IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. DANIEL STEVEN ZOLOTOFF, Defendant-Appellant Respondent on Review.	Marion County Circuit Court Case No. 09C42126 CA A145303 SC S061003

RESPONDENT'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Marion County
Honorable Darryl L. Larson, Judge

Opinion Filed: December 21, 2012
Author of Opinion: Nakamoto, Judge
Before: Schuman, Presiding Judge, and Wollheim, Judge and Nakamoto, Judge

PETER GARTLAN #870467
Chief Defender
DANIEL C. BENNETT #073304
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Dan.Bennett@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Defendant-Appellant

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA JOYCE #013112
Solicitor General
TIMOTHY A. SYLWESTER #813914
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
Timothy.Sylwester@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

The state petitioned this court to review the Court of Appeals decision rejecting the state's argument that the trial court's failure to provide the jury with an instruction on a lesser-included offense must be harmless when the jury convicts on the charged offense. *State v. Zolotoff*, 253 Or App 593, 594-95, 291 P3d 781 (2012), *rev allowed*, 353 Or 428, 299 P3d 889 (2013). This court allowed the state's petition.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

First Question Presented

Is a trial court's failure to give the jury a lesser-included offense instruction harmless error when the jury convicts on the charged offense?

First Proposed Rule of Law

A trial court's failure to give the jury a lesser-included offense jury instruction, when that instruction is supported by the evidence, is not harmless.

Second Question Presented

What was the legislature's intent in enacting ORS 136.460(2), the "acquittal first" rule?

Second Proposed Rule of Law

The legislature enacted ORS 136.460(2) to govern the formal order and structure of the jury's deliberations, not to alter the substantive content of those deliberations.

SUMMARY OF ARGUMENT

When the evidence in the record supports the giving of a lesser-included offense instruction, a trial court's failure to give that instruction to the jury is not harmless. Although a jury instruction error may be harmless if the instructions, taken as a whole, give the jury a full and complete picture of the law, such error is not harmless error when the jury is not given all of the information necessary to make a fully informed decision.

This court has already held that it is harmful to fail to give a lesser-included offense instruction, even when the defendant is ultimately convicted of the charged offense. *State v. Naylor*, 291 Or 191, 629 P2d 1308 (1981). The rationale in *Naylor* has not changed: the legislature has the authority to provide defendants the right to have a jury instructed as to matters that may affect its deliberations. This court recently reaffirmed that proposition in *State v. George*, 337 Or 329, 97 P3d 656 (2004), in which it held that it is not harmless to fail to instruct a jury on the incarcerative consequences of a guilty except for insanity verdict. Here, as in *George*, the jury was wrongly denied knowledge of the full and complete law that it was to apply in contravention of a legislative mandate.

The state argues that this court's decision in *Naylor* did not survive the enactment of the "acquittal first" rule, which requires that juries acquit a defendant on the charged offense before considering a lesser-included offense. However, the text, context, and legislative history of that statute demonstrate that the legislature intended that the "acquittal first" rule govern the formal structure and order of jury deliberations rather than alter the substantive nature of a jury's deliberations. Even following the enactment of the "acquittal first" rule, a properly instructed jury may acknowledge the option of a lesser-included offense option while deliberating on the charged offense. Further, the presence of the lesser-included offense may provide valuable context to the jury, and may serve to highlight certain key disputed elements. Therefore, proper instruction of a jury is essential to provide a full statement of the relevant law and may affect the deliberations on the charged offense.

