

THE ERRONEOUS INSTRUCTION OF STATE V. JACKSON

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[[I]T IS THE ESTABLISHED DOCTRINE IN THIS STATE THAT UPON THE TRIAL OF A PERSON INDICTED FOR AN OFFENSE CONSISTING OF DIFFERENT GRADES, THE COURT MAY, BY SUITABLE INSTRUCTIONS, IF THE EVIDENCE WARRANTS IT, DIRECT THE JURY THAT THE CASE, AS MADE OUT BY THE EVIDENCE, BELONGS TO ONE OF THE SPECIFIED GRADES, AND THAT, IF THE EVIDENCE IS BELIEVED, THEY MUST FIND THEIR VERDICT ACCORDINGLY. THIS PRACTICE IS NOT AN INVASION OF THE PROVINCE OF THE JURY AS TO QUESTIONS OF FACT; IT IS SIMPLY APPLYING THE LAW TO THE FACTS.

THE SUPREME COURT
OF MISSOURI, 1869²

Introduction

In *State v. Jackson*³ and the companion case of *State v. Pierce*,⁴ a four-judge majority of the Supreme Court of Missouri ruled that “the jury’s right to disbelieve all or any part of the [state’s] evidence . . . is a sufficient basis in the evidence – by itself”⁵ to mandate the submission of all “nested” lesser-included offenses upon a defendant’s request.⁶ The Court reached this conclusion by erroneously conflating distinct legal and epistemic concepts, while ignoring the plain wording and history of the statute that it interpreted. These decisions usher in a new era of automatic submission of nested lesser-included offenses in Missouri criminal cases, squarely placing this state in a sparse minority of jurisdictions with a similar rule. Trial courts are now compelled to submit instructions in support of non-existent facts, evidence, and theories to facilitate the jury’s right to disbelieve the state’s evidence. That right is a legal truism to be sure, but one the Court erroneously co-opted from a separate line of cases that address an entirely different legal concept: the sufficiency of the evidence to support a verdict.

Compounding this error, the Court conflated the separate and distinct epistemic concepts of a jury’s collective belief *about* the evidence with the evidence *itself* and concluded that the jury’s right to disbelieve the evidence was the same thing as a basis *in* the evidence. Finally — and most fundamentally — these decisions confuse the jury’s right to judge the facts with the

trial court's duty to properly instruct the jury based upon its assessment of the legal sufficiency of those facts to support the submission of a lesser included instruction. Legislation should be enacted to overrule these erroneous decisions and bring Missouri back into the legal mainstream.

The Facts

On August 27, 2009, Denford Jackson entered a St. Louis coffee shop and loitered around the store for several minutes.⁷ He briefly spoke to a customer while keeping one hand in his pocket.⁸ Jackson then walked to the other side of the store, where two other customers noticed that he was standing closely behind a female employee at the cash register.⁹ From their vantage point, the customers were unable to hear what was being said or to see whether Jackson had a gun.¹⁰ "Neither customer saw Jackson leave or knew that [a crime had been committed] until the employee ran out of the kitchen [yelling] that she had been robbed."¹¹

"The employee testified that . . . when the incident began[,] . . . she was in the kitchen" and failed to "notice Jackson until he came through the door behind the cash register counter."¹² When she approached him, he grabbed her arm, turned her around, and walked her back through the same door that he had entered.¹³ The employee testified that she felt something in her back, then glanced down and saw a revolver with a silver-looking six-inch barrel.¹⁴ "After the employee gave Jackson the [cash] from the . . . register, he took her back into the kitchen, made her lie down, [and] patted her pockets . . . for additional money" before leaving the business.¹⁵ After hearing the door of the business open and close, the employee yelled for help and called police.¹⁶

Surveillance video showed Jackson entering the store with his hand in his pocket, speak briefly with a customer, and then move to the empty market side of the store.¹⁷ He then looked around and examined something he removed from his pocket before "he enter[ed] the kitchen through the door behind the cash register."¹⁸ Seconds later, the employee exited the kitchen with Jackson close behind her. He held her with one hand while his other hand pressed an object against the small of her back.¹⁹ Jackson then directed the employee behind the counter and toward the cash register.²⁰

"After the employee hand[ed] Jackson money from the cash register," the two "emerg[ed] from behind the counter."²¹ When the employee moved away from Jackson, he extended his arm to keep a plainly visible object firmly pressed against her back, grabbed her with his other hand, and turned her toward the kitchen.²² Jackson then forced the employee to the kitchen floor and patted down her pockets before he left the business.²³

A detective who viewed the video testified that he could see Jackson holding a small, dark blue or black-colored pistol to the employee's back.²⁴ In addition, when Jackson is seen inspecting the object from his pocket, the detective testified that the gestures are those of one checking to see if a revolver is loaded.²⁵

Jackson was charged with robbery in the first degree and armed criminal action.²⁶ "At the close of the evidence, [defense] counsel requested that the trial court instruct the jury on both" robbery in the first degree and robbery in the second degree.²⁷ "The only difference between the two" charges is that robbery in the first degree requires that during "the course of taking

property, the defendant" must display "what appear[s] to be a deadly weapon or dangerous instrument."²⁸ Based on the video, defense counsel argued that there was evidence to dispute the employee's testimony that Jackson had a gun.²⁹ Counsel claimed that the jury could choose either to disbelieve the employee's claim that Jackson had a gun, or to believe that she was mistaken in her belief that a gun was present.³⁰

The trial judge refused the second-degree robbery instruction, noting that if it were given on the instant facts, he would be obliged to submit it in every first-degree robbery case.³¹ "The jury found Jackson guilty of robbery in the first degree" and armed criminal action.³² He appealed.³³

The Court's Rationale

Jackson's claim that the trial court erred by refusing to instruct the jury on robbery in the second degree was "based solely on section 556.046, and he assert[ed] no state or federal constitutional right to this lesser included offense instruction."³⁴ Accordingly, the Supreme Court of Missouri stated that its rationale in *Jackson* was based entirely on its interpretation of § 556.046, construed in light of prior judicial decisions.³⁵

In pertinent part, § 556.046.2 states: "The court shall not be obligated to charge the jury with respect to an included offense unless there is a *basis for a verdict* acquitting the person of the offense charged and convicting him of the included offense."³⁶

The statute was amended in 2001 and an entirely new subsection was added which addressed the same topic.³⁷ It states:

The court shall be obligated to instruct the jury with respect to a particular included offense only if there is a *basis in the evidence* for acquitting the person of the immediately higher included offense and there is a *basis in the evidence* for convicting the person of that particular included offense.³⁸

The *Jackson* Court began its analysis by citing its 2010 decision in *State v. Williams*³⁹ to justify its position that the Missouri General Assembly's 2001 addition of subsection 3 to the statute was meaningless and that there was no substantive difference between subsections 2 and 3.⁴⁰ "The Court view[ed] these . . . provisions as interchangeable for purposes of whether the trial court is obligated to give an instruction on a first-level lesser included offense."⁴¹ As a result, the Court stated that its "interpretation of section 556.046 did not change after 2001."⁴²

