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No. SC96159

In The Supreme Court of Missouri

STATE OF MISSOURI EX REL. STEPHANIE WINDEKNECHT,

Petitioner,

vs.

ANGELA MESMER, SUPERINTENDENT,

Respondent.

PETITIONER'S BRIEF

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JURISDICTIONAL STATEMENT

On January 9, 2014, Petitioner, Stephanie Windeknecht, pled guilty in the Circuit Court for Scott County to one count of stealing in excess of 500 dollars in violation §§ 570.030.1 and 570.030.3 RSMo (Supp. 2009).[1] On March 13, 2014, the court sentenced Petitioner to six (6) years in the Missouri Department of Corrections.

On August 23, 2016, this Court ruled that the felony enhancements contained in § 570.030.3, which apply only when "value" was an element of the offense, could not properly enhance the misdemeanor offense of stealing defined in § 570.030.1 because the definition of stealing contained therein did not include "value" as an element of the offense. State v. Bazell, 497 S.W.3d 263 (Mo. 2016).

In light of the Bazell decision, on October 27, 2016, Petitioner filed a petition for writ of habeas corpus in the Circuit Court for Audrain County because she was and is incarcerated in the Women's Eastern Reception, Diagnostic, and Correctional Center in Vandalia, Missouri. Petitioner argued her continued incarceration was illegal following the Bazell opinion. The State responded to that court's order to show cause on December 30, 2016. On December 30, 2016 the Circuit Court for Audrain County dismissed Petitioner's filing. Petitioner refiled her petition in the Missouri Court of Appeals for the Eastern District on January 6, 2017. That court denied the writ petition on January 9, 2017.

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[1] Statutory citations are to Revised Statutes of Missouri (Supp. 2009) unless otherwise noted.

This Court has jurisdiction to "issue and determine original remedial writs," including writs of habeas corpus under Art. V, § 4, subsection 1, of the Missouri Constitution. Further, "a writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government." State ex rel. Woodworth v. Denney, 396 S.W.3d 330, 337 (Mo. banc 2013). This matter is presently before this Court pursuant to Supreme Court Rule 91.01 *et seq.*, and § 532.020 *et seq*. RSMo (2000).

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STATEMENT OF FACTS

On October 2, 2013, Petitioner was charged by prosecutor's information in Scott County with stealing in excess of $500 but less than $25,000 (Petitioner's Exhibits, p. 1; Appendix, p. A1). The prosecutor apparently relied on § 570.030.3(1) to elevate Petitioner's theft of cash from the 50% Off Store from a class A misdemeanor to a class C felony. Id. Subsection 3(1) of the stealing statute under which she was charged read:

> 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 hundred dollars or more but less than twenty-five thousand dollars;

§ 570.030.3(1).

On Janaury 9, 2014, Petitioner pled guilty in Scott County cause number 13SO-CR00951-01 to one count of stealing in excess of $500 (Petitioner's Exhibits, p. 2; Appendix, p. A2). On March 14, 2014, the court sentenced Petitioner to six (6) years in the Missouri Department of Corrections (Petitioner's Exhibits, pp. 2-3, Appendix, pp. A2-A3).

On August 23, 2016, this Court ruled that the felony enhancements contained in § 570.030.3, which enhanced Petitioner's theft to a class C felony, apply only when "value" was an element of the offense. State v. Bazell, 497 S.W.3d 263 (Mo. 2016). Those enhancements, the Court ruled, could not properly enhance the misdemeanor

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offense of stealing defined in § 570.030.1 because the definition of stealing contained therein did not include "value" as an element of the offense. Bazell, 497 S.W.3d at 265. The Court wrote,

> The definition of stealing in section 570.030.1 is clear and unambiguous, and it does not include the value of the property or services appropriated as an element of the offense. As a result, enhancement pursuant to section 570.030.3 does not apply to Defendant's stealing convictions for the theft of the firearms. These offenses must, therefore, be classified as misdemeanors.

Id.

In light of the Bazell decision, on October 27, 2016, Petitioner filed a petition for writ of habeas corpus in the Circuit Court for Audrain County because she was and is incarcerated in the Women's Eastern Reception, Diagnostic, and Correctional Center in Vandalia, Missouri (Petitioner's Exhibits, pp. 4-12). Petitioner argued her continued incarceration was illegal following the Bazell opinion. Id. The State responded to that court's order to show cause on December 30, 2016 (Petitioner's Exhibits, pp. 13-20). On December 30, 2016 the Circuit Court for Audrain County dismissed Petitioner's filing contending the decision in Bazell could not apply to cases like Petitioner's that were final (Petitioner's Exhibits, pp. 21-23). Petitioner refiled her petition in the Missouri Court of Appeals for the Eastern District on January 6, 2017 (Petitioner's Exhibits, pp. 24-38). That court denied the writ petition on January 9, 2017 (Petitioner's Exhibits, p. 39).

On January 12, 2017, Petitioner refiled her petition for writ of habeas corpus in this Court. Following Respondent's filing of suggestions in opposition, the Court issued the preliminary writ of habeas corpus on February 28, 2017. On March 10, 2017, the Respondent filed her answer/return on the writ. The Court set this case for argument on May 2, 2017. Any further facts necessary for the disposition of this case will be set out in the argument portion of this brief.