SUMMARY OF FACTS

The Court of Appeals summarized the facts as follows:

> "In 2009, defendant was incarcerated at the Marion County Correctional Facility in a single-occupancy cell when Deputies Brazeal and Dunbar found a broken spoon attached to the underside of the toilet bowl with caulking from the cell window. The spoon was approximately three inches long and appeared to a certain extent to be sharpened. At trial, Brazeal testified that the round part of the spoon had been removed and that the spoon handle 'was starting to angle at the head of it—starting to sharpen it.' Because it appeared to be filed down, Brazeal believed that defendant had purposely broken the spoon and 'was trying to make

> some sort of weapon out of it.' Brazeal believed that defendant could have used the spoon as a weapon against someone at the facility, but that the spoon could have been sharpened even further. Dunbar testified that defendant was 'in the process of making a stabbing device.' He also believed that defendant could have used the spoon to stab either a deputy or another inmate. In addition, Deputy Herring testified that the spoon appeared to be a 'shank,' which is a prison term for an item that has been turned into weapon, that can be used as a knife, dagger, or stabbing instrument.
>
> "Before trial, defendant requested the uniform criminal jury instruction on attempt crimes for 'attempted possession of a weapon by an inmate.' At the pretrial hearing, the prosecutor objected to defendant's jury instruction, arguing that it could not be given unless the charged crime required intentional conduct, as do attempt crimes, but the charged crime required defendant to act knowingly, *State v. Wolfe*, 288 Or. 521, 525–26, 605 P.2d 1185 (1980). The trial court agreed with the state's objection and refused to give the instruction. After the court instructed the jury and after closing arguments, defendant took exception to the ruling. The jury found defendant guilty of one count of possession of a weapon by an inmate."

Zolotoff, 253 Or at 594-95.

ARGUMENT

Defendant was convicted of a criminal offense after the trial court erroneously failed to provide a required lesser-included offense instruction. The trial court ruled pre-trial that it would not provide defendant's requested "attempt" instruction, a ruling that the state now concedes was erroneous. Despite this abrogation of defendant's right to have the jury given a lesser-included offense instruction, the state now argues that the trial court's error was

harmless, because the jury convicted defendant of the charged offense. The state is incorrect.

Defendant was entitled to present his defense and have the jury instructed on the lesser-included offense. This court cannot hold that the error could not have affected the outcome of the case because the jurors may have weighed evidence differently knowing the full range of their options, because the jury was never provided with all the instructions necessary to decide this case, and because the court's pre-trial decision to deny the instruction may have affected the presentation of the case. In addition, holding that a trial court's failure to give lesser-included instructions to the jury is always harmless would insulate a trial court's decision from meaningful appellate review and provide trial courts *carte blanche* to deny such instructions, raising significant constitutional concerns.

I. The members of the jury were entitled to know about their full range of options in this case.

A. A trial court's failure to provide a required jury instruction is harmful unless the instructions as a whole cure the error.

Although the state concedes that the trial court erred when it failed to provide defendant's requested instruction on attempted inmate in possession of a weapon, it argues that the error was harmless because defendant was convicted of the charged offense and so, even had the jury been instructed as required on the attempt crime, it would never have "considered" the existence

of that offense under the "acquittal first" instruction[1] and so the lesser-included instruction would not have affected the verdict. The question on review, however, is not whether the jury would have convicted defendant had the court not erred, but whether the error *could* have affected the outcome of the trial. *See State v. Davis*, 336 Or 19, 34-35, 77 P3d 1111 (2003) (error not harmless when it could have affected the jury's verdict), *State v. Lopez-Minjarez*, 350 Or 576, 585, 260 P3d 439 (2011) (reversal required when "the jury's guilty verdict on one or more of the charges *could* have been based on the theory of criminal responsibility contained in the erroneous instruction.") (emphasis added). Here, the error could have affected the verdict, and therefore it was not harmless.

An error in failing to provide a jury instruction is prejudicial when the error deprives a criminal defendant of a benefit that the legislature intended to provide. In *State v. George*, this court considered the effect of a trial court's failure to provide an instruction required by ORS 161.313, which provides that

---

[1] ORS 136.460(2) provides:

> "The jury shall first consider the charged offense. Only if the jury finds the defendant not guilty of the charged offense may the jury consider a lesser included offense. If there is more than one lesser included offense, the jury shall consider the lesser included offenses in order of seriousness. The jury may consider a less serious lesser included offense only after finding the defendant not guilty of any more serious lesser included offenses."

