

**IN THE  
MISSOURI SUPREME COURT**

---

**STATE OF MISSOURI,** )  
 )  
 **Respondent,** )  
 )  
 **vs.** ) **No. SC93321**  
 )  
 **BRUCE PIERCE,** )  
 )  
 **Appellant.** )

---

**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI  
22<sup>ND</sup> JUDICIAL CIRCUIT, DIVISION 21  
THE HONORABLE THOMAS C. GRADY, JUDGE**

---

**APPELLANT'S SUBSTITUTE BRIEF**

---

**ROXANNA A. MASON, MOBar #61210  
Assistant Public Defender  
1010 Market Street, Suite 1100  
Saint Louis, Missouri 63101  
Phone: (314)340-7662  
FAX: (314)340-7685  
Email: [Roxy.Mason@mspd.mo.gov](mailto:Roxy.Mason@mspd.mo.gov)**

**ATTORNEY FOR APPELLANT**

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES.....	3
JURISDICTIONAL STATEMENT.....	7
STATEMENT OF FACTS.....	8
POINTS RELIED ON.....	13
ARGUMENT.....	16
I.....	16
II.....	25
III.....	30
CONCLUSION.....	33
CERTIFICATE OF SERVICE AND COMPLIANCE.....	33

**TABLE OF AUTHORITIES**

	<u>Pages</u>
<b><u>CASES:</u></b>	
<i>Missouri Prosecuting Attorneys v. Barton County,</i>	
311 S.W.3d 737 (Mo. banc 2010) .....	16, 20
<i>State v. Baker,</i>	
850 S.W.2d 944 (Mo. App. E.D. 1993).....	19
<i>State v. Belton,</i>	
153 S.W.3d 307 (Mo. banc 2005) .....	30
<i>State v. Derenzy,</i>	
89 S.W.3d 472 (Mo. banc 2002) .....	14, 26
<i>State v. Elliot,</i>	
987 S.W.2d 418 (Mo. App. W.D. 1999) .....	19
<i>State v. Fassero,</i>	
256 S.W.3d 109 (Mo. banc 2008) .....	21
<i>State v. Gaver,</i>	
944 S.W.2d 273 (Mo. App. S.D. 1997).....	19
<i>State v. Hibler,</i>	
5 S.W. 3d 147 (Mo. banc 1999) .....	28
<i>State v. Hineman,</i>	
14 S.W.3d 924 (Mo. banc 1999) .....	14, 26