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POINTS RELIED ON

I.

Stephanie Windeknecht is entitled to a writ of habeas corpus because her conviction, sentence, and continued incarceration for a felony is illegal under the holding of State v. Bazell, 497 S.W.3d 263 (Mo. 2016), the laws of Missouri, Art. I, § 10 of the Mo. Const., and the V and XIV amendments to the U.S. Const. in that the felony enhancement provisions of § 570.030.3 RSMo. apply only if the stealing is one in which the value of the property or service is an element of the offense but the crime of stealing for which Petitioner was imprisoned - § 570.030.1 - does not include value as an element of the crime. Therefore the plea court lacked authority to enter a conviction for felony stealing and sentence Petitioner to six years in the Missouri Department of Corrections based on Petitioner's theft of cash from the 50% Off Store. Petitioner's continued incarceration is illegal because due process requires Bazell to be applied retrospectively to cases that are final where this Court's decision unambiguously clarified the interpretation of a criminal statute and did not create "new law."

Fiore v. White, 531 U.S. 225 (2001)

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

State v. Severe, 307 S.W.3d 640 (Mo. banc 2010)

Thornton v. Denney, 467 S.W.3d 292 (Mo. App. W.D. 2015)

Revised Statutes of Missouri

§ 570.030 *et seq.* (Supp. 2009)

§ 570.080 *et seq.* (Supp. 2011)

§ 577.023 *et seq.* (Supp. 2007)

Mo. Const., Article I, § 10

Mo. Const. Article V, § 4

U.S. Const., Amend V

U.S. Const., Amend XIV

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II.

Stephanie Windeknecht is entitled to a writ of habeas corpus because her conviction, sentence, and continued incarceration for a felony is illegal under the holding of State v. Bazell, 497 S.W.3d 263 (Mo. 2016), the laws of Missouri, Art. I, § 10 of the Mo. Const., and the V and XIV amendments to the U.S. Const. in that the felony enhancement provisions of § 570.030.3 RSMo. apply only if the stealing is one in which the value of the property or service is an element of the offense but the crime of stealing for which Petitioner was imprisoned - § 570.030.1 - does not include value as an element of the crime. Therefore the plea court and Respondent, respectively, lacked authority to enter a conviction for felony stealing, sentence Petitioner to six years in the Missouri Department of Corrections, and continue to imprison Petitioner based on her theft of cash from the 50% Off Store because Bazell plainly declared "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'" and "[t]he value of the property or services appropriated is not an element of the offense of stealing." The gravity of a stealing offense depends solely on the clear language proscribing the offense and not on the quality or nature, as defined in § 570.030.3, of what was stolen.

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

State v. McMillian, (WD79440) 2016 WL 6081923 (Mo. App. W.D. Oct. 18, 2016)

Revised Statutes of Missouri, § 570.030 *et seq.* (Supp. 2009)

Mo. Const., Article I, § 10

Mo. Const. Article V, § 4

U.S. Const., Amend V

U.S. Const., Amend XIV

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ARGUMENTS

I.

Stephanie Windeknecht is entitled to a writ of habeas corpus because her conviction, sentence, and continued incarceration for a felony is illegal under the holding of State v. Bazell, 497 S.W.3d 263 (Mo. 2016), the laws of Missouri, Art. I, § 10 of the Mo. Const., and the V and XIV amendments to the U.S. Const. in that the felony enhancement provisions of § 570.030.3 RSMo. apply only if the stealing is one in which the value of the property or service is an element of the offense but the crime of stealing for which Petitioner was imprisoned - § 570.030.1 - does not include value as an element of the crime. Therefore the plea court lacked authority to enter a conviction for felony stealing and sentence Petitioner to six years in the Missouri Department of Corrections based on Petitioner's theft of cash from the 50% Off Store. Petitioner's continued incarceration is illegal because due process requires Bazell to be applied retrospectively to cases that are final where this Court's decision unambiguously clarified the interpretation of a criminal statute and did not create "new law."

Standard for Obtaining Habeas Relief:

Article V, § 4 of the Missouri Constitution vests this Court with the authority "to issue and determine original remedial writs," including writs of habeas corpus. State ex rel. Zinna v. Steele, 301 S.W.3d 510, 513 (Mo. banc 2010). "Habeas corpus relief is the final judicial inquiry into the validity of a criminal conviction and functions to relieve

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defendants whose convictions violate fundamental fairness." Id. The petitioner has the burden of showing that he or she is entitled to habeas corpus relief. Id.

A writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government. *Id*. Questions of law, including constitutional challenges, are reviewed *de novo*. Earth Island Inst. v. Union Elec. Co., 456 S.W.3d 27, 32 (Mo. banc 2015).

Analysis

The Bazell decision makes Petitioner's felony conviction invalid

Petitioner's continued incarceration is illegal because the circuit court exceeded its authority when it sentenced Petitioner for felony stealing under §§ 570.030.1 and 570.030.3 of the Revised Statutes of Missouri. The offense to which Petitioner pled guilty can only be a misdemeanor, not a felony, under the holding of Bazell, *supra*.