when a defendant raises a defense of mental disease or defect, the court must inform the jury of the effect of a "guilty but insane" verdict. 337 Or 329, 331-32, 97 P3d 656 (2004). After determining that the trial court erred in failing to give the jury such an instruction, the court turned to the question of whether the error was harmful:

> "That leaves only the question whether the error was prejudicial. When a trial court fails to give the instruction that ORS 161.313 requires, *it denies the defendant a benefit that the legislature intended that he or she have*, *viz.*, a jury that will be informed adequately as to the consequences of a 'guilty but insane' verdict and, therefore, will not be influenced by unwarranted concerns that the defendant will be released immediately or prematurely. Defendant did not have the benefit of such a jury. We see no basis, on this record, for suggesting that such an omission could be harmless error. Defendant's convictions, all of which are affected by the error, must be reversed, and the case remanded to the trial court for further proceedings."

Id. at 340 (footnote omitted) (emphasis added).

George controls this case. There, the benefit conferred upon the defendant by the legislature was the right to have a jury informed that finding a defendant to be "insane" would not result in his or her immediate release. *See State v. Amini*, 154 Or App 589, 600, 963 P2d 65, (1998), *rev'd*, 331 Or 384, 15 P3d 541 (2000) ("It appears that the 1983 legislature's objective in enacting ORS 161.313 was to prevent juries from inferring that a finding of insanity would necessarily result in the defendant's immediate or 'premature' freedom."). The ultimate fate of a convicted or acquitted defendant is not

normally a proper consideration for a jury. *State v. Daley*, 54 Or 514, 523, 103 P 502 (1909) ("Where the jury are not authorized by statute to prescribe the punishment to be inflicted for the commission of a crime, no error is committed in refusing to instruct them what the penalty might be if the defendant is found guilty as charged * * * ."). Nevertheless, where the legislature has elected to confer upon a defendant the benefit of informing the jury of the effect of their verdict it is harmful error to deprive a defendant of that benefit. Here, the legislature has conferred upon criminal defendants the right to have a jury informed of the existence of any appropriate lesser-included instruction and it is not harmless to deny that right.

The state cites several cases for the proposition that errors in instructing a jury are harmless in some instances. Such errors *can* be harmless, but only when the instructions, considered as a whole, are correct. For example, in *State v. Bowen*, this court found an instructional error harmless because "the trial court's instructions to the jury, as a whole, were sufficient to inform the jury of the possible verdicts it could return on the various charges, based on how it resolved the facts." 340 Or 487, 517, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). In *Bowen*, the defendant requested that the jury be instructed that manslaughter was a lesser-included offense of aggravated murder and that the verdict form include both murder and manslaughter as lesser-included offenses on each of the two counts of aggravated murder. *Id.* at 511-12.

The trial court agreed to instruct the jury on the lesser-included offense, but declined to instruct the jury that manslaughter was a lesser-included offense of aggravated murder. *Id.* at 512-13. Instead, the court only instructed the jury that it could consider manslaughter as a lesser-included of intentional murder (Count 3), not aggravated murder (Counts 1 and 2). *Id.* The trial court reasoned that if the jury found the defendant not guilty of aggravated murder, it would then consider intentional murder and its lesser-included offense of manslaughter. *Id.*

On appeal, the defendant argued that the trial court erred in failing to instruct the jury that it could consider manslaughter as a lesser-included offense of aggravated murder. *Id.* at 514. This court agreed that the trial court erred, but found that the error was not prejudicial because the "the trial court instructed the jury on the elements of aggravated murder (including the elements of burglary and robbery), intentional murder, and first-degree manslaughter, albeit not in the sequence that defendant requested." *Id.* at 516. Therefore, "the case was submitted to the jury *with complete and correct statements of the law* necessary for it to properly determine whether the state had proved defendant's guilt on the crimes charged beyond a reasonable doubt." *Id.* at 517 (emphasis added). Accordingly, the instructions *as a whole* were correct and no elements or permissible verdicts were wholly omitted.