With this emasculating construction of subsection 3 in place, the Court held that the statute obligates a trial court "to give an instruction on a first-level lesser included offense" when "a. a party timely requests the instruction; b. there is a basis in the evidence for acquitting the defendant of the charged offense; and c. there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested."⁴³

The Court noted that defense counsel timely requested the lesser instruction, satisfying the first requirement; and, since "the elements of second-degree robbery are a subset [of those applicable to] first-degree robbery, there [was] no dispute about the third requirement."⁴⁴ The Court concluded that the outcome of the appeal was solely dependent upon the second requirement: whether "there [was] a basis in the evidence for acquitting" Jackson of first-degree robbery.⁴⁵

The disputed legal element was whether a deadly weapon or dangerous instrument was displayed, and hence “whether the [store] employee reasonably believed the object . . . held against her back . . . was a gun.”⁴⁶ As a result, the Court found that Jackson could only establish that the trial court erred by refusing his requested instruction “if there was a basis in the evidence [for the jury] to conclude that the employee had no such belief or that [her belief] was not reasonable.”⁴⁷

The state contended “that the jury’s right to disbelieve all or part of the [prosecution’s] evidence cannot, by itself, constitute a ‘basis in the evidence’ to acquit the defendant of the . . . charged crime for purposes of section 556.046.”⁴⁸ To support this position, it relied on *State v. Olson*.⁴⁹

Prior to the enactment of subsection 3 of § 556.046, the Supreme Court of Missouri in *Olson* considered the meaning of the phrase “basis for a verdict” in subsection 2 of § 556.046.⁵⁰ The *Olson* Court noted that the Missouri Court of Appeals – Southern District in *State v. Hill*⁵¹ conceded that “[i]t could be argued that the jury’s disbelief of the evidence necessary to establish an element of the greater offense is such a basis.”⁵² Nevertheless, the *Olson* Court rejected that interpretation of subsection 2, noting, “It seems the intent [of the statute] was not to require an instructing down unless there were facts in evidence from which the jury could find the appellant NOT guilty of the higher offense AND guilty of the lesser.”⁵³

The *Jackson* Court responded to the state’s position by noting that “*Olson* [was] no longer valid” law.⁵⁴ It cited three cases decided after *Olson* that allegedly undercut its interpretation of § 556.046.2.⁵⁵ These decisions were *State v. Santillan*, *State v. Pond*, and *State v. Williams*.⁵⁶ The Court lamented that each of these decisions “fail[ed] to fasten the lid down on *Olson* strongly enough . . . to prevent the state from continuing” to argue “that [a defendant] is not entitled” to a lesser included instruction simply because the jury might disbelieve some of the state’s evidence.⁵⁷ This was because the Court had tempered its holding by the use of qualifying language which stated that “[t]o the extent that *Olson* [could] be read to require a defendant to put on affirmative evidence [that] an essential element of the higher offense [was lacking], it is overruled.”⁵⁸ With that synopsis — and a certain air of frustration — the *Jackson* Court focused its cross-hairs on *Olson* for the final time:

[T]he Court again holds that the jury’s right to disbelieve all or any part of the evidence and its right to refuse to draw needed inferences is a sufficient basis in the evidence – by itself – for a jury to conclude that the state has failed to prove the differential element. To the extent *Olson* suggests anything to the contrary, it is overruled.

All decisions as to what evidence the jury must believe and what inferences the jury must draw are left to the jury, not to judges deciding what reasonable jurors must and must not do. The Court now reaffirms those holdings because, as long as the jury has the right to disbelieve all or any part of the evidence, and refuse to draw needed inferences, section 556.046 cannot be read any other way.⁵⁹

To make it unequivocally clear that a defendant need do nothing to be entitled to a lesser included offense instruction, the Court further stated:

Now, the Court holds expressly what *Pond* and *Williams* only may have implied: a defendant not only does not need to introduce affirmative evidence, he does not have to “cast doubt” over the state’s evidence via cross-examination or explain to the judge or jury precisely how or why the jury can disbelieve that evidence and so acquit him of the greater offense and convict him of the lesser. To the extent *Olson* or any other case suggests otherwise, it no longer should be followed.⁶⁰

The Court concluded that if the extent of § 556.046 “[was] to make a lesser included offense instruction available in one . . . case but not another” depending on the trial judge’s belief in the relative strength of the state’s evidence, “the language presently chosen [in subsections 2 and 3] to accomplish that goal fails. . . .”⁶¹ It claimed that this was because “[t]here simply is no way for this Court to construe the phrases ‘a basis in the evidence to acquit the defendant,’ § 556.046.3, or ‘a basis for a verdict acquitting the defendant,’ § 556.046.2, to achieve such an end without undermining the fundamental values embodied in the presumption of innocence and the right to a jury trial.”⁶² The Court concluded the principal part of its opinion by proclaiming that “until some other language is employed, the construction given here (and in *Williams*) to subsections 2 and 3 of section 556.046 is the best — and only — construction reasonably available.”⁶³ The Court recognized the impact of this conclusion by acknowledging that it “likely will be that lesser included offense instructions will be given virtually every time they are requested.”⁶⁴

The “General Rule” in Missouri for Instructing on Lesser Included Offenses at the Time § 556.046.2 Was Enacted

Between the mid-1800s and the January 1, 1979 enactment of § 556.046, Missouri courts consistently held that an affirmative evidentiary basis was required to warrant the submission of a lesser included offense instruction.⁶⁵ These cases are exemplified by the Supreme Court of Missouri’s 1962 decision in *State v. Washington*.⁶⁶ In *Washington*, the Court held that the trial judge properly refused a lesser instruction on common assault for a defendant charged with assault with intent to rob.⁶⁷ Citing Corpus Juris Secundum, the *Washington* Court stated, “Before instructions on the included or lesser offenses are compelled . . . there must be evidentiary support for such offenses.”⁶⁸ By the time § 556.046 was enacted in 1979, the Supreme Court of Missouri had never held that the jury’s right to disbelieve the state’s evidence — standing alone — was a sufficient basis to support the submission of a lesser included offense instruction. To the contrary, the Court’s opinions consistently rejected this approach.⁶⁹

The Legislative Intent of § 556.046.2

The genesis of § 556.046 was Senate Bill 60, passed in 1977 as part of Missouri’s new criminal code, which became effective on January 1, 1979. The code drafters’ 1973 Comment to § 556.046 states that “[t]his section follows the present approach” which is “consistent with the general rule that instructions on the included offenses are not required unless there is a basis for finding the accused innocent of the higher offense and guilty of the

lesser.”⁷⁰ The Comment cites the Supreme Court of Missouri’s decision in *State v. Craig*⁷¹ as an example of that general rule.⁷²

In *Craig*, the defendant was convicted of attempted first-degree robbery.⁷³ On appeal, he argued the trial court erred by refusing to instruct the jury on the lesser offense of common assault.⁷⁴ The Court held otherwise, stating that “[t]he evidence in this case does not warrant, much less require, the submission of an instruction on common assault.”⁷⁵ It concluded that “[w]here, as here, the proof of defendant’s guilt of the offense charged was strong and substantial and the evidence clearly showed commission of the more serious crime as charged, it was not therefore necessary to instruct on a lesser and included offense.”⁷⁶

