

**IN THE  
MISSOURI SUPREME COURT**

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<b>STATE OF MISSOURI,</b>	)	
	)	
	)	<b>Respondent,</b>
	)	
<b>vs.</b>	)	<b>No. SC88894</b>
	)	
<b>BRIAN FASSERO,</b>	)	
	)	
	)	<b>Appellant.</b>

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. CHARLES, MISSOURI  
ELEVENTH JUDICIAL CIRCUIT  
THE HONORABLE NANCY L. SCHNEIDER, JUDGE**

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**APPELLANT’S SUBSTITUTE REPLY BRIEF**

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## **JURISDICTIONAL STATEMENT**

Appellant adopts and incorporates by reference the jurisdictional statement from his opening substitute brief.

## **STATEMENT OF FACTS**

Appellant adopts and incorporates by reference the statement of facts from his opening substitute brief.

## POINTS RELIED ON

### I.

The trial court abused its discretion in ordering a mistrial of Mr. Fassero's first trial and in overruling his motion to dismiss thereby allowing the case to go to a second trial following this mistrial, because this second trial, following the *sua sponte* mistrial ordered by the trial court, subjected Mr. Fassero to double jeopardy in violation of his rights under the due process clauses of the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, in that there was no manifest necessity for the trial court to *sua sponte* declare a mistrial after the court received a note from the jury, which stated that it had come to a "final vote of 10 not guilty and 2 jurors voting guilty," because the jury had only deliberated for a little over four hours, it was the middle of the afternoon, the trial court had not given the jury a hammer instruction, and the trial court did not share the note with Mr. Fassero and did not ask him whether or not he wanted the hammer instruction to be given. Instead, the court called the jury into the courtroom, inquired through leading questioning whether jurors believed they would be able to reach a unanimous verdict, and when they said no the court declared a mistrial without warning.

*United States v. Charlton*, 502 F.3d 1 (1<sup>st</sup> Cir. 2007);

*Rogers v. United States*, 422 U.S. 35 (1975);

*United States v. Frazin*, 780 F.2d 1461 (9<sup>th</sup> Cir. 1986)

*United States v. Lara-Ramirez*, --- F.3d ---, 2008 WL 642528 (1<sup>st</sup> Cir.

(Puerto Rico));

The Code of Judicial Conduct, Rule 2, Canon 3(B)(7);

Missouri Supreme Court Rule 27.02(m); and

MAI-CR3d 312.10.

### III.

**The trial court erred and abused its discretion in overruling Mr. Fassero's objection to State's Exhibit No. 13, a 2003 Illinois indictment against him for two counts of aggravated criminal sexual abuse against an unnamed child under thirteen, because the indictment was not admissible in the second stage of his bifurcated jury trial under § 557.036, and its admission violated Mr. Fassero's rights to due process, a fair trial, and confrontation as guaranteed by 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that (1) Mr. Fassero was unable to confront and cross-examine his Illinois accuser because no witnesses were presented in his trial concerning those allegations; and (2) the indictment was not legally relevant because the actions of a grand jury do not reflect upon Mr. Fassero's history or character -- what is relevant is whether or not he committed those offenses and the actions of a grand jury are mere allegations that must be proved and are not proof of those acts. Mr. Fassero was prejudiced because the jury assessed the maximum punishment.**

*United States v. Juwa*, 508 F.3d 694 (2<sup>nd</sup> Cir. 2007);

*In re Care and Treatment of Coffman*, 225 S.W.3d 439 (Mo. banc 2007);

*Jamison v. State, Dept. of Social Servs., Div. of Family Servs.*, 218 S.W.3d 399 (Mo. banc 2007);

*State v. Clark*, 197 S.W.3d 598 (Mo. banc 2006); and

§ 557.036, RSMo Cum. Supp. 2004.

#### IV.

The trial court plainly erred in overruling Mr. Fassero's motion to dismiss and in allowing the case to go to a second trial, because the trial court did not have jurisdiction to try Mr. Fassero for this offense, violating his rights under Article I, § 19 of the Missouri Constitution, in that Mr. Fassero's first trial ended in a hung jury on June 18, 2004, after the trial court *sua sponte* declared a mistrial, and his second trial did not commence until January 18, 2005, and because Article I, § 19 of the Missouri Constitution specifically provides that "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 Mr. Fassero's second trial date did not commence within that required time period, the court no longer had jurisdiction over the case.