In *State v. Gowin*, the defendant appealed a trial court's failure to instruct the jury that certain state's witnesses were his accomplices as a matter of law. 241 Or 544, 546, 407 P2d 631 (1965). This court held that the trial court erred in declining to instruct that one witness was an accomplice, but held that the instructions, taken as a whole, cured the error because the trial court provided the applicable law that "advised the jury that whoever actually set fire to the building at the request of the defendant was an accomplice." *Id.* at 548. Thus, again unlike the instant case, the instructions as a whole remedied the error in omitting one particular instruction.

Here, by contrast, the instructions as a whole did not inform the jury of the possible verdicts it could return – the lesser-included attempt instruction was entirely omitted, and the jury did not know that it was an option. In other words, the instructions taken as a whole were not "complete and correct." Therefore, the instructions taken as a whole do not remedy the trial court's error in failing to instruct the jury that it could convict defendant of the lesser-included offense of attempted inmate in possession of a weapon.

B. This court has resolved this issue in *State v. Naylor* and need not revisit that decision.

As the state acknowledges, this court has previously resolved the precise issue raised in this case in *State v. Naylor*, 291 Or 191, 629 P2d 1308 (1981). There, this court rejected the state's argument that the trial court's failure to

give a lesser-included instruction was harmless when the jury returned a guilty verdict on the charged offense. *Id.* at 197-98. This court identified several reasons to reject that argument.

First, "[t]he failure of the trial court to give the instruction resulted in the case being submitted to the jury without the complete statement of the law necessary for the jury to properly exercise its function in the trial of this defendant." *Id.* As set out above, in the instant case the jury was not given a complete statement of the law, and so the error was not cured in that manner. The state argues that the instructional error could not have affected the verdict because jurors may no longer "abort" consideration of the charged offense to consider a lesser-included offense. Pet. Br. at 33. However, for the reasons discussed below, the presence of the lesser-included offense option could influence the jury's decision as to whether to convict or acquit defendant on the charged offense. Therefore, inclusion of the lesser-included offense was necessary to provide jurors with a complete statement of the law.

Next, the *Naylor* court explained that, should the state's argument prevail, any failure by a trial court to give a lesser-included instruction would be insulated from review and courts could violate the rule with impunity, "for if the jury finds the defendant not guilty of the greater offense, certainly the defendant would have no occasion to challenge the error. On the other hand, if the jury finds the defendant guilty of the greater offense, the error becomes

harmless by that finding, ipso facto." *Id.* at 198. The state argues, however, that the "purpose of a reversal is only to correct the specific error that occurred – not to punish the trial court for committing the error or to set up that error as an example in order to deter other courts from committing the same error." Pet. Br. at 34. On the contrary, this court has emphatically stated its role in ensuring fair trials:

> "If the only way defendants can be assured fair trials is for appellate courts to reverse an occasional judgment in the fact of what well may be overwhelming evidence of guilt, then that is the course we must take. Any other course would encourage the wholesale destruction of the rights of accused persons."

State v. Wederski, 230 Or 57, 62, 368 P2d 393, 395 (1962). In addition, this court has expressed its institutional role in its criteria for granting discretionary review. *See* ORAP 9.07(3) (asking, "Whether many people are affected by the decision in the case. Whether the consequence of the decision is important to the public, even if the issue may not arise often.").

In addition, the state argues that a defendant who is deprived a lesser-included offense instruction may seek mandamus review, but provides no authority for the proposition that such a remedy is available. Pet. Br. at 35. If that remedy is available, it could lead to substantial disruptions in criminal trials, requiring mid-trial interruptions to seek an appellate ruling on a trial court's refusal to provide a required instruction. The concern expressed in

Naylor about the harmful effects of insulating a trial court's ruling on a lesser- included instruction from appellate review remains viable.