*State v. Hopson,*  
 168 S.W.3d 557 (Mo. App. E.D. 2005)..... 15, 31

*State v. Neher,*  
 213 S.W.3d 44 (Mo. banc 2007) ..... 19

*State v. Nichols,*  
 207 S.W.3d 215 (Mo. App. S.D. 2006)..... 16

*State v. Ondo,*  
 231 S.W.3d 314 (Mo. App. S.D. 2007)..... 15, 30

*State v. Rosendahl,*  
 938 S.W.2d 274 (Mo. App. W.D. 1997) ..... 19

*State v. Smith,*  
 825 S.W.2d 388 (Mo. App. S.D. 1992)..... 14, 26

*State v. Smith,*  
 370 S.W.3d 891, 894 (Mo. App. E.D. 2012)..... 19

*State v. St. George,*  
 215 S.W3d 341 (Mo. App. S.D. 2007)..... 15, 32

*State v. Williams,*  
 313 S.W.3d 656 (Mo. banc 2010) ..... 14, 25, 27-28

**CONSTITUTIONAL PROVISIONS:**

Mo. Const., Art. I § 10..... 14, 25

Mo. Const., Art. I § 18(a) ..... 14, 18, 25

Mo. Const., Art. I § 19..... 8, 13, 16-18,  
..... 22-23, 33

Mo. Const., Art. I § 32..... 23

Mo. Const., Art. V § 5 ..... 22

Mo. Const., Art. V § 10 ..... 7

U.S. Const., Amend. V ..... 14, 25

U.S. Const., Amend. VI..... 14, 25

U.S. Const., Amend. XIV ..... 14, 25

**STATUTES:**

Mo. Rev. Stat. § 195.285 (2010) ..... 12, 27

Mo. Rev. Stat. § 195.295 (2010) ..... 12, 26

Mo. Rev. Stat. § 195.223 (2012) ..... 12

Mo. Rev. Stat. § 478.205 (2010) ..... 8, 13, 18

Mo. Rev. Stat. § 545.890 (2010) ..... 19

Mo. Rev. Stat. § 545.900 (2010) ..... 19

Mo. Rev. Stat. § 545.910 (2010) ..... 19

Mo. Rev. Stat. § 545.920 (2010) ..... 19

Mo. Rev. Stat. § 556.046 (Supp. 2004) ..... 28

Mo. Rev. Stat. § 556.046 (2010) ..... 14, 26

Mo. Rev. Stat. § 565.025 (Supp. 2004) ..... 28

Mo. Rev. Stat. § 575.150 (2010) ..... 15, 30

**MISSOURI SUPREME COURT RULES:**

Rule 19.03..... 22

Rule 20.01..... 21-22

Rule 24.04..... 20

Rule 28.02..... 14, 25

Rule 28.03..... 25

**MISSOURI MODEL APPROVED INSTRUCTIONS:**

MAI-CR3d 304.11 ..... 14, 28

MAI-CR3d 325.02..... 11, 14, 26

**OTHER:**

21<sup>st</sup> Judicial Circuit Local Rule 2.2 ..... 6, 18

22<sup>nd</sup> Judicial Circuit Local Rule 2.2 ..... 6, 8

Gram, <http://en.wikipedia.org/w/index.php?title=Gram&oldid=556120181>  
(last visited May 30, 2013)..... 27

## JURISDICTIONAL STATEMENT

A jury in the City of St. Louis convicted Bruce Pierce of second-degree trafficking of a controlled substance and of resisting a felony arrest (LF 115)<sup>1</sup>. The trial court sentenced him as a prior and persistent offender and as a prior and persistent drug offender (LF 116). It ordered Bruce into the custody of the Missouri Department of Corrections for concurrent terms of ten and seven years, respectively (LF 116). Bruce appealed to the Missouri Court of Appeals—Eastern District and that court affirmed his convictions. *State v. Pierce*, 2013 WL 682739 (Mo. App. E.D. 2013). This Court accepted transfer of the case on May 28, 2013. The Court has jurisdiction pursuant to Article V, § 10 of the Missouri Constitution.

---

<sup>1</sup> The record will be cited as: Legal File (LF); Transcript (Tr.); Sentencing Transcript (STr.)

## **STATEMENT OF FACTS**

### *Motion to Dismiss*

On November 9 and 10, 2010, the Circuit Court for the City of St. Louis tried Bruce Pierce for second-degree trafficking of a controlled substance and resisting a felony arrest (LF 8-9). In that trial, the jury became hopelessly deadlocked and did not reach a verdict, so the trial court declared a mistrial (LF 8). It remanded Bruce back into the sheriff's custody (LF 8). The case was not tried again until November 30, 2011, over a year later (LF 5). Where no local rule sets terms of court new terms begin on the second Mondays in February, May, August and November. Mo. Rev. Stat. § 478.205<sup>2</sup>. No local rule in the City of St. Louis sets terms of court. *See*, 22<sup>nd</sup> Judicial Circuit Local Rule 2.2. Therefore, Bruce was retried in the fourth term following his original trial. *Id.*

Before Bruce's second trial, his attorney filed a motion to dismiss (LF 5, 68-69). The motion alleged that retrying Bruce four terms after his original trial violated Article I, § 19 of the Missouri Constitution, and therefore the case should have been dismissed (LF 68). This trial court took up the motion in a pretrial conference, ultimately denying the motion and proceeding to trial (LF 5-8). Bruce raised the issue again in his post-trial "Motion for Dismissal, Judgment of Acquittal Notwithstanding the Jury's Verdict, and (Alternatively) New Trial" (LF 110-11). The trial court denied that motion as well (STr. 6).

---

<sup>2</sup> All statutory references are to Mo. Rev. Stat. (2010) unless otherwise noted.

*Officer Patrick Daut*

On May 5, 2010 around 7:00 p.m., Officer Patrick Daut of the St. Louis Police Department was working as part of a “covert clash undercover” unit (Tr. 157). He was in his “covert vehicle” with his partner, traveling south on Garrison (Tr. 157). He and his partner were wearing plain clothes but they were also wearing vests with “POLICE” plastered across the front and back (Tr. 162). He saw Bruce walking through a vacant lot toward some vacant buildings (Tr. 159). Bruce eventually sat down on the front steps of a vacant building at 2939 James Cool Papa Bell Avenue (Tr. 160). Finding this suspicious, the officers decided to talk to Bruce (Tr. 161). The policemen drove up to him, and Daut said something like, “Hey, it’s the police. How you doing?” (Tr. 161). Bruce got up immediately and ran (Tr. 162).

He went eastward down the sidewalk and then headed north through a gangway (Tr. 162-63). The police officers tried to catch him in their car, but they failed, so Daut’s partner tried to chase Bruce on foot (Tr. 163). Daut watched part of the foot pursuit and at one point saw his partner stop and pick something up (Tr. 164). The foot chase went through a vacant lot and into the backyard of 1350 Garrison, then into that house (Tr. 164). Daut then saw his partner bring Bruce out of the house in handcuffs (Tr. 165).