*State v. Whitmore*, 948 S.W.2d 643 (Mo. App. W.D. 1997); and  
Mo. Const., Art. I, §§ 18(a) and 19.

## ARGUMENT

### I.

The trial court abused its discretion in ordering a mistrial of Mr. Fassero's first trial and in overruling his motion to dismiss thereby allowing the case to go to a second trial following this mistrial, because this second trial, following the *sua sponte* mistrial ordered by the trial court, subjected Mr. Fassero to double jeopardy in violation of his rights under the due process clauses of the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, in that there was no manifest necessity for the trial court to *sua sponte* declare a mistrial after the court received a note from the jury, which stated that it had come to a "final vote of 10 not guilty and 2 jurors voting guilty," because the jury had only deliberated for a little over four hours, it was the middle of the afternoon, the trial court had not given the jury a hammer instruction, and the trial court did not share the note with Mr. Fassero and did not ask him whether or not he wanted the hammer instruction to be given. Instead, the court called the jury into the courtroom, inquired through leading questioning whether jurors believed they would be able to reach a unanimous verdict, and when they said no the court declared a mistrial without warning.

Respondent states that Mr. Fassero does not claim that the trial court erred in not revealing the numerical split to counsel before it *sua sponte* declared a mistrial (Resp. Br. at 19, n. 2). Mr. Fassero does claim that the trial court erred in not disclosing the note to counsel before declaring a mistrial. In fact, the trial courts failure to do so plays a large part in why there was not a manifest necessity to declare a mistrial, resulting in a double jeopardy violation.

At Mr. Fassero's second trial, he moved to dismiss based on double jeopardy, and in doing so he contended that a second trial after the trial court had declared a mistrial at the first trial without his consent would result in double jeopardy (Tr. 1-18). He noted that because the trial court had not informed him of the contents of the jury note that had indicated their voting split he "was unable to make an intelligent response or any objection whatsoever with respect to the state of jury deliberations" (Tr. 18). If he had known the exact contents of the jury note in question, he would have moved for a "hammer" instruction (Tr. 21).

In Mr. Fassero's timely Motion for New Trial paragraphs 1 and 2 raised the claim that the trial court erred in denying Mr. Fassero's motion to dismiss because the second trial violated his right to be free of double jeopardy in that the trial court ordered a mistrial in the first trial without manifest necessity and "after the trial court failed to divulge an *ex-parte* communication from the jury which defendant was entitled to know to formulate his trial strategy, to wit: whether to give the hammer instruction because the court knew the jury vote count stood 10 to 2 for acquittal" (L.F. 16-17).

In his point relied, Mr. Fassero asserts, in part, that there was no manifest necessity for the trial court to *sua sponte* declare a mistrial after the court received a note from the jury, which stated that it had come to a “final vote of 10 not guilty and 2 jurors voting guilty,” because “the trial court did not share the note with Mr. Fassero and did not ask him whether or not he wanted the hammer instruction to be given.” Mr. Fassero does claim that the trial court erred in failing to reveal the numerical split to counsel before it *sua sponte* declared a mistrial.

Courts have repeatedly held that a defendant and his counsel have a right to be informed of all communications from the jury and be given an opportunity to be heard and make suggestions before the trial judge responds. ***Rogers v. United States***, 422 U.S. 35, 39 (1975); ***Roberts v. United States***, 402 A.2d 441, 443 (D.C. 1979); ***Smith v. United States***, 542 A.2d 823, 826 (D.C. 1988). *Also see, The Code of Judicial Conduct, Rule 2, Canon 3(B)(7)*, which provides that a judge “shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law,” and that a “judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding...”; and, ***Missouri Supreme Court Rule 27.02(m)*** (“*After conferring with counsel*, the court shall instruct the jury in the manner provided by Rule 28.02.”) (emphasis added). *Ex parte* communications, such as occurred here, violate a defendant’s right to due process of law. ***United States v. Frazin***, 780 F.2d 1461, 1469 (9<sup>th</sup> Cir. 1986).

Open and full communications is especially important when dealing with a possible deadlocked jury. A defendant's participation in formulating a response to a deadlocked jury may be important to ensuring the fairness of the verdict. *Id.* "The defendant should be given the opportunity to analyze the particular circumstances and assess whether a mistrial is appropriate." *Id.* One reason is because a defendant has "a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial." *United States v. Jorn*, 400 U.S. 470, 485 (1971). "[T]he judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Id.* at 486.