In a different case, decided two years after the enactment of § 556.046.2 (and later cited by *Olson*), the Missouri Court of Appeals – Southern District in *State v. Hill*⁷⁷ heard a capital murder defendant’s claim that the trial court erred by refusing to instruct the jury on various lesser included assault offenses. The court noted that the trial judge’s “duty” to instruct down was now statutorily defined by § 556.046.1.⁷⁸ It also observed that the “key phrase of that section is ‘a basis for a verdict.’”⁷⁹

Foreshadowing the Supreme Court’s interpretation of that same subsection 34 years later in *Jackson*, the *Hill* court acknowledged that “[i]t could be argued that the jury’s disbelief of the evidence necessary to establish an element of the greater offense is such a basis.”⁸⁰ The court, however, recognized that “such a construction would require an instruction on a lesser included offense in the vast majority of cases.”⁸¹ Before settling on the proper interpretation of the phrase “basis for a verdict,” the court examined the history of § 556.046, noting that “[i]t is appropriate to construe a statute with reference to the comment accompanying that statute when enacted.”⁸² Taking that into account, the *Hill* court observed that the *Craig* decision was cited by the drafters of the criminal code in their 1973 Comment to § 556.046.⁸³

Quoting directly from *Craig*, the *Hill* court stated: “In order to require the giving of an instruction on the included or lesser offense there must be evidentiary support in the case for its submission.”⁸⁴ *Hill* also cited the Supreme Court’s 1970 opinion in

*State v. Achter*⁸⁵ for the proposition that “[e]ven if the jury were to ‘disbelieve some of the evidence of the State, or decline to draw some or all of the permissible inferences, (this) does not entitle the defendant to an instruction otherwise unsupported by the evidence’”⁸⁶

The drafters’ Comment to § 556.046, in conjunction with the cases cited above, clearly demonstrates that Missouri’s longstanding common law rule governing the submission of lesser included offense instructions — formally embodied by the Legislature in § 556.046 — is in direct contradiction to the *Jackson* Court’s tenuous interpretation of the statute.

Prior Supreme Court Decisions Impacting § 556.046.2

The *Jackson* Court noted that it had addressed § 556.046.2 in three earlier decisions.⁸⁷ The first was *State v. Santillan*,⁸⁸ a first-degree murder case decided prior to the 2001 enactment of § 556.046.3. In *Santillan*, the Court held that “Section 556.046.2 . . . requires only that there be a basis for the jury to acquit on the higher offense in order for the court to submit an instruction for the lesser included offense.”⁸⁹ In addition, the Court stated that “[i]f a reasonable juror could draw inferences from the evidence presented that the defendant did not deliberate, the trial court should instruct down. The defendant is not required to put on affirmative evidence as to lack of deliberation to obtain submission of a second degree murder instruction.”⁹⁰

The *Santillan* Court overruled *Olson* to the extent that it could be read to require a defendant to offer affirmative evidence in support of a lesser included instruction.⁹¹ What *Santillan* did not do, however, was undercut the intent of the Legislature embodied in § 556.046.2. *Santillan* unequivocally required that inferences drawn by the jury against the state’s theory be based on “the evidence presented” rather than the notion that the jury’s right to disbelieve the evidence is itself a basis in the evidence.⁹²

The second decision was *State v. Pond*,⁹³ a case decided three years after the 2001 enactment of § 556.046.3. In *Pond*, the defendant was convicted of first-degree statutory sodomy and claimed on appeal that the trial court erred by refusing to instruct down on the lesser charge of child molestation in the first degree.⁹⁴ On appeal, the state noted that “Pond presented



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no affirmative evidence” at trial and argued that he was therefore “not entitled to a lesser-offense instruction merely because a jury might disbelieve some of the State’s evidence.”⁹⁵ In response, the Court noted that the cases offered by the state in support of its argument relied on *Olson*. Citing *Santillan*, the Court stated, “This Court, however, *overruled Olson, and its interpretation of section 556.046.2.*”⁹⁶

The *Pond* Court’s characterization of *Santillan*’s holding is correct only insofar as *Santillan* found that *Olson* interpreted § 556.046.2 to require that a defendant present affirmative evidence to be entitled to a lesser included instruction. However, contrary to the categorical nature of *Pond*’s assertion regarding the scope of *Santillan*, that decision *did not* overrule *Olson*’s interpretation of § 556.046.2. Rather, the *Santillan* Court distinguished its *own* interpretation of § 556.046.2 – that the submission of a lesser charge must be *based in the evidence presented* – from the *Olson* Court’s holding that § 556.046.2 required a *defendant to present affirmative evidence* to be entitled to a lesser included instruction.

Correctly read, *Santillan* merely held “[t]o the extent that *Olson* . . . [could] be read to require a defendant [present] affirmative evidence as to the lack of an essential element of the higher offense [it is] overruled.”⁹⁷ Thus, notwithstanding *Pond*’s categorical assertion to the contrary, *Santillan did not* overrule *Olson*’s interpretation of section 556.046.2 in whole cloth, but *only* to the extent that *Olson* read subsection 2 to require that a *defendant present affirmative evidence* to receive a lesser included instruction.⁹⁸ As a result, *Pond* mischaracterized *Santillan*’s holding by sweeping with too broad a brush, overstating the extent to which it modified *Olson*.

The third decision was *State v. Williams*, decided nine years after the enactment of § 556.046.3.⁹⁹ In *Williams*, the defendant was charged with and convicted of second-degree robbery.¹⁰⁰ On appeal, he claimed that the trial court erred by refusing to submit the lesser included offense of felony stealing.¹⁰¹ The Court agreed, citing *Santillan* for the proposition that “‘Section 556.046.2 . . . requires only that there be a *basis* for the jury to acquit on the higher offense in order for the court to submit an instruction for the lesser included offense.’”¹⁰²

The *Williams* Court correctly identified the relevant basis for instructing down as being located *in the evidence* presented at trial. However, in reaching its ultimate decision that the trial court erred by not submitting the felony stealing instruction, the Court wrongly concluded that the jury’s right to disbelieve the state’s evidence was a sufficient basis for a verdict to acquit the defendant of the higher offense and convict him of the lesser.

In reaching this conclusion, the *Williams* Court ignored the legislative intent embodied in § 556.046 and reflected in the drafters’ Comment. The Comment cited the *Craig* decision and highlighted its admonition that “[i]n order to *require* the giving of an instruction on the included or lesser offense there *must be evidentiary support* in the case *for its submission.*”¹⁰³ It noted that *Craig* was an example of the current practice, which followed the general rule that the drafters intended § 556.046 to follow. The *Craig* decision provides *no* support for the Court’s current position that the jury’s right to disbelieve the state’s evidence is itself a basis in the evidence or a basis for a verdict requiring the submission of a lesser-included offense.