Daut’s partner then handed him what appeared to be drugs (Tr. 167). Daut put this evidence in his pocket, and later packaged it and took it to the lab for analysis (Tr. 168). He also informed Bruce of his Fifth Amendment rights and took a statement from him (Tr. 174-76). Bruce told Daut, “I am on parole. I cannot afford to take this hit. I shouldn’t have gone in that lady’s house, but I didn’t think she would mind” (Tr. 176).

***Detective Nathan Burkemper***

Detective Burkemper is the one who chased Bruce on foot (Tr. 187). When he first got out of the car he was thirty to forty feet behind Bruce, but within four or five seconds he had closed that distance to between twenty and twenty-five feet (Tr. 187, 199). Burkemper saw Bruce throw an object down with his right hand (Tr. 187). Burkemper focused on the object, which was dropped in grass between five and eight inches tall, and Burkemper claims he somehow managed to pick it up without stopping running (Tr. 188). This contradicted Daut's testimony (Tr. 164). Then Burkemper shouted at Bruce that he was a police officer and that Bruce was under arrest (Tr. 188). Bruce kept running (Tr. 188). Eventually, when Bruce was in the house, Burkemper ordered him to stop and he did (Tr. 190-91).

***Allyson Seger***

Allyson Seger works for the St. Louis Metropolitan Police Department (Tr. 211). She has worked for them for over a decade (Tr. 211). Seger tested the suspected drugs and determined that the substance contained cocaine base (Tr. 215). The first time she weighed it, in May 2010, she claims it weighed 2.51 grams (Tr. 216). She weighed it again in November, 2010, and it only weighed 2.20 grams (Tr. 217). She hypothesized that the drop was likely due to moisture loss over time (Tr. 217).

***Christina Hayes***

Christina Hayes also works for the St. Louis police (Tr. 222). She reweighed the substance during Bruce's second trial (Tr. 221). She concurred with the other police-employed analyst that it contained cocaine base (Tr. 224). When she weighed the

substance it only weighed 2.14 grams (Tr. 225). She also hypothesized the decline was due to possible moisture loss (Tr. 225).

***Proposed Lesser Included Offense Instruction***

Bruce was charged with second-degree trafficking of a controlled substance, in that he was alleged to have “possessed more than 2 grams of a mixture or substance containing cocaine base, a controlled substance, knowing of its presence and nature” (LF 19). Bruce asked the trial court to instruct the jury regarding the lesser included offense of possession of a controlled substance (Tr. 271-72, LF 76). His proposed instruction, which he provided in writing, was model instruction MAI-CR3d 325.02 (LF 76). He argued that such an instruction was proper because the jury could believe Bruce possessed a controlled substance but choose to disbelieve the evidence that the substance weighed over two grams (Tr. 271-72). The trial court refused to give the instruction (Tr. 271-72, LF 76).

Bruce raised the issue regarding the instruction again in his “Motion for Dismissal, Judgment of Acquittal Notwithstanding the Jury’s Verdict, and (Alternatively) New Trial” (LF 112-13). He argued the issue at the hearing on that motion (STr. 3-4). The trial court overruled the motion (STr. 6).

The trial court determined Bruce was a persistent drug offender (LF 116). Persistent drug offenders convicted of second-degree trafficking of over two<sup>3</sup> grams of a

---

<sup>3</sup> In 2012, the Missouri legislature raised this requirement from two grams to eight grams, partially eliminating the crack versus powder cocaine disparity. If this alleged crime

substance containing cocaine base must serve their sentences without the possibility of probation or parole. Mo. Rev. Stat. § 195.295. Had Bruce been convicted as a persistent drug offender of possession, rather than trafficking, he would have been eligible for probation or parole. Mo. Rev. Stat. § 195.285.

---

were committed today, it would be a simple possession. Mo. Rev. Stat. § 195.223 (2012).

**POINTS RELIED ON**

- I. The trial court erred in denying Bruce’s motion to dismiss and in retrying his case four terms after the first trial resulted in a mistrial due to a hung jury, because Article I, § 19 of the Missouri Constitution limits the Circuit Court’s lawful authority to retry such cases, in that the Circuit Court is only allowed to retry the accused within the same or the next term of court.**

Mo. Const., Art. I § 19

Mo. Rev. Stat. § 478.205 (2010)

**II. The trial court erred in failing to submit “Instruction A” on the lesser-included offense of possession of a controlled substance because failing to so instruct the jury deprived Bruce of his rights to due process of law, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Bruce was entitled to an instruction on any theory the evidence established and a jury may accept part of a witness’ testimony and reject another part of the witness’ testimony, so the jury could have accepted the lab technicians’ testimony that what Bruce possessed contained cocaine base while rejecting the inconsistent testimony as to the substance’s weight.**