Although the trial court has discretion in deciding whether to declare a mistrial, this discretion is constrained by constitutional safeguards. *United States v. Charlton*, 502 F.3d 1, 5 (1<sup>st</sup> Cir. 2007). On appeal, the exercise of discretion is reviewed to ascertain whether the declaration of deadlock and ensuing mistrial was manifestly necessary. *Id.* Several interrelated factors form the foundation of this appellate inquiry, including: (1) whether alternatives to a mistrial were explored and exhausted; (2) whether counsel had an opportunity to be heard; and (3) whether the judge's decision was made after sufficient reflection. *Id.* *In accord, United States v. Lara-Ramirez*, --- F.3d ---, 2008 WL 642528 (1<sup>st</sup> Cir. (Puerto Rico)).

Here none of these factors exist, and thus the trial court's decision to declare a mistrial was not manifestly necessary. No alternatives to a mistrial were explored and exhausted. The jury had been deliberating for only between four and five hours; it was before 3:00 p.m. on a Friday afternoon; the case was tried over the course of four days and the jury was numerically close to a verdict (10-2); the hammer instruction (*MAI-CR 3d 312.10*) was not given to the jury. Counsel was not given an opportunity to be heard. The trial court failed to share the contents of the note to the parties so objections or suggestions could be made; and the court failed to tell the parties that it intended to declare a mistrial. And, the trial court decision was not made after sufficient reflection; rather, it was made from the bench based upon its *ad hoc* leading questions primarily directed to the foreperson.

There was not a manifest necessity to declare a mistrial under these specific circumstances. As this Court has stated, “the defendant has a constitutionally protected interest in proceeding to a verdict and a hasty trial judge would commit error in failing to prompt the jury to a verdict.” *State v. Anderson*, 698 S.W.2d 849, 853 (Mo. banc 1985), citation omitted. The trial court abused its discretion in *sua sponte* declaring a mistrial. Therefore, double jeopardy bared the retrial. This Court should reverse Mr. Fassero's conviction and discharge him from his judgment and sentence.

### III.

**The trial court erred and abused its discretion in overruling Mr. Fassero's objection to State's Exhibit No. 13, a 2003 Illinois indictment against him for two counts of aggravated criminal sexual abuse against an unnamed child under thirteen, because the indictment was not admissible in the second stage of his bifurcated jury trial under § 557.036, and its admission violated Mr. Fassero's rights to due process, a fair trial, and confrontation as guaranteed by 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that (1) Mr. Fassero was unable to confront and cross-examine his Illinois accuser because no witnesses were presented in his trial concerning those allegations; and (2) the indictment was not legally relevant because the actions of a grand jury do not reflect upon Mr. Fassero's history or character -- what is relevant is whether or not he committed those offenses and the actions of a grand jury are mere allegations that must be proved and are not proof of those acts. Mr. Fassero was prejudiced because the jury assessed the maximum punishment.**

#### *Confrontation clause applies to second stage of bifurcated jury trial*

Neither this Court nor the United States Supreme Court have addressed whether the constitutional right to confront witnesses applies to the punishment phase of a bifurcated jury trial (either capital or non-capital). Both Mr. Fassero

and Respondent have cited caselaw showing that there is a split of authority in other jurisdictions concerning whether the confrontation clause applies at jury sentencing. Mr. Fassero believes that his original substitute brief covers this split and will not address the split further other than to cite an additional case that supports Mr. Fassero's position: *Dixon v. State*, 2007 WL 4197310, 7 (Tex.App.-Hous. (14 Dist. (Tex.App.-Houston [14 Dist.], 2007) (Confrontation Clause does applies during the punishment phase of a criminal trial).

**(2) *Indictment does not reflect upon Mr. Fassero's history and character***

Respondent contends that a 2003 Illinois amended indictment, which alleged that between August 2000, and August 2002, Mr. Fassero fondled the vaginal area and the breast of a child who was less than thirteen years old (State's Exhibit No. 13), was admissible because it was relevant to jury's determination of Mr. Fassero's punishment in that it reflected on his character and history under § 557.036.3 (Resp. Br. at 39, 47-52). Respondent argues that "the fact that a grand jury finds probable cause to charge a person with a crime does reflect on that person's history and does reflect on that person's character" (Resp. Br. at 47). Respondent further asserts that "the fact that anywhere from 9 to 16 [grand] jurors have found sufficient evidence to find probable cause to charge appellant with two counts of aggravated criminal sexual abuse certainly *is* relevant to appellant's history and character" (Resp. Br. at 49, emphasis in original).