Subsection 2 and Legislative Intent Circumstances, Conditions, and Context

When attempting to determine the meaning of a statute, the Supreme Court of Missouri has observed that “[i]nsight into the legislature’s object can be gained by identifying the problems sought to be remedied and the *circumstances and conditions existing at the time of the enactment.*”¹⁰⁴ The Court has established rules that it purports to follow when attempting to divine the intent behind a particular legislative enactment. One of these “[w]ell-settled principles of statutory interpretation require[s] [the court] to *ascertain the legislative intent* from the language of the act, considering the words used in their plain and ordinary meaning, and *to give effect to that intent whenever possible.*”¹⁰⁵ Another well-settled rule is that “[i]f the statute is ambiguous, [the court] attempt[s] to *construe it in a manner consistent with the legislative intent, giving meaning to the words used within the broad context of the legislature’s purpose in enacting the law.*”¹⁰⁶

Overlooking these longstanding rules of statutory construction, the *Pond*, *Williams*, and *Jackson* Courts wholly failed to analyze the “circumstances and conditions existing at the time of the [statute’s] enactment.”¹⁰⁷ These circumstances and conditions included more than 100 years of Missouri common law governing the submission of lesser included offenses — a judicial history completely at odds with the notion that the jury’s right to disbelieve the state’s evidence is equivalent to a basis for a verdict. These circumstances and conditions also included the 1973 Comment to § 566.046, which made it unmistakably clear that the intent of the statute was to codify the general rule set forth in *State v. Craig*,¹⁰⁸ a rule ignored by *Pond*, *Williams*, and *Jackson*.

The Supreme Court’s own rules of statutory construction required it to interpret any ambiguity it found in the § 556.046.2 phrase “basis for a verdict” “in a manner *consistent with the legislature’s intent, [so as to] giv[e] meaning” to that intent* in the “broad context” of the legislative purpose to codify the existing general rule of Missouri common law governing the submission of lesser included offenses.¹⁰⁹ But the Court refused to do so, and thereby failed to follow its own rules.

The Jackson Court’s Failure to Properly Analyze the 2001 Amendment to § 556.046.3

As noted by the *Jackson* majority, both the defendant’s argument on appeal and the legal basis for the Court’s opinion were based *entirely* on its interpretation of § 556.046.¹¹⁰ With that concession, the *Jackson* Court began its analysis of the statute by declaring that the legislature’s 2001 amendment — which added subsection 3 — was essentially meaningless because it viewed “these statutory provisions [subsections 2 and 3] as interchangeable [when deciding] whether the trial court is obligated to give an instruction on a first-level lesser included offense.”¹¹¹ The single authority cited by the Court in support of its position was its 2010 decision in *State v. Williams*.¹¹² The Court observed that *Williams* “quot[ed] both subsections [of the statute] without noting any substantive difference between the two.”¹¹³ Based solely on *Williams*’ failure to recognize — or at least articulate — the differences in wording between subsections 2 and 3 of § 556.046, the *Jackson* Court summarily concluded that its “interpretation of section 556.046 did not change after 2001.”¹¹⁴ No further analysis or justification on this point was

offered. Yet *Williams* was not the first time the Court had ignored subsection 3. In 2004, only three years after the new provision's enactment, the Court had also refused to acknowledge its significance in *State v. Pond*.

Rules of Statutory Construction

The Supreme Court of Missouri has stated, "It is presumed that the legislature was aware of the interpretation placed upon existing statutes by the courts, and that *in amending a statute, the intent was to effect some change in the existing law.*"¹¹⁵ "This Court presumes the legislature intended every word, clause, sentence, and provision of a statute to have effect and did not insert superfluous language into the statute."¹¹⁶

The Court has also stated, "*Each word, clause, sentence, and section of a statute is given meaning*"¹¹⁷ "When the legislature has altered an existing statute *such change is deemed to have an intended effect, and the legislature will not be charged with having done a meaningless act.*"¹¹⁸ "Courts have *no right, by construction, to substitute their ideas of legislative intent for that unmistakably held by the Legislature and unmistakably expressed in legislative words. 'Expressum facit cessare tacitum.'*"¹¹⁹

The *Jackson* Court's willful failure to recognize and address the differences between subsections 2 and 3 of § 556.046 is, of course, directly contrary to its self-imposed rules of statutory construction. The Court should have utilized these principles to interpret and understand the meaning behind the enactment of subsections 2 and 3. Its refusal to do so greatly diminishes the credibility of its decision.

Section 556.046.2 states that the "court shall not be obligated to charge the jury with respect to an included offense unless there is a *basis for a verdict* acquitting the person of the offense charged and convicting him of the included offense."¹²⁰ Section 556.046.3, in contrast, states that "the court [is] obligated to instruct the jury with respect to a particular included offense only if there is a *basis in the evidence* for acquitting the person of the immediately higher included offense *and* there is a *basis in the evidence* for convicting the person of that particular included offense."¹²¹

As written, one could argue that § 556.046.2 is ambiguous as to *where* the basis for a verdict is grounded for purposes of instructing the jury. It could be claimed that this basis resides wholly with the jury. Alternatively, it could be argued that this basis resides entirely in the evidence. One could also assert that this basis is found in both the jury's will *and* in the evidence. In light of this uncertainty, the Court's own rules of statutory construction required it to interpret § 556.046.2 in a manner consistent with the Legislature's intent and to give meaning to that intent.¹²² To discern and give meaning to that intent, the Court should have examined both Missouri common law controlling the submission of lesser included offenses prior to the statute's enactment and the drafters' Comment to § 556.046.

In 2001, the addition of subsection 3 clarified any ambiguity in § 556.046.2, adding substance, specificity, and meaning to the statute while making it clear that the *basis for a verdict* referred to in § 556.046.2 *must be grounded in the evidence itself – and nowhere else –* to both justify a potential acquittal of the immediately

higher offense *and* to justify the possible conviction of an included offense. Unfortunately, however, the *Jackson* Court's interpretation of subsection 3 ignored the longstanding rules of statutory construction established by its own precedent. The Court failed to acknowledge the legislative intent behind the addition of subsection 3 and the presumption that the Legislature was aware of the Court's interpretation of § 556.046.2. The Court also failed to acknowledge that the intent behind § 556.046.3 was to effect a change in existing law.¹²³ It refused to indulge the presumption that "the legislature intended every word, clause, sentence, and provision" of § 556.046.3 to have meaning, and that there was no intent to "insert superfluous language into the statute."¹²⁴ As a result, the Court failed to give meaning to each "word," "clause," and "sentence" in § 556.046.3 by ignoring the phrase, "basis for a verdict."¹²⁵ Finally, it refused to acknowledge that the addition of subsection 3 had an "intended effect."¹²⁶ Effectively, the Court charged the Legislature with "having done a meaningless act."¹²⁷ With its strained interpretation of § 556.046.3, the *Jackson* Court substituted *its own* notion of good judicial policy in place of the statutory intent expressed by the Legislature.¹²⁸

The Jury's Right to Believe/Disbelieve the Evidence

A constant refrain heard in the *Jackson* decision is that "[a] *jury may accept part of a witness's testimony, but disbelieve other parts.*"¹²⁹ This statement and the Court's citation to *State v. Redmond* appears to have been borrowed

"WITH ITS STRAINED INTERPRETATION OF § 556.046.3, THE JACKSON COURT SUBSTITUTED ITS OWN NOTION OF GOOD JUDICIAL POLICY IN PLACE OF THE STATUTORY INTENT EXPRESSED BY THE LEGISLATURE."

from the Court's 2004 opinion in *Pond*.¹³⁰ The *Redmond* Court had previously co-opted this phrase from its decision in *State v. Dulany*.¹³¹ The Court's use of the rule in *Dulany*, however, had nothing to do with Missouri law governing the submission of lesser included offenses.