The primary basis relied upon by this court in *Naylor* in rejecting the state's harm argument is that "ORS 136.465 represents *a legislative choice* that both the state and the defendant shall have a right to have a jury, in appropriate circumstances, consider whether the defendant is guilty of an offense less than that with which the defendant has been charged." 291 Or at 198. This court noted that "[o]ne of the apparent reasons" the legislature granted that right is to "avoid placing the jury in the position of making an all-or-nothing choice as between guilt and innocence where there is evidence which would justify a verdict of guilty of a lesser offense." *Id.* (footnote omitted). The state ascribes the "concern" about the risk of the all-or-nothing verdict to this court and argues that such concern does not provide a basis for reversal. Pet. Br. at 36-37. However, the state does not acknowledge *Naylor*'s position that the concern was one apparently belonging to the legislature, not to the court. As *George* makes clear, it is within the legislature's purview to provide a mechanism to assuage potential all-or-nothing concerns that a jury might have. 337 Or at 340. The legislature has granted both defendants and the state the right to have a jury informed of the existence of an appropriate lesser- included instruction, and *George* establishes that such a legislative grant must be respected. *Id.*

Finally, the state's primary argument for abandoning *Naylor* is that the analysis in that case has been undercut by the adoption of ORS 136.460(2), the "acquittal first" rule. Whether ORS 136.460(2) has the effect ascribed to it by the state involves a question of statutory interpretation. As set out below, ORS 136.460(2) merely structures the order of formal deliberations and does not require this court to abandon *Naylor*.

II. Under a proper understanding of ORS 136.460(2), a trial court's failure to provide a lesser-included offense instruction is not harmless.

This court has already held that a trial court's failure to give a lesser-included offense instruction is not harmless. Here, the state acknowledges the trial court's error, but argues that, had the jurors been given the required instruction, they would also "have been directed that they could not even *consider* the lesser offense unless they first acquitted defendant on the charged[.]" Pet. Br. at 19 (emphasis in original). The state repeats that point, arguing that in this case, "the jurors, having found unanimously that defendant was guilty on the charged offense, never would have even *considered* the lesser offense." *Id.* (emphasis in original).

In advancing that argument, the state employs an expansive interpretation of the word "consider" in ORS 136.460(2). For a trial court's failure to give a lesser-included instruction to be harmless, the members of the jury would have to be precluded from discussing, or arguably even thinking about, the

availability of a lesser-included offense option. ORS 136.460(2) does not require that outcome because a lesser-included instruction may highlight certain disputed elements and provide crucial context to the jury in evaluating the charged offense.

A. It would not have been improper for the members of the jury to be aware of the existence of the lesser-included offense option because ORS 136.460(2) merely governs the order of formal deliberations.

The purpose of ORS 136.460(2) is to provide structure to the order of jury deliberations. It was not intended to bar discussion of the existence of a lesser-included jury instruction or to prevent a juror from giving weight to that option. The text, context, and legislative history of ORS 163.460(2) show that the legislature did not intend to invade the province of the jury's decision-making process, but rather to provide structure governing the order in which it must deliberate on various offenses.[2]

---

[2] The meaning of ORS 136.460(2) presents a question of statutory interpretation. This court has outlined the methodology by which it interprets statutes in *PGE. v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) and *State v. Gaines*, 346 Or 160, 206 P3d 104 (2009). The first step of the statutory interpretation analysis requires this court to examine the text and context of a statute. *Gaines*, 346 Or at 171. After considering the text and context, this court will consult any legislative history offered by a party if it appears useful, giving it such weight as the court deems fit. *Id.* at 172. Finally, if the intent of the legislature "remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.*

Here, the text, context, and legislative history of ORS 136.460(2) all support defendant's position that a jury remains free to discuss and weigh the existence of the lesser-included option as it deliberates on a primary offense, and that the "acquittal first" rule merely governs the order and structure of deliberations.

1. The plain text and context of ORS 136.460(2) make clear that that statute only governs the structure of formal deliberations.