Petitioner was charged by prosecutor's information with a crime, stealing in excess of $500 but less than $25,000, which does not have "value" as an element of the offense (Petitioner's Exhibits, p. 1). Stealing, as prohibited by § 570.030.1, states: "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." Any violation of the stealing statute for which no penalty is specified is a class A misdemeanor. § 570.030.8. The prosecutor apparently relied on § 570.030.3(1) to elevate Petitioner's theft from a class A misdemeanor to a class C felony. Subsection 3(1) reads in pertinent part:

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> 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 hundred dollars or more but less than twenty-five thousand dollars;

§ 570.030.3(1). Because value was not an element of Petitioner's offense under § 570.030.1, it was improper to use subsection 3 to enhance the offense from a misdemeanor to a class C felony.

As noted, this Court invalidated the provision of the stealing statute that the State employed to enhance Petitioner's stealing charge from an A misdemeanor to a class C felony. Bazell, *supra*. The Court ruled that the plain language of the stealing statute did not permit enhancement under subsection 3 – which states that the section applies only when "value" is an element of the offense – because the crime of stealing proscribed by § 570.030.1 does not contain "value" as an element of the offense. Id. The Court wrote,

> Under section 570.030.1, a person commits the crime of stealing when she appropriates the property or services of another with the purpose to deprive the owner thereof. 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. The definition of stealing in section 570.030.1 is clear and

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> unambiguous, and it does not include the value of the property or services appropriated as an element of the offense. As a result, enhancement pursuant to section 570.030.3 does not apply to Defendant's stealing convictions for the theft of the firearms. These offenses must, therefore, be classified as misdemeanors.

Id., at 265. Likewise, Petitioner's conviction for a violation of § 570.030.1 was enhanced by § 570.030.3(1) even though value is not an element of the stealing statute, § 570.030.1.

Petitioner is entitled to relief despite her case being final

The Respondent argues in this Court and below that Petitioner must remain imprisoned because her case is final. But retroactivity analysis is not required when a new decision clarifies existing law. Thornton v. Denney, 467 S.W.3d 292 (Mo. App. W.D. 2015). Petitioner does not seek retroactive application of a new rule of law; rather, she seeks application of the statute - - properly understood - - that was in effect at the time of her plea. Id. at 298-299.

There is no material difference 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 Missouri Supreme Court decision later clarifying the meaning of a statute. Thornton's complaint was that his felony DWI could not have been enhanced to a felony where that enhancement was, in part, based on a municipal SIS. Id. at 294-295; see Turner v. State, 245 S.W.3d 826 (Mo. banc 2008)

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(clarifying the DWI statute by holding that municipal SIS dispositions could not serve as prior offenses for DWI statute). Turner and Bazell are similar in that they "merely clarified the language of an existing statute." Thornton, *supra* at 298. Accordingly, Thornton is controlling on the issue and Petitioner must benefit from the new understanding of the stealing statute.

The Respondent has advanced a variety of arguments in opposition to Petitioner's bid for release. Respondent argues: 1) there is a general rule forbidding retroactive application of overruling decisions of this Court; 2) this Court's use of the term "should no longer be followed" meant its decision in Bazell was to apply only prospectively; 3) this Court's decision in State v. Stewart, 832 S.W.2d 911 (Mo. banc 1992), defined the limits of retroactive relief; and 4) because this Court did not specifically overrule cases supposedly identifying "value" as an element of stealing, the Court meant to limit its holding by implication. Respondent's arguments are unavailing.

There is no general rule restricting retroactive application of substantive decisions

Initially, the Respondent argues that the holding in Thornton can be distinguished from Petitioner's situation,

> Thornton does not change the general rule described in Ferguson, nor could it. Thornton is an exception to the general rule that Missouri Supreme Court decisions apply only to cases still on direct review. The exception is for cases in which the law, as described in a Missouri Supreme Court

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> decision, helps the person challenging a conviction, *and* that law was abundantly clear before the decision was made.

(Petitioner's Exhibits, pp. 16-17)(emphasis in the original).[2] Respondent's argument is flawed for several reasons.

Typically, when a "new rule" is announced by a reviewing court the question of retrospective application turns on whether the rule is substantive or procedural. Schriro v. Summerlin, 542 U.S. 348, 351-352 (2004). In Schriro, the United States Supreme Court held substantive rulings apply retroactively and "[t]his includes decisions that narrow the scope of a criminal statute by interpreting its terms." Id. at 351-352 *citing* Bousely v. United States, 523 U.S. 614, 620-621 (1998). Such substantive rules apply retroactively because there is "a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose on him." Schriro, *supra* at 352 citing Bousley, *supra* at 620. This Court's decision in the Bazell case is the very definition of a substantive new rule because it interpreted Missouri's stealing statute and it affects, if not the scope of the stealing the statute, the punishment which the law can impose on persons so convicted.