In *Dulany*, one of the central issues was whether there was *sufficient evidence* for the jury to conclude that the defendant alone had committed the charged acts.¹³² After recounting *Dulany's* version of the events in question, the Court noted that the jury was not required to believe her self-serving explanation.¹³³ Instead, it was entitled to accept or reject all or any part of her testimony.¹³⁴ The *Dulany* Court concluded its analysis on this point by reciting the often-stated legal axiom that "[i]t is within the jury's province to believe all, some, or none of the witness' testimony in arriving at their verdict."¹³⁵ This passage in *Dulany* was shortened and paraphrased by the *Redmond* Court before it was borrowed from, and incorporated into, the *Pond* and *Jackson* decisions.

The first iteration of this rule (hereinafter the "all, part, or none rule") in a civil case was the Supreme Court of Missouri's 1842 decision in *Henry v. Forbes*.¹³⁶ The *Forbes* Court, in response

to a defendant's claim that the verdict was against the weight of the evidence, stated:

It will scarcely be contended, even by the zealous advocate of the defendant, that the jury had not the liberty and the right to believe or not to believe the whole or any part of the testimony of the defendant, although he was called on by the plaintiffs to testify.¹³⁷

The rule's first clear formulation in a criminal case (outside the context of a jury instruction) was the Supreme Court of Missouri's 1903 decision in *State v. McKenzie*.¹³⁸ In response to the defendant's claim that there was "no evidence to support the verdict," the Court countered:

[I]t must not be overlooked, under our form of trial, that the jury had the right to pass upon his testimony. They could believe or disbelieve him — accept or reject any part of his testimony. They were the sole and exclusive judges of the credibility of the witnesses testifying in the cause, and of the weight to be attached to their testimony.¹³⁹

These decisions demonstrate that the all, part, or none rule originated in cases: 1) where challenge was made to the sufficiency of the evidence; or 2) in which the verdict was claimed to be against the weight of the evidence. It did *not* originate as a rule governing the submission of lesser included instructions. From its inception in 1842, the rule was nearly always cited by Missouri courts as an aphoristic riposte to these two types of claims.¹⁴⁰ When these arguments were advanced, courts typically responded by noting that while the evidence may have been in conflict, it was the jury's right to believe all, part, or none of that evidence.

On very rare occasions, the all, part, or none rule has been invoked by the Supreme Court of Missouri in support of its conclusion that a trial court erred by not submitting an instruction for a lesser included offense. The two earliest cases in which this occurred are *State v. Williams* in 1925¹⁴¹ and *State v. Carey* in 1926.¹⁴² However, despite the Court's reference to the rule in these decisions, there was a substantial *evidentiary basis* in each case that should have prompted the trial court to submit the lesser instruction. Importantly, in neither *Williams* nor *Carey* did the Court assert that the jury's right to disbelieve all or part of the state's evidence was — standing alone — a basis in the evidence that would support the lesser instruction.

After the *Williams* and *Carey* decisions in the 1920s, the all, part, or none rule was again consistently invoked with fidelity to its judicial origins until 1971. In that year, the Supreme Court of Missouri again repurposed the rule in the case of *State v. Rust*¹⁴³ to justify its conclusion that the trial court should have submitted a lesser included instruction.¹⁴⁴ In support of this maneuver, the *Rust* Court stated, "The rule is well established that a jury may believe all of the testimony of any witness, or none of it, or it may accept part and reject part. This rule has been articulated most clearly in civil cases, but the rule is the same in criminal cases."¹⁴⁵

As stated, that much is true. The Court, however, failed to acknowledge that each of the cases it cited in support of this well

established rule had invoked it for a completely different purpose — to reject claims that the evidence was insufficient to support the verdict.¹⁴⁶ None of the cases cited by the *Rust* Court relied on the rule to justify the submission of a lesser included offense on the theory that the jury might disbelieve all or part of the state's evidence. Most fundamentally, however, in *Rust* there was a basis in the evidence for the submission of the lesser instruction and the Court never claimed that the lesser instruction was warranted by the jury's right to disbelieve the state's evidence.

In spite of these exceptional applications, Missouri's common law rule (set forth in *Craig*) governing the submission of lesser included offenses existed in harmony with the all, part, or none rule both before and after the *Williams* and *Carey* decisions in the 1920s, up until the *Rust* opinion in 1971.¹⁴⁷ Even then, and despite *Rust's* misapplication of the rule, it continued to co-exist in amity with Missouri's common law rule governing the submission of lesser included instructions for another 28 years before being once again uprooted and repurposed by the Supreme Court in 1999.¹⁴⁸ This occurred in *State v. Hineman*.¹⁴⁹

In *Hineman*, the defendant was charged with one count of assault in the first degree.¹⁵⁰ He argued that the trial court should have instructed the jury on the lesser offense of second-degree assault.¹⁵¹ The Supreme Court agreed and held that "the trial court erred [by] refusing . . . the requested instruction."¹⁵² In reaching this conclusion, the Court stated that "[t]he 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."¹⁵³ Eleven years after the *Hineman* decision, it was cited in *State v. Williams* as authority for application of the all, part, or none rule to the submission of lesser included offenses based on the jury's right to disbelieve the state's evidence.¹⁵⁴ *Williams*, in turn, was the case principally relied upon by the *Jackson* Court in support of its conclusion that lesser included instructions must be submitted for all nested offenses. The fundamental problem with *Jackson's* final repurposing of the all, part, or none rule to justify the automatic submission of lesser offenses is not simply its contextually incorrect application; rather, the problem lies in the Court's knowing disregard of countervailing statutory authority and the resulting evisceration of the trial court's common law duty to appropriately instruct the jury based on the legal sufficiency of the facts to support applicable instructions:

The Jackson Court's Erroneous Conflation of the Jury's "Right to Disbelieve the Evidence" with a "Basis in the Evidence"

To justify its holding, the *Jackson* Court invoked the all, part, or none rule, stating that "[a] jury *always* can disbelieve all or any part of the evidence, just as it always may refuse to draw inferences from that evidence."¹⁵⁵ Later in its opinion, the Court cited the passage in *State v. Redmond* that "[a] jury may accept part of a witness's testimony, but disbelieve other parts."¹⁵⁶ The Court then — for the first time ever — married the all, part, or none rule with the phrase "a basis in the evidence," taken from subsection 3 of § 556.046, to anchor its holding that:

