

**IN THE SUPREME COURT
OF MISSOURI**

KEITH MEINERS,)
 Appellant,)
))
vs.) **Case No. SC96278**
))
STATE OF MISSOURI,)
 Respondent.)

APPELLANT’S SUBSTITUTE REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES 3-4

JURISDICTIONAL STATEMENT 5

STATEMENT OF FACTS 6

POINT RELIED ON

*Appellate counsel failed to raise the issue on direct appeal that the trial
court erred in refusing verdict directors on voluntary and first-degree
involuntary manslaughter..... 7-8*

ARGUMENT9-13

CONCLUSION 14

CERTIFICATES OF SERVICE AND COMPLIANCE15

TABLE OF AUTHORITIES

	<u>Page</u>
 <i>CASES:</i>	
<u>State v. Derenzy</u> , 89 S.W.3d 472 (Mo. banc 2002)	11
<u>State v. Hill</u> , 614 S.W.2d 744 (Mo. App. S.D. 1981)	10
<u>State v. Hineman</u> , 14 S.W.3d 924 (Mo. banc 1999)	7, 11
<u>State v. Jackson</u> , 433 S.W.3d 390 (Mo. banc 2014)	7,10,11,12
<u>Keith Meiners v. State</u> , No. SC96278 (Mo. banc filed March 15, 2017)	9
<u>State v. Olson</u> , 636 S.W.2d 318 (Mo. banc 1982)	7, 10
<u>State v. Pond</u> , 131 S.W.3d 792 (Mo. banc 2004).....	11
<u>State v. Santillan</u> , 948 S.W.2d 574 (Mo. banc 1997)	7, 11, 12
<u>State v. Williams</u> , 313 S.W.3d 656 (Mo. banc 2010)	11
 <i>CONSTITUTIONAL PROVISIONS:</i>	
Mo. Const., Art. I, § 10	7, 8, 9, 12, 13
Mo. Const., Art. I, § 18(a).....	7, 8, 9, 12, 13
U.S. Const., Amend. V.....	7, 9, 12, 13
U.S. Const., Amend. VI	7, 8, 9, 12, 13
U.S. Const., Amend. XIV	7, 8, 9, 12, 13

STATUTES:

Mo. Rev. Stat. § 546.040 (2000) 8, 12
Mo. Rev. Stat. § 546.380 (2000) 8, 12
Mo. Rev. Stat. § 556.046 (Cum. Supp. 2010).8, 10, 12

RULES:

Mo. Sup. Ct. Rule 29.15..... 7, 8, 9
Mo. Sup. Ct. Rule 83.08..... 14
Mo. Sup. Ct. Rule 84.06..... 14

JURISDICTIONAL STATEMENT

Appellant Keith Meiners restates and incorporates by reference his Jurisdictional Statement filed with the Substitute Statement, Brief, and Argument filed in this Court on May 22, 2017.

* * * * *

Sources will be cited as follows: trial transcript – “Tr.”; legal file in underlying criminal cause from direct appeal – “L.F.”; transcript of the evidentiary hearing – “E.H.Tr.”; and legal file on appeal of post-conviction proceeding – “PCR L.F.”

STATEMENT OF FACTS

Appellant Keith Meiners restates and incorporates by reference his Statement of Facts filed with the Substitute Brief and Argument filed in this Court on May 22, 2017.

POINT RELIED ON

The motion court clearly erred in denying Appellant Keith Meiners' Rule 29.15 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law¹ in that appellate counsel failed to raise the issue on direct appeal that the trial court erred in refusing Instructions A (a verdict director on voluntary manslaughter) and B (a verdict director on first-degree involuntary manslaughter).

The court denied Mr. Meiners' Rule 29.15 motion for post-conviction relief after an evidentiary hearing although he established by a preponderance of the evidence he was denied his rights.

Mr. Meiners was prejudiced by appellate counsel's ineffectiveness. Had appellate counsel raised this issue on direct appeal, there was a reasonable probability an appellate court would have reversed and remanded.

State v. Jackson, 433 S.W.3d 390 (Mo. banc 2014);

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

State v. Olson, 636 S.W.2d 318 (Mo. banc 1982);

State v. Santillan, 948 S.W.2d 574 (Mo. banc 1997);

U.S. Const., Amend. V;

¹ These rights are guaranteed by the United States Constitution, Fifth, Sixth, and Fourteenth Amendments and the Missouri Constitution, Article I, §§ 10 and 18(a).

U.S. Const., Amend. VI;
U.S. Const., Amend. XIV;
Mo. Const., Art. I, § 10;
Mo. Const., Art. I, § 18(a);
Mo. Sup. Ct. Rule 29.15;
Mo. Rev. Stat. § 546.040 (2000);
Mo. Rev. Stat. § 546.380 (2000); and
Mo. Rev. Stat. § 556.046 (Cum. Supp. 2010).

ARGUMENT

The motion court clearly erred in denying Appellant Keith Meiners' Rule 29.15 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law² in that appellate counsel failed to raise the issue on direct appeal that the trial court erred in refusing Instructions A (a verdict director on voluntary manslaughter) and B (a verdict director on first-degree involuntary manslaughter).

The court denied Mr. Meiners' Rule 29.15 motion for post-conviction relief after an evidentiary hearing although he established by a preponderance of the evidence he was denied his rights.

Mr. Meiners was prejudiced by appellate counsel's ineffectiveness. Had appellate counsel raised this issue on direct appeal, there was a reasonable probability an appellate court would have reversed and remanded.