§ 557.036.3, RSMo Cum. Supp. 2004, provides, in pertinent part, that in the second stage of a bifurcated non-capital jury trial, evidence supporting or

mitigating punishment may be presented, and such evidence may include with the discretion of the court “evidence concerning ... the history and character of the defendant.” In *State v. Clark*, 197 S.W.3d 598, 600 (Mo. banc 2006), this Court noted that generally the trial court has discretion during the second stage of a bifurcated trial to admit whatever evidence it deems to be helpful to the jury in assessing punishment. *Id.*

But there are limits to this discretion, including a defendant’s due process right to be sentenced on accurate information. *United States v. Tucker*, 404 U.S. 443, 447 (1972). Factual matters considered as a basis for a defendant’s sentence must have some minimal indicium of reliability beyond mere allegation. *United States v. Juwa*, 508 F.3d 694, 700-01 (2<sup>nd</sup> Cir. 2007). Further, facts relevant to sentencing must be found by a preponderance of the evidence. *Id.* at 701. *Also see, State v. Clark*, 197 S.W.3d 598, 600 (Mo. banc 2006), where this Court held that the sentencing court could consider conduct underlying a charge that the defendant had been acquitted of, “*so long as that conduct has been proved by a preponderance of the evidence.*” *Id.* at 600-02, citing *United States v. Watts*, 519 U.S. 148, 157 (1997) (emphasis added).

An indictment is not evidence of guilt; it is only a finding of probable cause by a required percentage of grand jurors that a crime had been committed. *Juwa*, 508 F.3d at 701. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. *United States v. Calandra*, 414 U.S. 338, 343 (1974). The grand jury’s sources of information are widely drawn,

and it may consider incompetent evidence. *Id.* at 345-46. As a result, an indictment is not evidence of guilt, but only a finding of probable cause that a crime has been committed, and that the accused is reasonably believed to have committed it. *Id.* at 343. *Cf. Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 241 (1957) (“The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct;” arrest, by itself, is not competent evidence at either a criminal or civil trial to prove that a person did certain prohibited acts.).

Here, although at least nine of sixteen grand jurors might have found probable cause to believe that Mr. Fassero committed some crimes, this standard is lower than the required preponderance of the evidence standard. *Clark*, 197 S.W.3d at 600; *Watts*, 519 U.S. at 157.

“Probable cause” is a reasonable ground for supposing that a criminal charge is well-founded. *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 444 (Mo. banc 2007). In contrast, “preponderance of the evidence” refers to the “greater weight of evidence, or evidence which is more credible and convincing to the mind.” *Id.* Thus, the main difference between the two standards is that the probable cause standard does not require the fact-finder to weigh conflicting evidence. *Id.* Because the probable cause standard does not require a balancing of available evidence, it leaves the ultimate assessment open to the subject values of the fact finder, thereby magnifying the risk of error. *Jamison v. State, Dept. of Social Servs., Div. of Family Servs.*, 218 S.W.3d 399, 411 (Mo. banc 2007), *citing*

*Santosky v. Kramer*, 455 U.S. 745, 762 (1982). An important problem with the probable cause standard is that it places the brunt of the risk of error, if not the entire risk of error, on the alleged perpetrator. *Jamison*, 218 S.W.3d at 411.

Here, because the “conduct” underlying the indictment was not proven by a preponderance of the evidence, the indictment was inadmissible. While the evidentiary standard at sentencing is more relaxed than at trial and the burden of proof is a preponderance of the evidence and not beyond a reasonable doubt, probable cause is a lower standard than preponderance of the evidence; it requires only a probability or substantial chance of criminal activity not an actual showing of such activity. *Juwa*, 508 F.3d at 701. An indictment is *not* meant to serve an evidentiary function; its primary purpose is to acquaint the defendant with the specific crime with which he is charged. *Id.* As a result, at sentencing, an indictment or a charge within an indictment, standing alone and without independent substantiation, cannot be the basis upon which a criminal punishment is imposed. *Id.* Some additional information is needed to provide evidentiary support for the charges and their underlying facts. *Id.*