THE ERRONEOUS INSTRUCTION CONTINUED FROM PAGE 74

... the jury's right to disbelieve all or any part of the evidence and its right to refuse to draw needed inferences is a sufficient basis in the evidence — by itself — for a jury to conclude that the state has failed to prove the differential element. To the extent *Olson* suggests anything to the contrary, it is overruled.¹⁵⁷

In reaching this conclusion, the *Jackson* Court pronounced that its decision was “based solely on the language of section 556.046.”¹⁵⁸ However, as if anticipating the criticism that was sure to follow from this dubious construction of subsection 3, the Court — almost apologetically — stated:

[T]his statute must be applied in the context of the constitutional imperatives of the presumption of innocence and the right to a trial by jury. The holding in this case is faithful to the language of section 556.046 in that context There simply is no way for this Court to construe the phrases “a basis in the evidence to acquit the defendant,” §556.046.3, or “a basis for a verdict acquitting the defendant,” § 556.046.2, to achieve such an end without undermining the fundamental values embodied in the presumption of innocence and the right to a jury trial. Accordingly, until some other language is employed, the construction given here (and in *Williams*) to subsections 2 and 3 of section 556.046 is the best — and only — construction reasonably available.¹⁵⁹

The Court's contention that its construction of the statute is “the best — and only — construction reasonably available” is quite plainly untenable.

In the dictionary, the word “basis” is defined as a foundation, base, or fundamental principle.¹⁶⁰ The word “in” is defined as “located inside or within.”¹⁶¹ “Evidence” is defined as “information indicating whether something is true or valid.”¹⁶² “Belief” is defined as “a firmly held opinion.”¹⁶³ Combining these definitions, the phrase “a basis in the evidence” can be alternately described as a foundational or fundamental principle located inside or within information indicating whether something is true or valid. A belief is a firmly held opinion *about* something *other than* the belief itself.

These definitions simply make more obvious what common sense and a reasonable interpretation of the words already reveal: A jury's belief or inference *about* evidence is not evidence in support of, or contrary to, a criminal charge. Likewise, evidence in support of, or contrary to, a criminal charge is not the same thing as what a jury believes or infers *about it*. These are completely separate and distinct epistemic concepts. Contrary to the Court's strained construction, a *basis in* the evidence is a fundamental component of *that* entity — the evidence — *from which* a separate entity — the jury — can draw, or choose not to draw, inferences and form beliefs. The jury's beliefs do not exist *in* the evidence; they exist separate and apart from it. It follows

that the “jury's right to disbelieve all or any part of the evidence and its right to refuse to draw needed inferences” logically *cannot* “by itself” (as the Court asserted) be a “basis in the evidence.”¹⁶⁴ The basis must necessarily exist *within the evidence itself* — *not* in the jury's belief *about* that evidence.

By holding to the contrary, the *Jackson* Court's interpretation of subsection 3 dispenses with all semblance of logic. If the evidence *and* the jury's right to disbelieve it were one and the same epistemic entity, then jury trials would be unnecessary because the evidence could simply sit in judgment of itself, dismissing its whole or its parts as it saw fit. This is, of course, an absurd *non sequitur*.

In the 1869 case of *State v. Joeckel*, the Supreme Court of Missouri declared:

[I]t is the established doctrine in this State that upon the trial of a person indicted for an offense consisting of different grades, the court may, by suitable instructions, *if the evidence warrants it, direct the jury that the case, as made out by the evidence, belongs to one of the specified grades, and that, if the evidence is believed, they must find their verdict accordingly. This practice is not an invasion of the province of the jury as to questions of fact; it is simply applying the law to the facts.*¹⁶⁵

One hundred forty-five years after *Joeckel*, the *Jackson* Court undercut this axiom of Missouri law by concluding that the jury's absolute right to disbelieve all or part of the state's evidence overrides and arrogates the trial court's statutorily mandated duty under § 556.046 to determine whether or not there is both a “basis for a verdict”¹⁶⁶ and a “basis in the evidence”¹⁶⁷ for the submission of a lesser included offense instruction. Focusing solely on these key phrases, the Court ignored the statutory directive in subsection 3 that “[t]he [trial] court shall be obligated to instruct . . . only if there is a basis in the evidence”¹⁶⁸

This directive places the duty squarely on the trial court — not the jury — to *preliminarily* determine whether or not there is an *evidentiary basis* to acquit the defendant of the higher offense and convict him of the lesser. The jury is, of course, free to believe or disbelieve, in whole or in part, any evidence it hears. However, the jury can *never* exercise that absolute right *until* it is provided appropriate instructions *by the court* — pursuant to § 556.046 — *based on the sufficiency of the evidence* to support those instructions, *as determined by* the trial judge. “This practice is not an invasion of the province of the jury as to questions of fact; it is simply applying the law to the facts.”¹⁶⁹

In conclusion, and contrary to the Court's claim, its interpretation of the statute is neither “faithful to the language [contained in] § 556.046” nor is it the “only . . . construction reasonably available.”¹⁷⁰

Post-Jackson Supreme Court Decisions

To date,¹⁷¹ the Supreme Court of Missouri has issued two decisions that further explain its rationale in *Jackson* and *Pierce* — both on the same day. These cases are *State v. Randle*¹⁷² and *State v. Roberts*.¹⁷³

In *Randle*, the defendant was convicted of trespass in the first degree, assault in the second degree, and armed criminal action.¹⁷⁴ On appeal, he claimed that the trial court erred by

refusing his proposed instruction on assault in the third degree.¹⁷⁵ The Missouri Court of Appeals – Eastern District was first to hear the appeal.¹⁷⁶ It ruled that Randle was “not entitled” to the third-degree assault instruction because there was “no evidence [to] support[] the inference that [he] recklessly caused” the victim’s injury.¹⁷⁷ This was based on the court’s conclusion that “differential element[s]” described by *Jackson* do not refer to mental states, such as “knowingly” and “recklessly,” that may exist between a greater and a lesser included offense.¹⁷⁸ The court held that when the difference between the greater and the lesser charge is a *mental element*, there must be some “affirmative evidence” offered on the lesser charge to justify the submission of that instruction.¹⁷⁹

On transfer, the Supreme Court of Missouri reversed the Eastern District’s decision in *Randle*.¹⁸⁰ The Court noted that second- and third-degree assaults require the state to prove that the defendant acted with different mental states regarding the infliction of physical injury for each offense.¹⁸¹ It reasoned that because mental states of differing levels are set forth by statute, and since “the State bears the burden of proof” . . . “these *mens rea* requirements are differential elements” of second- and third-degree assault.¹⁸² As a result, the Court concluded that third-degree assault was a nested lesser included offense of second-degree assault.¹⁸³