*State v. Derenzy*, 89 S.W.3d 472 (Mo. banc 2002)

*State v. Hineman*, 14 S.W.3d 924 (Mo. banc 1999)

*State v. Smith*, 825 S.W.2d 388 (Mo. App. S.D. 1992)

*State v. Williams*, 313 S.W.3d 656 (Mo. banc 2010)

Mo. Rev. Stat. § 556.046

Rule 28.02

MAI-CR3d 304.11

MAI-CR3d 325.02

**III. The trial court erred in denying Bruce’s motions for judgment of acquittal as to the resisting arrest count and in accepting the jury’s guilty verdict because the State did not present sufficient evidence upon which a reasonable jury could have found Bruce guilty beyond a reasonable doubt, in that the State failed to prove that Bruce fled for the purpose of preventing the law enforcement officer(s) from making the arrest.**

*State v. Hopson*, 168 S.W.3d 557 (Mo. App. E.D. 2005)

*State v. Ondo*, 231 S.W.3d 314 (Mo. App. S.D. 2007)

*State v. St. George*, 215 S.W3d 341 (Mo. App. S.D. 2007)

Mo. Rev. Stat. § 575.150 (2010)

## ARGUMENT

- I. The trial court erred in denying Bruce’s motion to dismiss and in retrying his case four terms after the first trial resulted in a mistrial due to a hung jury, because Article I, § 19 of the Missouri Constitution limits the Circuit Court’s lawful authority to retry such cases, in that the Circuit Court is only allowed to retry the accused within the same or the next term of court.**

### Standard of Review

Usually denials of a motion to dismiss are reviewed for an abuse of discretion. *State v. Ferdinand*, 371 S.W.3d 844, 850 (Mo. App. W.D. 2012). However, whether a case should be dismissed because of a statute or constitutional provision is a legal question, which makes de novo review appropriate. *See, e.g. State v. Nichols*, 207 S.W.3d 215, 219 (Mo. App. S.D. 2006) (whether a case should be dismissed based on the Uniform Mandatory Disposition of Detainers Law is a question of law to be reviewed de novo). “Here, the question is whether the trial court drew the proper legal conclusion from the uncontested facts and, therefore, because the decision below was based upon an interpretation of the Missouri Constitution, this Court’s review is de novo.” *State v. Pierce*, 2013 WL 622739, \*2 (Mo. App. E.D. 2013), citing *Missouri Prosecuting Attorneys v. Barton County*, 311 S.W.3d 737, 740 (Mo. banc 2010).

### Analysis

Article I, § 19 of the Missouri Constitution limits the circuit court’s lawful authority to preside over criminal cases once a jury has hung. It says:

That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; **but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court;** and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law.

Mo. Const., Art. I § 19 (emphasis added). This provision explains what circuit courts may do in a criminal case once one trial has been had, and breaks such circumstances up into three distinct categories<sup>4</sup>:

<b>Result of First Trial</b>	<b>Authority the Circuit Court has to Retry the Case</b>
Not Guilty Verdict	Court may not retry the defendant
No Verdict	Court may retry the defendant during that term or the following term
Guilty Verdict	Court may retry the defendant according to the law

Bruce's case falls into the second category. His original jury trial, held November 9 and 10 of 2010, resulted in a mistrial because the jury could not reach a verdict (LF 8-9). The case was not tried again until November 30, 2011, over a year later (LF 5). No local rule governs terms of court in the City of St. Louis, so by state law new terms begin

---

<sup>4</sup> The Missouri Constitution does not appear to directly address cases where mistrials are granted for reasons other than a hung jury.

on the second Mondays in February, May, August and November. Mo. Rev. Stat. § 478.205; 22<sup>nd</sup> Circuit Local Rule 2.2<sup>5</sup>. Therefore, Bruce was retried in the fourth term following his original trial. *Id.*

Bruce filed a motion to dismiss before his second trial (LF 5, 68-69). The motion alleged that retrying him four terms after his original trial violated Article I, § 19 of the Missouri Constitution, and therefore the case should have been dismissed (LF 68). The trial court addressed the motion in a pretrial conference, denied it, and proceeded to trial (LF 5-8). He raised the issue again in his post-trial “Motion for Dismissal, Judgment of Acquittal Notwithstanding the Jury’s Verdict, and (Alternatively) New Trial” (LF 110-11). The trial court denied that motion as well (STr. 6).

***This is Not a Speedy Trial Case so Bruce’s Request was Timely***

Bruce has never claimed he was denied his right to a speedy trial. The right he is asserting is provided under Article I, § 19 of the Missouri Constitution, not § 18(a) of that same constitution. It flows from the very same sentence of the Missouri Constitution that protects him from being twice put in jeopardy. Article I, § 19 says that no person shall “be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court...”