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[2] Citing State v. Ferguson, 887 S.W.2d 585 (Mo. banc 1994). *See also*, Respondent's SUGGESTIONS CONCERNING CONSIDERATION AND SUGGESTIONS IN OPPOSITION OF PETITION FOR WRIT OF HABEAS CORPUS at p. 7.

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The Respondent clouds what should be a very straightforward analysis by her appeal to State v. Ferguson, 887 S.W.2d 585 (Mo. banc 1994). Any commentary in Ferguson concerning retroactivity in cases where the judgment is final was *dicta* insomuch as Ferguson's case was on direct review when taken up by this Court. Id. No question of the application of its prior decisions to a case not on direct review was before that Court. The cases Respondent cites as confirming the commentary in Ferguson similarly dealt with cases still on direct appeal. State v. Wurtzburger, 40 S.W.3d 893, 897 (Mo. banc 2001)(ruling on the applicability of State v. Withrow, 8 S.W.3d 75 (Mo. banc 1999) handed down while Wurtzberger's case was on appeal); State v. Hayes, 23 S.W.3d 783, 791 (Mo. App. W.D. 2000)(ruling on the applicability of State v. Beeler, 12 S.W.3d 294 (Mo. banc 2000) handed while Hayes' case was on appeal). But it is unlikely the Court, in Ferguson, meant to issue an advisory opinion beyond the scope of the facts before it. *See, e.g.*, State v. Self, 155 S.W.3d 756, 761 (Mo. banc 2005).

More importantly, the Ferguson Court only considered the retrospective application of its decision concerning a pattern jury instruction and not a decision on the validity or reach of a criminal statute. Id. Whether due process requires retrospective relief for inmates convicted under statutes later clarified by the Court was simply not considered in Ferguson, Wurtzberger, or Hayes. The Keltner v. Keltner case – cited by Respondent for the proposition that "it is considered 'undesirable to give retroactive effect to overruling decisions, except under the most compelling circumstances'" – suggests that an overruling decision altering the punishment of a criminal statute is a compelling circumstance. 589 S.W.2d 235, 239 (Mo. banc 1979) *citing* United States ex

rel. Angelet v. Fay, 333 F.2d 12, 21 (2nd Cir. 1964). In Keltner, this Court was loathe to apply an overruling decision retroactively because it would work a hardship on Mr. Keltner by subjecting him to imprisonment for conduct – failure to pay alimony – previously thought beyond the circuit court's reach. Id. at 240. To the extent the Court may wish to balance the equities, this Court will err on the side of the citizen and not the State where a citizen is imprisoned or faces imprisonment.

Fortunately, the United States Supreme Court has addressed the issue presented in this case. Fiore v. White, 531 U.S. 225 (2001). Fiore was convicted of a Pennsylvania statute criminalizing the operation of a hazardous waste facility without a permit. Fiore, *supra* at 226. Fiore argued that he had a permit, but the Commonwealth countered Fiore had so deviated from the terms of the permit as to violate the statute. Id. at 227. After Fiore's conviction was final, the Pennsylvania Supreme Court vacated the conviction of his codefendant concluding that the statute meant what it said – that is, one who violated the terms of a permit was not one without a permit. Id. Because the decision in the codefendant's case clarified existing law, there was no issue of retroactivity. Id. at 228. Pennsylvania could not convict Fiore for conduct its criminal statute, as properly understood, did not prohibit. Id. Petitioner's situation parallels Fiore's; she is imprisoned for six years for conduct that Missouri statute, properly understood, denominates a misdemeanor.

Thus, there is no "general rule" in Missouri requiring inmates remain incarcerated for criminal statutes or sentences later declared infirm by this Court. Neither can Petitioner discern an "exception to the general rule" hinging on how "abundantly clear" a

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criminal statute is or was. Even if this were the case, Respondent's argument fails because the Bazell decision repeatedly points out that the language of the stealing statute was "clear and unambiguous." Bazell, *supra* at 265, 266-67. The Western District of the Missouri Court of Appeals answered this argument of Respondent succinctly in Thornton. In Thornton, the court made no mention of Ferguson's supposed general rule nor an exception to said rule based on the abundant clarity of the criminal statute. Rather, citing Fiore, the court held retroactivity analysis was unnecessary because the Missouri Supreme Court decision on which Thornton relied only clarified existing law. Thornton, *supra* at 299.

Use of the term "should no longer be followed" does not indicate whether a decision will be applied retroactively or prospectively

The Respondent next argues this Court's admonition, "[t]o the extent that State v. Passley, 389 S.W.3d 180 (Mo.App.2012) holds otherwise, that decision should no longer be followed" means that Bazell is to be applied prospectively only. (Respondent's RETURN TO PRELIMINARY WRIT OF HABEAS CORPUS at pp. 6-7 citing Bazell, 497 S.W.3d at 267 n. 3). Of course if that was what the Court meant it would have said so. Respondent cites State v. Shafer, 609 S.W.2d 153, 157 (Mo. banc 1980) to argue that when the Court directs that a particular case "should no longer be followed" it is making its decision prospective in effect. But Shafer is factually distinguishable because it concerned application of a concededly procedural rule change – a rule of evidence concerning spousal testimonial privilege. Id. The Shafer Court was careful to point out

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that it was declining to apply a decision reached after Shafer's trial[3] to Shafer's appeal because of the procedural nature of the rule change. Id.

