. Strauser v. Martinez, 416 S.W.3d 798, 804 (Mo. 2014). If the court has not made every reasonable effort to rule on the defendant's alleged probation violation within the two year period of probation that this Court had the authority to grant, then the Court is divested of its authority to

proceed in this matter. Id.

FOR THE REASONS SET FORTH ABOVE, defendant moves this Honorable Court to terminate the defendant from probation in the above cause pursuant to its authority under 559.036.2. Continued prosecution of defendant for a felony violates defendant's rights to due process of law, to equal protection of law and to be free from cruel and unusual punishment as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, and 21 of the Missouri Constitution.

Respectfully submitted,

/s/ Katy Thoman

Katy Thoman, Mo Bar No. 63291
Attorney for Defendant
Suite 264
300 N. Second St.
St. Charles, MO 63301
Phone: 636-949-7300
Fax: 636-949-7301
E-Mail: Katy.Thoman@mspd.mo.gov

Certificate of Service

I hereby certify that on this 30th day of September, 2016, an electronic copy of the foregoing was sent through the Missouri e-Filing system to counsel of record.

/s/ Katy Thoman

Katy Thoman