Because it does not flow from the speedy trial right, Article I, § 19 should not be

---

<sup>5</sup> Compare with Local Rule 2.2 from the 21<sup>st</sup> Judicial Circuit which provides specifically for three terms of court per year.

treated like statutes that regulate speedy trial requests such as §§ 545.890, 545.900, 545.910 and 545.920. In the speedy trial context in *State v. Harper*, this Court held that the defendant must show he demanded a trial and that such request was unsuccessful for a reasonable amount of time before his demand for release. 473 S.W.2d 419, 424 (Mo. 1971). However, the double jeopardy provision that is coupled with and inseparable from the right Bruce has asserted is applied using different standards.

Double jeopardy claims have been addressed by both the Court of Appeals and this Court when they were raised much later in the proceedings. The “right to be free from double jeopardy is a constitutional right that goes to the very power of the State to bring the defendant in the court to answer the charge brought against him.” *State v. Neher*, 213 S.W.3d 44, 48 (Mo. banc 2007). In fact, “a claim of a double jeopardy violation ‘that can be determined from the face of the record is entitled to plain error review on appeal after trial.’” *State v. Smith*, 370 S.W.3d 891, 894 (Mo. App. E.D. 2012) citing *Neher*, 213 S.W.3d at 48.

Even when double jeopardy violations are not obvious from the record, so plain error review is inappropriate, a “number of Missouri cases have held that the constitutional protection to be free from double jeopardy is a personal right or privilege **which is waived if not timely and properly asserted at trial** or when entering a guilty plea.” *State v. Elliot*, 987 S.W.2d 418, 420-21 (Mo. App. W.D. 1999) citing *State v. Rosendahl*, 938 S.W.2d 274, 277 (Mo. App. W.D. 1997); *State v. Gaver*, 944 S.W.2d 273, 279 (Mo. App. S.D. 1997); *State v. Baker*, 850 S.W.2d 944, 947 (Mo. App. E.D. 1993) (emphasis added). Bruce filed his motion and raised his objection the morning of

trial, just like a number of Missouri cases have held is appropriate in the traditional double jeopardy context (LF 68; Tr. 5-8). He also preserved it in his motion for new trial (LF 110-11).

Bruce's filing his motion the morning of trial also complied with the Missouri Supreme Court Rules. Rule 24.04(b)(1) says "Any defense or objection which is capable of determination without trial of the general issue may be raised before trial by motion." He raised the issue before trial by motion.

While a defendant must affirmatively invoke his speedy trial right if he wishes to be protected by it, the "hung jury double jeopardy right" he now asserts is a constitutional right that goes to the very power of the State to bring the defendant to trial just like the "traditional double jeopardy right." The trial court's discretion to retry a defendant after a hung jury is expressly limited to the term of the original trial and the following term. In order for that constitutional language to have any meaning, litigants like Bruce must be entitled to discharge.

***This Issue is one of Constitutional Command***

Further, Bruce's case presents an issue of constitutional command, not mere statutory construction. The rules "applicable to constitutional construction are the same as those applied to statutory construction, **except that the former are given a broader construction, due to their more permanent character.**" *Missouri Prosecuting Attorneys v. Barton County*, 311 S.W.3d 737, 741 (Mo. banc 2010) (emphasis added). Common words "must be given their plain or ordinary meaning unless such construction will defeat the manifest intent of the constitutional provision." *Id.* at 742. Every word of

a constitutional provision is presumed to have meaning. *Id.* This is another reason why the provision should be interpreted so as to entitle Bruce to discharge. The provision establishes a right, enumerated in the Missouri Bill of Rights. Interpreting it to be mere guidance, rather than to be a mandatory limit on the circuit courts' authority, would be to render it without meaning in direct contradiction to the rules of construction.

In *State v. Fassero*, the appellant raised a similar issue to the issue here, but he had failed to do so at the trial court level. 256 S.W.3d 109, 117 (Mo. banc 2008). He tried to claim that his argument was not waived, because it was jurisdictional, but this Court determined his claim was not one of jurisdiction. *Id.* This Court explained in footnote three of its opinion that in “the absence of cited authority to support Fassero’s theory that the local rules of court determine the ‘term of court,’ as that phrase is used in art. I, § 19, the Court declines to review for plain error on the part of the trial court.” *Id.* In explaining why plain error review was inappropriate, this Court looked to Rule 20.01(c). *Id.* That rule provides:

The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any criminal proceedings pending before it, which it is otherwise by law authorized to do or take.

Rule 20.01(c). However, now that a properly preserved challenge is before the Court, Rule 20.01 should not control the Court’s analysis. Rule 20.01 does not govern, and

does not trump, the Missouri Constitution. Article V, § 5 of the Missouri Constitution gives this Court the authority to craft the Rules of Practice and Procedure. It says in relevant part:

The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules **shall not change substantive rights**, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal...