In fact, this Court has elsewhere noted that the phrase "should no longer be followed" does not settle the prospective/retroactive question. Sumners v. Sumners, 701 S.W.2d 720 (Mo. banc 1985). The Court warned against the very interpretation of Shafer Respondent now urges,

> The language "should no longer be followed" of itself is not an indication of whether the court intended prospective-only application of its decision. In Shafer, the court applied the decision prospectively-only not because Euell used the words "should no longer be followed", but because Euell worked a procedural change in the law.

Sumner, *supra* at 725.

Respondent's argument from the Shafer case also conflicts with her competing argument from the Ferguson case. If this Court indeed meant to so limit relief on all overruling decisions – procedural or substantive – by stating a case "should no longer be followed" then why are defendants on direct review able to get relief under Bazell? This Court would not apply the overruling decision – State v. Euell, 583 S.W.2d 173 (Mo. banc 1979) – to Shafer's case because Euell was decided after Shafer's trial. Shafer,

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[3] State v. Euell, 583 S.W.2d 173 (Mo. banc 1979) overruling State v. Frazier, 550 S.W.2d 590 (Mo. App. K.C.D. 1977)

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supra at 157. Yet elsewhere Respondent and her counsel concede that relief under Bazell *is* owed to defendants on direct review and not only to those tried after the Bazell decision in August of 2016 (Petitioner's Exhibits, pp. 15-16; Respondent's SUGGESTIONS CONCERNING CONSIDERATION AND SUGGESTIONS IN OPPOSITION OF PETITION FOR WRIT OF HABEAS CORPUS at p. 5); *see also* State v. Shockley, ___ S.W.3d ___ 2017 WL 772255 at *5 (Mo. App. E.D. February 28, 2017)(State conceded Bazell decision applied to Shockley's theft of a motor vehicle) and State v. Buch, (WD79336) 2017 WL 1055658 (Mo. App. W.D. March 21, 2017)(State conceded Bazell decision applied to Buch's theft of firearms). This Court's directive that Passley should no longer be followed did not serve to make the Bazell decision prospective only.

The Stewart case did not define the limits for

retroactive application of substantive decisions

Respondent contends that State v. Stewart, 832 S.W.2d 911 (Mo. banc 1992), represents the first in a line of cases restricting the retroactive application of substantive decisions (Respondent's RETURN TO PRELIMINARY WRIT at p. 7). But Stewart is not helpful to Respondent's cause because Stewart explicitly limited its retroactive application. The Court wrote "[t]he retrospective application is as to all pending cases not finally adjudicated as to the date of this opinion" Id. at 914. In Bazell, the Respondent argues, this Court intended by implication that its holding should apply prospectively only.

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Respondent attempts to draw a parallel between the Stewart and Bazell cases suggesting each were decisions considering Missouri pattern instructions perhaps to minimize the substantive nature of the Bazell decision or to distinguish Turner,

> The Court's holding in Stewart interpreted the DWI statute in a way that conflicted with existing approved DWI jury instructions, while Turner did not. Like Stewart, the Bazell opinion's statutory interpretation conflicts with the approved jury instructions and approved charges for stealing. *See* MAI-CR 324.02.1 (2012); MACH-CR 24.02.1 (2013). Furthermore, the Stewart opinion recognized that it conflicted with the existing jury instructions and stated that those instructions should "no longer be followed."

(Respondent's RETURN TO PRELIMINARY WRIT OF HABEAS CORPUS at p. 8). That the holding in Bazell might incidentally affect the pattern instruction for stealing is true because the holding of the case was substantive. But neither the Stewart case nor the Bazell case had anything to say about pattern jury instructions, so Respondent's analogy – an effort to make the Bazell decision seem procedural – does not hold up. Stewart does not control.

Well after Stewart, the Severe case anticipated the retroactive application of substantive decisions of this Court. State v. Severe, 307 S.W.3d 640 (Mo. banc 2010). In the Severe case, the State argued its evidence of Ms. Severe's guilt was sufficient at the time of her trial before Turner restricted the use of municipal violations resulting in an

SIS to enhance misdemeanor DWI's to felonies. Severe, *supra* at 642. The State lost that argument and now attempts to distinguish the decision in Severe. But the Severe case militates in favor of retrospective application – as the Western District found in Thornton – because both Ms. Severe and Petitioner here appeal to a case clarifying the statute imprisoning them. As the Western District further observed, the State's pinched view of retroactivity could not be correct or Mr. Turner himself would not have gotten relief since his was a post-conviction complaint. Thornton, *supra* at 298-99.