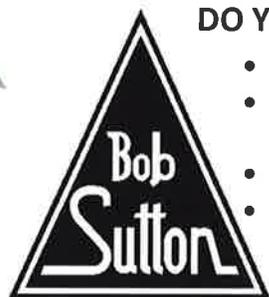
In *Roberts*, the defendant was convicted of domestic assault in the second degree and witness tampering.¹⁸⁴ On appeal, he claimed “that the trial court erred by [refusing] his request to instruct the jury on the lesser-included offense of third-degree domestic assault.”¹⁸⁵ The case of *State v. Roberts* was originally heard by the Missouri Court of Appeals – Western District, which held that “[b]ecause the evidence was sufficient to prove Roberts acted with the higher mental state of knowingly,” it was also “necessarily sufficient, pursuant to Section 562.021.4, to prove that he acted with the lower mental state of recklessly.”¹⁸⁶ The court acknowledged that the Eastern District’s decision in *Randle* had reached a contrary conclusion on whether a defendant’s mental state was a “differential element” under

Jackson.¹⁸⁷ The Western District, however, declined to follow *Randle*, noting that it failed to address the impact of § 562.021.4, which states “that evidence establishing that the defendant acted knowingly also [proves] that [he] acted recklessly.”¹⁸⁸ The court also observed that *Randle*’s conclusion that “some affirmative evidence” was required to justify the submission of “a lesser included [instruction] with a different mental state appears to run afoul of *Jackson*.”¹⁸⁹ As a result, the Western District vacated Roberts’ convictions and remanded the case to the circuit court.¹⁹⁰

The Supreme Court of Missouri accepted transfer. Consistent with its opinion in *Randle*, the Court held that “[d]ifferent mental states are required to prove . . . second- and third-degree domestic assault, and these different *mens rea* requirements are differential elements on which the State bears the burden of proof.”¹⁹¹ The Court rejected the state’s claim that the defendant’s act of punching the victim supported the singular inference that he acted “knowingly.”¹⁹² It noted that “[t]his argument [was] foreclosed by section 562.021.4,” which provides “that ‘knowingly’ engaging in criminal conduct establishes that the conduct was also reckless.”¹⁹³ Accordingly, the Court concluded that “third-degree domestic assault [was] a ‘nested’ lesser-included offense . . . of second-degree domestic assault.”¹⁹⁴

A “Basis in the Evidence” – Always or Almost Always?

In both *Randle* and *Roberts*, the Supreme Court made clear that different mental states are, in fact, differential elements that trial courts must consider when determining whether a lesser charge is nested within a higher one. That clarification, however, was not the most significant aspect of the two decisions. In both the *Randle* and *Roberts* opinions, a single sentence that purports to summarize one of the principle points of *Jackson*’s holding stands out from all the rest: “There is *almost* always a basis in the evidence for acquitting the defendant of the immediately higher-included offense because the jury has a right to disbelieve all, some, or none of the evidence presented in a particular case. *State v. Jackson*, 433 S.W.3d 390, 399 (Mo. banc 2014).”¹⁹⁵



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An examination of the *Jackson* opinion — cited in both *Randle* and *Roberts* as the source for this statement — reveals that it says nothing of the kind.¹⁹⁶ The *Jackson* Court unequivocally held that “the jury’s right to disbelieve all or any part of the evidence and its right to refuse to draw needed inferences is a sufficient basis in the evidence — by itself — for a jury to conclude that the state has failed to prove the differential element.”¹⁹⁷ In addition, the *Jackson* Court stated:

No matter how strong, airtight, inescapable, or even absolutely certain the evidence and inferences in support of the differential element may seem to judges and lawyers, no evidence *ever* proves an element of a criminal case until all 12 jurors believe it, and no inference *ever* is drawn in a criminal case until all 12 jurors draw it.¹⁹⁸

These two passages affirm the following: 1) the *Jackson* Court’s theoretical premise that the jury’s right to disbelieve the state’s evidence *by itself* controls the “basis in the evidence” analysis, including whether that basis exists under § 556.046.3; and 2) the unequivocal nature of its holding that the jury’s right to disbelieve the state’s evidence is *always* a sufficient basis in the evidence to require a trial court to instruct down on all nested lesser included offenses. The Court’s inclusion of the word “almost” to qualify the word “always” in the *Randle* and *Roberts* opinions is startling because it completely undercuts both of these bases for the *Jackson* holding. What’s more, the *actual* holding in *Jackson* cannot be harmonized with the *Randle* and *Roberts* Court’s description of it because, taken together, they violate one of the fundamental principles of logic — “the law of non-contradiction” — whereby something cannot both exist and not exist at the same time.¹⁹⁹

If, indeed, “there is [only] *almost* always a basis in the evidence for acquitting the defendant of the immediately higher-included offense”²⁰⁰ as set forth in *Randle* and *Roberts*, then logic commands that the jury *cannot* have an *absolute* right to disbelieve the state’s evidence, as proclaimed in *Jackson*. And if the jury *does not* possess that right absolutely, then there must be *some* room left in § 556.046.3 for the trial court to make those determinations. However, if that is the case, this state of affairs *cannot* also logically co-exist with the air-tight seal the *Jackson* Court placed around the following concepts: 1) the jury’s categorical right to disbelieve the state’s evidence; 2) the absolute role of the jury’s right to disbelieve that evidence as a basis in the evidence under § 556.046.3; and 3) the absolute role of the right to disbelieve to control that legal analysis. Therefore, the characterization of the *Jackson* Court’s holding by *Randle* and *Roberts* creates a fundamental logical contradiction. That contradiction in turn creates a legal contradiction that the Supreme Court of Missouri must now confront.

It’s hard to imagine that the *Randle* and *Roberts* Courts failed to realize the importance of inserting the word “almost” before “always.” This is especially true given the brevity of the opinions and the fact that the identical sentence was included in both. One can only hope that this was the Court’s first step toward consciously dismantling the theoretical basis upon which the *Jackson* and *Pierce* interpretations of § 556.046 were constructed,

leading to their ultimate demise. Regardless of judicial action, however, a statutory fix is in order.

A Proposed Statutory Fix

The *Jackson* Court stated that its “decision is based solely on the language of section 556.046.”²⁰¹ The Court then observed that unless there is a constitutional right to a lesser included instruction in non-capital cases — a question it did not address — “statutory language eliminating such instructions in all such cases would seem to pose no drafting difficulty.”²⁰² It then asserted:

[T]o the extent that the purpose of section 556.046 is to make a lesser included offense instruction available in one . . . case but not another based on how strong or weak the trial judge believes the state’s evidence to be, the language presently chosen to accomplish that goal fails for the reasons (and to the extent) set forth above.²⁰³

The hostility anticipated by the Court to its decision has nothing to do with its critics’ desire to “eliminate[e] such instructions in all such cases.”²⁰⁴ Instead, the concern is simply whether the *Jackson* opinion is true to the words set forth in § 556.046 and the plain common law meaning of those words as embodied in the statute. Quite plainly, it is not. Given this state of affairs, the questions now become how to most efficiently and effectively remediate *Jackson*’s mistaken interpretation of Missouri law and bring the state back into the legal mainstream; and how to provide trial judges with clear direction on when juries must be instructed on lesser included offenses. A proposed amendment to subsections 2 and 3 of § 556.046 is offered below to legislatively overrule the *Jackson* and *Pierce* decisions.²⁰⁵ Proposed amended language is included in brackets and in bold.