To say Rule 20.01 eliminates or renders meaningless a right guaranteed by Article I, § 19 would be to say that Rule 20.01 violates the Missouri Constitution because it changes a substantive right. Therefore, in order to uphold the constitutionality of Rule 20.01, the Court should not apply it to constitutional provisions where doing so would affect substantive rights. Instead, Rule 20.01 should only be applied to issues relating to practice and procedure, as Article V, § 5 allows. Further, Rule 19.03 mandates that the Rules “shall be construed to secure the just, speedy and inexpensive determination of every criminal” proceeding. Interpreting Rule 20.01 in such a way that would discourage the timely retrial of criminal defendants after a hung jury would not meet those ends.

***Public Policy Concerns Support Interpreting the Provision to Bar Lengthy Delays***

When a case is returned to a trial docket after a hung jury the parties are in a position unlike the standard cases on the docket: they are by definition ready for trial. Witnesses have been located, strategies planned, and investigation done. All that remains

is to pick a date. Interpreting Article I, § 19 so as to encourage prompt retrials supports a variety of public policy goals.

A policy that encourages prompt retrials promotes just outcomes. Memory fades with time, and witnesses are more likely to be able to testify accurately closer in time to the alleged events than years later. Witnesses on both sides of a case are more likely to be available immediately after they have already had to testify once, than they would be after being out of touch for a year or more. The longer physical evidence is held, the more likely it is to be lost, inadvertently destroyed, or contaminated. Innocent incarcerated defendants are more likely to plead guilty to crimes they did not commit the longer they are detained pre-trial.

Long delays in the proceedings also increase costs. The longer a defendant is detained pre-trial the more the cost of feeding, housing, clothing, medicating, protecting, and transporting him increases. While it may not matter in those cases where retrial results in conviction and the defendant would have been incarcerated anyway, when retrials result in acquittal the difference could be tens or hundreds of thousands of dollars. Further, the longer a case goes on the more time overburdened prosecutors, judges, and public defenders are required to spend on it—time that the taxpayers pay for.

Finally, victim's rights are protected by prompt retrials. Article I, § 32(5) of the Missouri Constitution provides that crime victims have the "right to the speedy disposition and appellate review of their cases, provided that nothing in this subdivision shall prevent the defendant from having sufficient time to prepare his defense[.]" The defendant has already had the opportunity to prepare for trial in these cases, so it seems

that the public policy voiced by both the legislature and the public at large in passing the Victim's Rights Amendment should be honored.

For all of these reasons, Bruce should be discharged.

**II. The trial court erred in failing to submit “Instruction A” on the lesser-included offense of possession of a controlled substance because failing to so instruct the jury deprived Bruce of his rights to due process of law, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Bruce was entitled to an instruction on any theory the evidence established and a jury may accept part of a witness’ testimony and reject another part of the witness’ testimony, so the jury could have accepted the lab technicians’ testimony that what Bruce possessed contained cocaine base while rejecting the inconsistent testimony as to the substance’s weight.**

Standard of Review

“At the close of the evidence, or at such earlier time as the court may direct, counsel shall submit to the court instructions and verdict forms that the party requests be given.” Rule 28.02(b). Further, “[t]he giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes On Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03.” Rule 28.02(f); *State v. Williams*, 313 S.W.3d 656, 659 (Mo. banc 2010).

Juries are to weigh the evidence and determine credibility. *Williams*, 313 S.W.3d at 660. “If a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established, the trial court should

instruct down.” *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002). “The jury is permitted to draw such reasonable inferences from the evidence as the evidence will permit and may believe or disbelieve all, part, or none of the testimony of any witness.” *State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999). “Doubts concerning whether to instruct on a lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide.” *Derenzy*, 89 S.W.3d at 474-75.

### Analysis

Bruce requested that the trial court instruct the jury on the lesser included offense of possession of a controlled substance, and he provided the requested instruction in writing (Tr. 271-72, LF 76). His proposed instruction was model instruction MAI-CR3d 325.02 (LF 76). It was labeled as “Instruction A” by the trial court (LF 76). Bruce argued that such an instruction was proper because the while jury could believe he possessed a controlled substance it could also choose to disbelieve evidence that the substance weighed over two grams (Tr. 271-72). The trial court is allowed to instruct on lesser included offenses, and drug possession is a lesser included offense of second-degree trafficking. Mo. Rev. Stat. § 556.046; *State v. Smith*, 825 S.W.2d 388, 391 (Mo. App. S.D. 1992). The trial court refused to give the instruction (Tr. 271-72, LF 76). This refusal was error.