Respondent contends that Ms. Severe was owed retroactive relief only because the infirmity in the DWI statute identified by Turner was "abundantly clear" from the language of § 577.023. This is an overstatement. Though the Court said the State was "on notice," the Court also conceded that the statute, § 577.023 *et. seq*. (Supp. 2007), was internally inconsistent, that the statutory language was "ambiguous," and that it was the rule of lenity that required interpretation in Ms. Severe's favor. Severe, *supra* at 642. On the other hand, the stealing statute was plainly deficient to the extent it sought to enhance a misdemeanor to a felony. In considering the clarity of the stealing statute, this Court wrote,

> Here, there is no need to resort to tools of interpretation because the language of section 570.030.3 is clear. We cannot know why 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

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> element" may be enhanced to a felony, but this is what the legislature clearly and unambiguously did.

Bazell, *supra* at 266–67. Prior to Bazell, the stealing statute was abundantly clear as to what extent it punished the crime of stealing. Petitioner's situation parallels Ms. Severe's predicament and thus Petitioner is entitled to relief.

The Court's explicit overruling of Passley in Bazell was not a normative choice restricting the scope or reach of its decision

Finally, Respondent writes "[i]n Bazell, the Court did not overrule any of the numerous cases in which the offense of stealing was a felony because of its value rather than its nature." (Respondent's RETURN ON THE PRELIMINARY WRIT OF HABEAS CORPUS at 9). To do so, Respondent argues would represent too great a change in the law to possibly correct. Id. Again, Respondent reads more into what the Court did not say in Bazell than what it did say. But, as the cases cited by Respondent are inapposite, her argument must fail.

The Respondent cites to State v. Miller, 466 S.W.3d 635 (Mo. App. S.D. 2015) *citing* State v. Slocum, 420 S.W.3d 685 (Mo. App. E.D. 2014), State v. Calicotte, 78 S.W.3d 790 (Mo. App. S.D. 2002), and State v. Tivis, 948 S.W.2d 690 (Mo. App. W.D. 1994) for the proposition that stealing may be a felony because of the value of the thing stolen. A review of these decisions reveals they are inapplicable and thus the Court would have no reason to overrule them in Bazell. In Miller, the Court of Appeals indeed cited Slocum for the notion that "'[a]bsent substantial evidence as to the value, an essential element of the felony stealing charge is not proved.'" Miller, *supra* at 636 *quoting*

Slocum, *supra* at 687. But Miller is not persuasive authority because Slocum, upon which it relied, was actually a receiving stolen property case. Slocum, *supra* at 686. At the time of Mr. Slocum's trial, receiving stolen property had no defect to its statutory language because it plainly stated, *inter alia*,

> 4. Receiving stolen property is a class C felony if:
>
> (1) The value of the property or services appropriated is five hundred dollars or more but less than twenty-five thousand dollars:

§ 570.080 (Supp. 2011). And to the extent that Slocum's gratuitous statement about the elements of felony stealing relied on the Calicotte case, it too is inapplicable. Calicotte, a stealing case, was decided in July of 2002, before the stealing statute at issue in Bazell was amended. Calicotte, *supra* at 794; *see* Bazell, *supra* at 266-67 ("We cannot know why 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, but this is what the legislature clearly and unambiguously did"). There was no problem with the stealing statute *vis a vis* enhancement prior to 2002. Prior to 2002, the stealing statute did not require stealing have value as an "element." Id. Respondent's cite to Tivis is likewise unavailing because it was decided in 1994. Tivis, *supra*. There was no reason for this Court to explicitly overrule Miller, Slocum, Calicotte, or Tivis, because they did not bear on the issues in the Bazell case.

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Conclusion

Where a court imposes a sentence that is in excess of that authorized by law, habeas corpus is a proper remedy. Zinna, 301 S.W.3d at 516-17 (when the court imposed a consecutive sentence against the defendant when the oral pronouncement was silent on whether the sentence was to be served concurrently with the defendant's other sentences, it exceeded that which the court was authorized to impose and provided a basis for habeas relief even though the defendant did not timely seek post-conviction relief). *Accord*, State ex rel. Osowski v. Purkett, 908 S.W.2d 690, 691 (Mo. banc 1995) (sentencing court acted beyond its authority when it sentenced the defendant to fifteen years in prison where the maximum authorized term of imprisonment was seven years); Merriweather v. Grandison, 904 S.W.2d 485, 486 (Mo. App. W.D. 1995) (defendant who was sentenced to a term in excess of statutory maximum was entitled to habeas relief even though the defendant failed to timely file a post-conviction motion since the excessive sentence was a defect patent upon the face of the record); State ex rel. Koster v. Jackson, 301 S.W.3d 586, 589 (Mo. App. W.D. 2010) (petitioner was entitled to habeas corpus relief on the basis that he was improperly sentenced on his DWI conviction as a persistent offender based on a prior municipal DWI offense for which he had received a suspended imposition of sentence, though he failed to challenge his sentence in a post-conviction proceeding, because the imposition of a sentence beyond that permitted by the applicable statutory may be raised by way of a writ of habeas corpus); State ex rel. Dutton v. Sevier, 336 Mo. 1236, 83 S.W.2d 581 (Mo. banc 1935) (defendant who was charged with assault with intent to kill, which was an offense with a maximum prison

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sentence of five years, was entitled to habeas corpus relief because the court was without authority to impose a sentence of twelve years' imprisonment, a sentence which required the additional element of malice aforethought).