In its Brief, the Respondent admitted that appellate counsel's decision not to raise on direct appeal the issue that the trial court erred in refusing Instruction B (a verdict director on first-degree involuntary manslaughter) was "incorrect." Substitute Brief for Respondent at 30, Keith Meiners v. State, No. SC96278 (Mo. banc filed March 15, 2017)[hereinafter, Substitute Brief for Respondent]. The Respondent, however, argues that "appellate counsel's decision was

² See n.1.

understandable, and . . . did not fall below an objective standard of reasonableness” because of “the legal landscape before [State v. Jackson], 433 S.W.3d 390 (Mo. banc 2014)].” Substitute Brief at 32-33.

The Respondent is incorrect in its charting of the legal landscape before State v. Jackson, *supra*. According to the Respondent, it was not until State v. Jackson that this Court “completely” overruled State v. Olson, 636 S.W.2d 318 (Mo. banc 1982). Substitute Brief for Respondent at 31-32.

In Olson, the defendant denied committing any of the charged offenses. Id. at 320. The only evidence of a lesser offense had come from the state’s evidence. Id. at 321. On appeal, Mr. Olson argued the trial court had erred in not submitting instructions on both lesser degrees of the charged offense and lesser-included offenses. Id.

This Court stated, “It could be argued that the jury’s disbelief of the evidence necessary to establish an element of the offense is such a basis [to acquit a defendant of the offense charged and convict him or her of a lesser offense].” Id. at 321 (quoting State v. Hill, 614 S.W.2d 744, 749-50 (Mo. App. S.D. 1981)). But this Court concluded, “Section 556.046.2 limits the requirement of instructing down to those instances where there is some affirmative evidence of a lack of an essential element.” State v. Olson, 636 S.W.2d at 322. Therefore, this Court required – before an instruction on a lesser offense could be given – the defense to

introduce evidence supporting the instruction.³

However, since State v. Santillan, this Court has not required the defense to introduce evidence before a trial court had to instruct on lesser offenses. 948 S.W.2d 574, 576 (Mo. banc 1997). In fact, since 1999, this Court has held that instructions on nested lesser-included offenses must be given – even where no evidence had been introduced supporting the instructions – because jurors are free to believe some, none, or all of the evidence presented. State v. Hineman, 14 S.W.3d 924, 927 (Mo. banc 1999); State v. Derenzy, 89 S.W.3d 472 (Mo. banc 2002). This Court has also held that jurors may believe some of the state’s evidence, yet disbelieve other parts. State v. Pond, 131 S.W.3d 792 (Mo. banc 2004); State v. Williams, 313 S.W.3d 656 (Mo. banc 2010). Therefore, the Respondent was incorrect in its analysis of the legal landscape before State v. Jackson, *supra*.

All the cases cited above were decided before appellate counsel wrote the Appellant’s Brief in Mr. Meiners’ direct appeal. Thus, her not raising the issue that the trial court had erred in refusing to submit an instruction on the nested lesser-included offense of involuntary manslaughter did fall below an objective standard of reasonableness.

In a footnote, the Respondent respectfully suggests this Court’s decision in

³ This Court also rested its decision on the defense’s not requesting any instructions on lesser offenses. Id. at 322.

State v. Jackson, *supra* “may warrant further consideration in an appropriate case.” Substitute Brief for Respondent at 35 n.3. Mr. Meiners respectfully suggests that no such further consideration is warranted.

The standard this Court used before State v. Heineman to interpret § 556.046.2 (Cum. Supp. 2010) was the reasonable-juror standard. To give an example: “If a reasonable juror could draw inferences from the evidence presented that the defendant did not deliberate, the trial court should instruct down.” State v. Santillan, 948 S.W.2d at 576.

As this Court pointed out in State v. Jackson, the reasonable-jury standard requires the trial court to decide what instructions to give the jury. 433 S.W.3d at 401. This “tacks far too close to the forbidden waters of directing a verdict in a criminal case.” Id. In a criminal jury trial, the court may not sum up or comment on the evidence, or charge the jury as to matter of fact. Mo. Rev. Stat. § 546.380 (2000). The jurors in a criminal case try the issues of fact. Mo. Rev. Stat. § 546.040 (2000). But, by deciding which nested lesser-included offenses the jury receives – and more importantly, which it does not – the trial court becomes a thirteenth juror. And it becomes a juror with more power than all the other jurors combined. This mixing of roles dilutes defendants’ right to a trial by jury. Mo. Const., Art. I, § 18(a).

For the reasons cited above, the motion court clearly erred in denying Mr. Meiners post-conviction relief because appellate counsel failed to raise the issue on direct appeal that the trial court erred in refusing Instructions A (a verdict

director on voluntary manslaughter) and B (a verdict director on first-degree involuntary manslaughter), thus violating his rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§ 10 and 18(a). Mr. Meiners therefore requests this Court reverse the motion court's judgment and remand this cause with directions that his conviction and sentence in the underlying criminal cause be set aside.

CONCLUSION

WHEREFORE, for the reasons set forth, Appellant Keith Meiners requests this Honorable Court reverse the motion court's judgment and remand this cause with directions that his conviction and sentence in the underlying criminal cause be set aside.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Under Missouri Supreme Court Rules 83.08(c) and 84.06(g), I hereby certify that on this 14th day of August, 2017, a copy of this Substitute Reply Brief was served via the Court's electronic filing system to Assistant Attorney General Shaun Mackelprang, Attorney General's Office, P.O. Box 899, Jefferson City, MO 65102 at shaun.mackelprang@ago.mo.gov.

/s/ Lisa M. Stroup
Lisa M. Stroup

CERTIFICATE OF COMPLIANCE

Under Mo. Sup. Ct. Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the limitations of 7,750 words for a Substitute **Reply Brief** in this Court. The word-processing software identified that this brief contains 2,286 words. It is in text-searchable PDF form.

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