The prejudice to Bruce was great. The trial court determined Bruce was a persistent drug offender so the trafficking sentence was automatically without the possibility of probation or parole (LF 116). Mo. Rev. Stat. § 195.295. Had Bruce been convicted as a persistent drug offender of possession, rather than trafficking, he would

have been eligible for probation or parole. Mo. Rev. Stat. § 195.285. And there was a reasonable basis upon which the jury could have found him guilty of possession rather than trafficking.

Two different police employees, Ms. Seger and Ms. Hayes, tested the substance Bruce allegedly possessed (Tr. 215, 224). They both agreed that the substance contained cocaine base (Tr. 215, 224). However, every time the technicians weighed the substance, they obtained a different result: once 2.51 grams, once 2.20 grams, and once 2.14 grams (Tr. 216, 217, 225). Even the greatest weight was a mere half a gram over the limit for trafficking. The lowest weight was only 0.14 grams over the limit. A paperclip weighs approximately one gram<sup>6</sup>, so the difference between one of the weights and the trafficking limit was equal to only 14% of a paperclip. Given the closeness and inconsistency of the weights, the evidence establishes a theory that Bruce possessed a controlled substance, just not in a great enough quantity to constitute second-degree trafficking.

The Court's decision in *State v. Williams* controls. 313 S.W.3d 656, 660-61 (Mo. banc 2010). Williams was convicted of second-degree robbery and argued the trial court should have instructed the jury on the lesser included offense of stealing. *Id.* at 660. The Supreme Court agreed because the "jurors could have believed Williams was complicit in the taking of money...believed [the victim's] testimony that no gun or knife was used,

---

<sup>6</sup> Gram, <http://en.wikipedia.org/w/index.php?title=Gram&oldid=556120181> (last visited May 30, 2013).

and disbelieved [the victim's] testimony about the use of physical force.” *Id.* In *Williams* the State contended that a defendant is not entitled to a lesser included instruction if the sole basis for the instruction is that the jury may disbelieve some of the State's evidence. *Id.* at 661. The Court rejected that analysis. *Id.*

The model jury instructions also support Bruce's claim. Paragraph G of the instruction on explaining how and when to instruct on defenses says:

Instructions on lesser included offenses and lesser degree offenses require a written request by one of the parties. Section 565.025.3, RSMo Supp. 2004. Moreover, such an instruction will not be given unless there is a basis for acquitting the defendant of the higher offense and convicting him of the lesser offense. State v. Hibler, 5 S.W. 3d 147 (Mo. banc 1999) and see Section 556.046, RSMo Supp. 2004. A defendant is entitled to an instruction on any theory the evidence establishes. **A jury may accept part of a witness's testimony, but disbelieve other parts.** If the evidence supports differing conclusions, the judge must instruct on each....

MAI-CR3d 304.11 (emphasis added).

The jury here could have easily accepted the evidence that Bruce possessed the substance and the substance contained cocaine base, while disregarding the evidence about weight in the same way the *Williams* jury could have believed part but not all of the victim's testimony. The alleged weight was extremely close to being a possession amount rather than a trafficking amount, and the witnesses who testified were police employees. It would not be unreasonable for jurors to believe that police employees may

have a pro-police, pro-prosecution bias. Jurors are allowed to take bias into account when choosing whether to believe evidence, and they could have easily chosen not to believe the law enforcement testimony regarding weight in a case this close. But the jurors were never given that opportunity. Further, no matter how many times the police weighed the substance, the result was different each time. No weight was measured the day Bruce allegedly possessed the substance, and no testimony or evidence was offered showing that the weight can only decrease over time, rather than increase (Tr. passim). Any of these reasons to doubt the testimony of the police employees who provided the sole evidence of weight may well have been the reason why the first trial resulted in a hung jury.

This Court has already held that jurors are allowed to believe part but not all of a witness's testimony, and if the jury's doing so could lead to conviction on a lesser included offense then the lesser included offense instruction should be given. There is no reason that police employees should be treated differently from lay witnesses in this regard. For that reason, Bruce is entitled to a new trial.

**III. The trial court erred in denying Bruce’s motions for judgment of acquittal as to the resisting arrest count and in accepting the jury’s guilty verdict because the State did not present sufficient evidence upon which a reasonable jury could have found Bruce guilty beyond a reasonable doubt, in that the State failed to prove that Bruce fled for the purpose of preventing the law enforcement officer(s) from making the arrest.**

Standard of Review

“When considering the sufficiency of the evidence on appeal, [the] Court must determine whether sufficient evidence permits a reasonable juror to find guilt beyond a reasonable doubt.” *State v. Belton*, 153 S.W.3d 307, 309 (Mo. banc 2005).