2. The court shall not be obligated to charge the jury with respect to an included offense unless there is a [rational] basis [in the evidence] for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. [It shall be the trial court’s duty to determine whether or not “a rational basis in the evidence for a verdict” exists before deciding whether or not one or more instructions on any lesser included offense is warranted. A jury’s right to disbelieve all or part of the state’s evidence does not constitute a “rational basis in the evidence for a verdict” acquitting the defendant of the offense charged and convicting the defendant of any included offense.]

...

3. The court shall be obligated to instruct the jury with respect to a particular included offense only if there is [both 1)] a [rational] basis in the evidence for acquitting the defendant of the immediately higher included offense; and [2)] there is a [rational] basis in the evidence for convicting the defendant of that particular included offense. [A jury’s right to disbelieve all or part of the state’s evidence does not constitute a “rational basis in the evidence” under this subsection

for purposes of the trial court's obligation to determine whether the evidence supports an instruction to the jury with respect to any included offense.】

These proposed revisions make it clear that it is the trial court's duty to make a legal determination whether or not the evidence supports the submission of one, or more, lesser included offense instructions. Furthermore, the trial court must decide whether there is a rational basis in the evidence to support that submission. Finally — and most importantly — the proposed amendment makes it crystal clear that the jury's right to disbelieve all or part of the state's evidence *does not* constitute a basis *in* the evidence.

Conclusion

The Supreme Court of Missouri held that Denford Jackson was entitled to a new trial because the jury should have been instructed on the lesser included offense of second-degree robbery. This decision placed Missouri with Florida and Iowa as the only states in the nation to “require [the] automatic submission [of] . . . lesser included offenses in criminal cases.”²⁰⁶ The *Jackson* and *Pierce* decisions were the result of a confluence of several events that occurred over a significant period of time. Among these were: 1) the 1979 enactment of § 556.046; 2) the 2001 amendment of the statute; 3) the Court's prior decisions in *Santillan*, *Pond*, and *Williams*; and 4) the Supreme Court's conversion of the all, part, or none rule from its humble origins as a judicial aphorism when assessing the sufficiency of the evidence to a new legal axiom requiring automatic submission of lesser included offenses.

The *Jackson* Court acknowledged that the likely effect of its decision would be the submission of “lesser included offense instructions . . . virtually every time they are requested.”²⁰⁷ It asserted, however, that its holding was expressly stated in *Williams* and at least implied in *Pond*, punning that “these particular clothes were missing from the emperor's wardrobe long before this case.”²⁰⁸ The Court also quipped that its decision “merely acknowledges what the rest of the villagers already have seen.”²⁰⁹ Be that as it may, the Supreme Court of Missouri should know that many of the villagers are appalled at the sight they have seen. The emperor needs to find his missing clothes.



Ted Robert Hunt

Endnotes

1 Ted Robert Hunt is chief trial assistant at the Jackson County Prosecutor's Office in Kansas City. He received his juris doctor degree from the University of Missouri-Kansas City School of Law in 1992. The views expressed in this article are his alone, and do not necessarily represent those of his office or any organization with which he is affiliated.

2 *State v. Joeckel*, 44 Mo. 234, 236 (Mo. 1869)

3 433 S.W.3d 390 (Mo. banc 2014).

4 433 S.W.3d 424 (Mo. banc 2014) (The focus of this article is the Court's rationale in *State v. Jackson*. However, the criticisms expressed herein are equally applicable to the *Pierce* decision.)

5 433 S.W.3d at 399.

6 *Id.* at 392.

7 433 S.W.3d at 392.
 8 *Id.*
 9 *Id.*
 10 *Id.* at 392-93.
 11 *Id.* at 393.
 12 *Id.*
 13 *Id.*
 14 *Id.*
 15 *Id.*
 16 *Id.*
 17 *Id.*
 18 *Id.*
 19 *Id.*
 20 *Id.*
 21 *Id.*
 22 *Id.*
 23 *Id.*
 24 *Id.*
 25 *State v. Jackson*, 433 S.W.3d at 393-94.
 26 *Id.* at 394 and 424 n.2.
 27 *Id.* at 394.
 28 *Id.*
 29 *Id.*
 30 *Id.*
 31 *Id.*
 32 *Id.* at 394, 424 n.2.
 33 *Id.* at 395.
 34 *Id.*
 35 *Id.* at 402.
 36 Section 556.046.2, RSMo Supp. 2015 (emphasis added).
 37 *Id.* at 396.
 38 Section 556.046.3, RSMo Supp. 2015 (emphasis added).
 39 313 S.W.3d 656 (Mo. banc 2010).
 40 433 S.W.3d at 396.
 41 *Id.*
 42 *Id.*
 43 *Id.*
 44 *Id.*
 45 *Id.*
 46 *Id.* at 396-97.
 47 *Id.* at 397.
 48 *Id.*
 49 636 S.W.2d 318 (Mo. banc 1982).
 50 *Id.* at 321.
 51 614 S.W.2d 744 (Mo. App. S.D. 1981).
 52 636 S.W.2d at 321.
 53 *Id.* (emphasis in original).
 54 433 S.W.3d at 397.
 55 *Id.* at 397-99.
 56 *Id.* *State v. Santillan*, 948 S.W.2d 574 (Mo. banc 1997); *State v. Pond*, 131 S.W.3d 792 (Mo. banc 2004); *State v. Williams*, 313 S.W.3d 656 (Mo. banc 2010).
 57 *Id.* at 398-99.
 58 *Id.* at 398 (emphasis added).
 59 *Id.* at 399 (internal citations omitted) (emphasis added).
 60 *Id.* at 401-02.
 61 *Id.* at 402.
 62 *Id.*
 63 *Id.*
 64 *Id.*
 65 **Murder cases:** see *State v. Tyler*, 556 S.W.2d 473, 475 (Mo. App. E.D. 1977); *State v. Mudgett*, 531 S.W.2d 275, 280-81 (Mo. banc 1975); *State v. Amerson*, 518 S.W.2d 29, 32-33 (Mo. 1975); *State v. Jackson*, 496 S.W.2d 1, 4 (Mo. banc 1973); *State v. Crow*, 486 S.W.2d 248, 254-55 (Mo. 1972); *State v. Ginnings*, 466 S.W.2d 675, 677 (Mo. 1971); *State v. King*, 433 S.W.2d 825, 827-28 (Mo. 1968); *State v. King*, 119 S.W.2d 322, 326-27 (Mo. 1938); *State v. Messino*, 30 S.W.2d 750, 761 (Mo. 1930); *State v. Niehaus*, 87 S.W. 473, 478-79 (Mo. 1905); *State v. Donnelly*, 32 S.W. 1124, 1125-26 (Mo. 1895); *State v. Joeckel*, 44 Mo. 234, 236 (Mo. 1869); **Robbery cases:** see *State v. Nylon*, 563 S.W.2d 540, 543 (Mo. App. E.D. 1978); *State v. Johnson*, 559 S.W.2d 756, 758-59 (Mo. App. E.D. 1977); *State v. Sampson*,

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