Here, Petitioner's prison sentence of six years was in excess of the statutory maximum for the charged stealing offenses (one year in the county jail). At the time of her offense, the crime of stealing was a class A misdemeanor unless otherwise specified in the stealing statute. § 570.030.8 ("Any violation of this section for which no other penalty is specified is a class A misdemeanor."). The felony enhancement provision of § 570.030.3, by its own terms, only applied if the offense was one "in which the value of the property or services is an element." But under § 570.030.1, stealing is defined 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 correction." Thus, "[t]he value of the property or services appropriated is not an element of the offense of stealing." Bazell, 497 S.W.3d at 266. "As a result, § 570.030.3 does not apply here." Id. at 267. Thus, Petitioner's stealing offense "must be classified as [a] misdemeanor[] because [it] cannot be enhanced to felonies by the terms of section 570.030.3." Id.

Under the plain language of §§ 570.030.1 and 570.030.3, the maximum sentence for Petitioner's stealing offense was one year in the county jail. Her six year prison sentence exceeded the maximum sentence. This is patent upon the face of the record. As a result, habeas corpus is a proper remedy. Zinna, 301 S.W.3d at 516-17; Osowski, 908 S.W.2d at 691; Merriweather, 904 S.W.2d at 486; Koster, 301 S.W.3d at 589; Dutton, 83 S.W.2d at 582-583.

This Court's decision in the Bazell case is the very definition of a substantive decision because it interpreted Missouri's stealing statute and the decision affects, if not the scope of the stealing statute, the punishment which the law can impose on persons so convicted. The Court did not announce "new law" in Bazell (nor could it), but rather it held the plain language of the stealing statute did not apply to Ms. Bazell and others whose misdemeanors were errantly enhanced to felonies. Due process, as guaranteed by Art. I, § 10 of the Mo. Const., and the V and XIV amendments to the U.S. Const., requires this Court grant the writ of habeas corpus and order Ms. Windeknecht released.

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II.

Stephanie Windeknecht is entitled to a writ of habeas corpus because her conviction, sentence, and continued incarceration for a felony is illegal under the holding of State v. Bazell, 497 S.W.3d 263 (Mo. 2016), the laws of Missouri, Art. I, § 10 of the Mo. Const., and the V and XIV amendments to the U.S. Const. in that the felony enhancement provisions of § 570.030.3 RSMo. apply only if the stealing is one in which the value of the property or service is an element of the offense but the crime of stealing for which Petitioner was imprisoned - § 570.030.1 - does not include value as an element of the crime. Therefore the plea court and Respondent, respectively, lacked authority to enter a conviction for felony stealing, sentence Petitioner to six years in the Missouri Department of Corrections, and continue to imprison Petitioner based on her theft of cash from the 50% Off Store because Bazell plainly declared "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'" and "[t]he value of the property or services appropriated is not an element of the offense of stealing." The gravity of a stealing offense depends solely on the clear language proscribing the offense and not on the quality or nature, as defined in § 570.030.3, of what was stolen.

Standard for Obtaining Habeas Relief

Article V, § 4 of the Missouri Constitution vests this Court with the authority "to issue and determine original remedial writs," including writs of habeas corpus. Zinna, *supra*. "Habeas corpus relief is the final judicial inquiry into the validity of a criminal

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conviction and functions to relieve defendants whose convictions violate fundamental fairness." Id. The petitioner has the burden of showing that he or she is entitled to habeas corpus relief. Id.

A writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government. Id. Questions of law, including constitutional challenges, are reviewed *de novo*. Earth Island, *supra*.

Analysis

The Bazell decision makes Petitioner's felony conviction invalid

Petitioner's continued incarceration is illegal because the circuit court exceeded its authority when it sentenced Petitioner for felony stealing under §§ 570.030.1 and 570.030.3 of the Revised Statutes of Missouri. The offense to which Petitioner pled guilty can only be a misdemeanor, not a felony, under the holding of Bazell, *supra*.

Petitioner was charged by prosecutor's information with a crime, stealing in excess of $500 but less than $25,000, which does not have "value" as an element of the offense (Petitioner's Exhibits, p. 1). Stealing, as prohibited by § 570.030.1, states: "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." Any violation of the stealing statute for which no penalty is specified is a class A misdemeanor. § 570.030.8. The prosecutor apparently relied on § 570.030.3(1) to elevate Petitioner's theft from a class A misdemeanor to a class C felony. Subsection 3(1) reads in pertinent part:

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> 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 hundred dollars or more but less than twenty-five thousand dollars;

§ 570.030.3(1). Because value was not an element of Petitioner's offense under § 570.030.1, it was improper to use subsection 3 to enhance any stealing offense from a misdemeanor to a class C felony.

The rationale of Bazell applies to all enhancements in § 570.030.3

The defect in the stealing statute, identified in Bazell, invalidates every enhancement provision contained in § 570.030.3. The defect in the stealing statute is with the prologue to § 570.030.3 which seeks to enhance only those stealing offenses "in which the value of property or services is an element." Because stealing, as defined by § 570.030.01, does not list "value" as an element of the offense, the whole of § 570.030.3 is infirm. Nevertheless, Respondent contends that the Bazell decision did not intend to affect stealing offenses enhanced because of the value of the property or services. (Respondent's RETURN ON PRELIMINARY WRIT OF HABEAS CORPUS at 11).