Analysis

The State did not prove beyond a reasonable doubt that Bruce resisted a felony arrest. The offense has three elements:

(1) the defendant, having knowledge that a law enforcement officer is making [a felony] arrest . . . (2) resists or interferes with the arrest by . . . fleeing from the officer . . . and (3) defendant **did so with the purpose of preventing the officer from completing the arrest.**

*State v. Ondo*, 231 S.W.3d 314, 316 (Mo. App. S.D. 2007), citing Mo. Rev. Stat. § 575.150 (emphasis added). The State did not prove the third element. In fact, the State’s evidence disproved that element.

The State relied on the testimony of two policemen to prove the resisting charge: Daut and Burkemper. The officers testified that on the night of the alleged crimes they

were working undercover and Daut saw Bruce walking through a vacant lot toward some vacant buildings (Tr. 157-59). Bruce sat down on the steps in front of one of the buildings (Tr. 160). Daut found this suspicious, so he identified himself as police and tried to speak to Bruce (Tr. 161). At that moment, before there was any reason to arrest Bruce, Bruce got up and began to flee (Tr. 162). He ran. *Id.* Burkemper wound up chasing him on foot, and eventually saw Bruce throw down what turned out to be drugs (Tr. 187). After Burkemper examined the item he yelled to Bruce he was under arrest (Tr. 188). Bruce did not stop (Tr. 188). He continued doing exactly what he had been doing before the officer attempted the arrest: he ran (Tr. 188).

Bruce's case is different from *State v. Hopson*, 168 S.W.3d 557, 561-62 (Mo. App. E.D. 2005). In *Hopson*, the defendant stopped his car after dropping some cocaine base, and then he did not flee until **after** the police officer picked up the drugs. *Id.* at 561. The Court determined that evidence Hopson fled **after** the officer discovered the drugs led to the inference that he fled to prevent the arrest. However, Bruce's purpose in running could not have been preventing Burkemper (or Daut) from completing the arrest. He started running before the officers had a reason to arrest him. He started running before the officers tried to arrest him. And the state presented no evidence that his reason for running ever changed from whatever it was when he started running. Had Bruce stopped when the officer told him he was under arrest, and then started running again, there would be some reasonable inference that he ran the second time to avoid arrest. But that is not the case here.

Bruce's case is also different from *State v. St. George*, 215 S.W3d 341 (Mo. App. S.D. 2007). In *St. George*, a motorcycle officer pulled the defendant over for a traffic infraction. *Id.* at 343. After stopping, the defendant sped away. *Id.* He stopped again and sped away again. *Id.* He stopped a third time. *Id.* After stopping the third time, the defendant sped away a third time, and in doing so he drove in a very careless manner that constituted assault on a law enforcement officer, as the motorcycle officer was nearly run over. *Id.* at 344. He was charged with resisting a felony arrest, and ultimately the Court of Appeals determined there was sufficient evidence to support the conviction. *Id.* at 345-46. That court determined that Mr. St. George's actions throughout the incident could change the nature of the crime (from what was originally resisting a lawful stop to what became resisting a felony arrest). *Id.*

Unlike Mr. St. George, Bruce's conduct did not stop. He did not stop. When he saw the officers he ran and he did not stop running until he got to the house where he was ultimately arrested (Tr. 188-90). Unlike St. George, who made multiple decisions to drive away, the only time Bruce started to run he could not have intended to resist arrest because there was no arrest to resist.

Because the State failed to prove the third element of the charge, Bruce's conviction for resisting a felony arrest by flight should be reversed, and he should be discharged.

## CONCLUSION

Bruce requests that both of his convictions be reversed and he be discharged because of the violation of Article I, § 19 of the Missouri Constitution. If the trafficking conviction is not reversed because of that issue, he requests that it be reversed and remanded for a new trial due to the instructional error. If the resisting arrest conviction is not reversed due to the constitutional issue, Bruce request that conviction be reversed and due to insufficient evidence.

Respectfully submitted,

/s/ Roxanna A. Mason

Roxanna A. Mason, MOBar #61210  
Assistant Public Defender  
1010 Market Street, Suite 1100  
Saint Louis, Missouri 63101  
Phone: (314)340-7662  
FAX: (314)340-7685  
Email: Roxy.Mason@mspd.mo.gov

ATTORNEY FOR APPELLANT

## CERTIFICATE OF SERVICE AND COMPLIANCE

I certify (1) that on June 14, 2013, the foregoing and a copy of Appellant's Substitute Appendix were served on the Office of the Attorney General via the Missouri Electronic Filing System, (2) this brief includes the information required by Rule 55.03 and it complies with the page limitations of Rule 84.06 (3) this brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and contains 6841 words, and (4) I scanned the document for viruses with Symantec Endpoint Protection Anti-Virus software and it is virus-free.

/s/ Roxanna A. Mason