In *Juwa*, the defendant pled guilty to one count of possession of child pornography. 508 F.3d at 696. The district court imposed a sentence based, at least in part, on pending state charges against the defendant for sexual abuse of a minor. *Id.* The district court cited the fact that the defendant had engaged in sexual conduct with a minor child “on repeated occasions.” *Id.* Although the defendant had been indicted in another case for multiple counts of sexual

misconduct against a child, he had said that he only intended on pleading guilty to one of those charges. *Id.* The Second Circuit in *Juwa* remanded for resentencing because it was unclear to what extent the district court impermissibly based its sentencing on “unsubstantiated charged conduct.” *Id.* In doing so, the Second Circuit “adhere[d] to the prescription that at sentencing, an indictment or a charge within an indictment, standing alone and without independent substantiation, cannot be the basis upon which a criminal punishment is imposed.” *Id.* at 701.

The reasoning in *Juwa* should be followed in this case because while the alleged underlying acts, if proven to be true, would be relevant to Mr. Fassero’s history and character, the fact that a grand jury has returned an indictment based upon some unknown evidence selected by the State of Illinois that Mr. Fassero did not have the opportunity to confront or cross-examine in order to test its trustworthiness is not relevant to his history and character.

Mr. Fassero’s sentence must be set aside and the cause remanded for a new jury sentencing trial.

#### IV.

**The trial court plainly erred in overruling Mr. Fassero’s motion to dismiss and in allowing the case to go to a second trial, because the trial court did not have jurisdiction to try Mr. Fassero for this offense, violating his rights under Article I, § 19 of the Missouri Constitution, in that Mr. Fassero’s first trial ended in a hung jury on June 18, 2004, after the trial court *sua sponte* declared a mistrial, and his second trial did not commence until January 18, 2005, and because Article I, § 19 of the Missouri Constitution specifically provides that “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 Mr. Fassero’s second trial date did not commence within that required time period, the court no longer had jurisdiction over the case.**

Defense counsel specifically told the court on September 13, 2004, that the new court date was January 18, 2005, and that it was set so far in the future because defense counsel was concerned about the publicity generated by the hung jury (9-13-04 Tr. 2). Defense counsel also affirmatively told the trial court that he did not have “any problems” with the trial date (9-13-04 Tr.). Thus, unless the trial court was deprived of jurisdiction to try the case, Mr. Fassero would have waived any claim that the trial court erred in allowing the case to be tried on

January 18, 2005, which was a date later than the same or next term of court, because his attorney agreed to such a setting.

Missouri courts have held that a claim of double jeopardy is an assertion of a constitutional grant of immunity which is significantly different than other constitutional guarantees pertaining to procedural rights since a trial court is without the power or jurisdiction to try or punish a defendant twice for the same offense. *State v. Whitmore*, 948 S.W.2d 643 (Mo. App. W.D. 1997).

Respondent asserts that Mr. Fassero's claim is not a double jeopardy claim; rather, it is a speedy trial claim, which is not jurisdictional (Resp. Br. at 54-55).

The Missouri double jeopardy provision, **Mo. Const. art. I, sec. 19**, applies to retrial after an acquittal ("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 that provision continues, "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." **Mo. Const. art. I, sec. 19**. The Missouri speedy trial provision, on the other hand, is included in a separate section of Article I of the Missouri Constitution: "That in criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury of the county." **Mo. Const. art. I, sec. 18(a)**.

Thus, it appears that the same or next term limitation after a hung jury is a special double jeopardy protection of the Missouri Constitution and not a speedy trial provision. If so, this Court must reverse Mr. Fassero's conviction and order

him discharged because the trial court was without jurisdiction to try Mr. Fassero because his first jury failed to render a verdict and his retrial did not occur at the same or next term of court,

**CONCLUSION**

For the reasons presented in Points I and IV, Mr. Fassero requests that this Court reverse his conviction and order him discharged. For the reasons presented in Point II, Mr. Fassero requests that this Court reverse his conviction and sentence and remand for a new trial. For the reasons presented in Point III, Mr. Fassero requests that this Court reverse his sentence and remand for a new jury sentencing hearing.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,669 words, which does not exceed the 31,000 words allowed for an appellant's substitute reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee VirusScan, which was updated on March 18, 2008. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this \_\_\_\_ day of March, 2008, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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