Initially, Respondent suggests that because this Court did not overturn Ms. Bazell's conviction for stealing property valued more than $500, the Court meant to carve out an unspoken exception to its decision (Respondent's RETURN TO PRELIMINARY WRIT OF HABEAS CORPUS at p. 11). However, the reason Ms. Bazell did not obtain

relief for stealing over $500 is because she did not challenge that conviction in the Court of Appeals or in her initial brief in the Supreme Court. Bazell, *supra* n. 4. The Court was not inviting speculation from its silence as to the reach of its holding but rather stating it would not consider newly added claims. Id. If the Court meant to carve out an exception to its ruling encompassing the whole of § 570.030.3, it would have said as much.

Respondent further argues what it considers authority that "there is no doubt that value is an essential element where, as here, stealing is a C felony because of the monetary value of the property, not its nature" (Respondent's RETURN ON PRELIMINARY WRIT OF HABEAS CORPUS at p. 12). But as Petitioner wrote in Point I of this brief, the cases upon which Respondent relies – Miller, Slocum, Calicotte, and Tivis – are inapposite. In Miller, the Court of Appeals indeed cited Slocum for the notion that "'[a]bsent substantial evidence as to the value, an essential element of the felony stealing charge is not proved.'" Miller, *supra* at 636 *quoting* Slocum, *supra* at 687. But Miller is not persuasive authority because Slocum, upon which it relied, was actually a receiving stolen property case. And to the extent that Slocum's gratuitous statement about the elements of felony stealing relied on the Calicotte case, it too is inapplicable. Calicotte, a stealing case, was decided in July of 2002, before the stealing statute at issue in Bazell was amended. Calicotte, *supra* at 794. None of the cases cited by Respondent establish value is an element of stealing since they rely on *dicta* and/or review a stealing statute different from the one considered in the Bazell case.

It matters not that the particular enhancement the State utilized in Petitioner's case refers to "value" (as opposed to stealing a firearm or a credit card, for example). In State

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v. McMillian, (WD79440) 2016 WL 6081923 (Mo. App. W.D. Oct. 18, 2016), the State argued that Bazell only invalidated enhancement under subsection 3 where the felony enhancement is based on the stealing of a firearm, motor vehicle, or other item and not where the enhancement is based on the stealing property or services with a value of over five hundred dollars. McMillian at *5. The Western District rejected that argument,

> We see no support in Bazell for the interpretation advocated by the State. Bazell made no distinction between the various ways the enhancement provision could be triggered. Bazell found that the statute under which McMillian was charged, section 570.030.1, does not contain as an element "the value of property or services." Id. Therefore, section 570.030.3, which *only* applies where "the value of property or services" is an element of the offense, is inapplicable.

McMillian at *5. All three districts of the Missouri Court of Appeals have considered and rejected this argument of Respondent. *See*, State v. Turrentine, (SD34257) 2016 WL 6818938 (Mo. App. S.D. Nov. 18, 2016); State v. Metternich, (WD79253) 2016 WL 7439121 (Mo. App. W.D. Dec. 27, 2016); and State v. Bowen, (ED103919) 2017 WL 361185 (Mo. App. E.D., Jan. 24, 2017)("we conclude that the Bazell decision bars all § 570.030.3 enhancements from being applied to a stealing offense charged under § 570.030"). In Petitioner's case, the circuit court did establish a factual basis to convict her of misdemeanor stealing, but because "value" was not an element of the stealing offense

she was accused of, there were no grounds to convict her of and sentence her for stealing as a felony.

Conclusion

Petitioner's continued incarceration is illegal because the circuit court exceeded its authority when it sentenced Petitioner for felony stealing under §§ 571.030.1 and 571.030.3 of the Revised Statutes of Missouri. The offense to which Petitioner pled guilty can only be a misdemeanor, not a felony, under the holding of Bazell, *supra*.

CONCLUSION

This Court should grant Ms. Windeknecht's writ of habeas corpus and order her discharged from her sentence for stealing, a misdemeanor, for which she has served well over three years in the Department of Corrections. Due process, as guaranteed by Art. I, § 10 of the Mo. Const., and the V and XIV amendments to the U.S. Const., requires Ms. Windeknecht's conviction to be amended to misdemeanor stealing and her six-year sentence to be vacated.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Scott Thompson, hereby certify: The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 8028 words, which does not exceed the 31,000 words allowed for an appellant's brief. I hereby certify that this document is in PDF-searchable format and has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software, with updated virus definitions, and has been found virus-free. And, on this 3rd day of April, 2017, electronic copies of Petitioner's Brief, and Petitioner's Appendix, were sent through the Missouri e-Filing System to Patrick J. Logan, Assistant Attorney General, at patrick.logan[at]ago.mo.gov and Michael J. Spillane, Assistant Attorney General, at mike.spillane[at]ago.mo.gov.

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