The starting point for statutory interpretation is the text itself because the text "is the best evidence of the legislature's intent." *PGE*, 317 Or at 610. ORS 136.460(2) provides:

> "The jury shall first consider the charged offense. Only if the jury finds the defendant not guilty of the charged offense may the jury consider a lesser included offense. If there is more than one lesser included offense, the jury shall consider the lesser included offenses in order of seriousness. The jury may consider a less serious lesser included offense only after finding the defendant not guilty of any more serious lesser included offenses."

Resolution of the issue in this case turns on the meaning of the word "consider." If "consider" is read in a very broad sense to mean that the jury may not think or talk about the existence of the lesser-included offense until reaching an acquittal, then the state might be correct. However, "consider" does not have such a broad meaning in the statute.

To define a word in a statute, this court looks first to a statutory definition, if there is one. *State v. Couch*, 341 Or 610, 617, 147 P3d 322 (2006).

"Consider" is not defined by statute here. When a word is not defined by statute, this court seeks to give the word its "plain, natural, and ordinary meaning."*PGE*, 317 Or at 611. In so doing, this court often consults Webster's Third New International Dictionary. *See, e.g., Potter v. Schlesser Co., Inc.*, 335 Or 209, 213, 63 P3d 1172 (2003). That dictionary defines "consider," in relevant part, as: "**1 :** to reflect on **:** think about with a degree of care of caution * * * REFLECT, DELIBERATE, PONDER * * * **4 :** to think of : come to view, judge, or classify". *Webster's Third New Int'l Dictionary* 483 (unabridged ed 1993). The dictionary definition of "consider" supports defendant's position that the legislative intent behind ORS 136.460(2) was to provide structure and order to deliberations, not to limit the topics of discussion during those deliberations.

Had the legislature intended to forbid jurors from discussing the existence of lesser-included offenses at a certain point in its deliberations, it would have done so clearly and unambiguously. The legislature was no doubt aware of the sanctity of the deliberative process and the strong animus expressed against intruding on the content of jury deliberations. *See Ertsgaard v. Beard*, 310 Or 486, 497, 800 P2d 759 (1990) (noting necessity of high threshold to consider claims of juror misconduct was necessary to protect "values includ[ing] freedom of deliberation"); *State v. Jones*, 126 Or App 224, 228, 868 P2d 18, 20 (1994) *rev den*, 318 Or 583 (1994) (noting the "need for freedom of deliberation"). Contrast the text of ORS 136.460(2) with a jury

instruction that is clearly intended to prohibit all discussion of a topic, Uniform Criminal Jury Instruction 1021. That instruction provides,

> "A defendant has an absolute constitutional right not to testify. Therefore, a defendant's decision not to testify cannot be considered as an indication of guilt. *It should not be commented on or in any way considered by you in your deliberations.*
>
> "A defendant also has an absolute constitutional right not to present any evidence. Therefore, a defendant's decision not to present any evidence cannot be considered as an indication of guilt. *It should not be commented on or in any way considered by you in your deliberations.*"

(emphasis added) (brackets omitted).

In construing the meaning of the word "consider" in ORS 136.460(2), note that that word is used repeatedly in that provision. When a term is used repeatedly throughout a statutory provision, it "generally has the same meaning throughout the statute." *Penland v. Redwood Sanitary Sewer Serv. Dist.*, 327 Or 1, 7, 956 P2d 964 (1998). Here, the repeated use of "consider" suggests that the legislature intended that it be used as the dictionary definition would suggest – as an analogue for "deliberate." The jury must first "consider" the primary offense, before it may "consider" a lesser-included offense, and then "consider" any remaining lesser-included offenses in declining order of seriousness. This repeated use of "consider" supports defendant's proposed construction – that the statute is merely intended to structure the *order* of deliberations, not the content of those deliberations. This interpretation is further supported by the use

of "consider" in ORS 136.460(4),[3] which provides that a jury may "consider" a lesser-included offense even if it cannot reach a verdict on the charged offense, by stipulation of the parties. Again, the scheme structures the order in which the jury may formally deliberate upon an offense, not the content of its discussion.

The state's argument requires that ORS 136.460(2) bar jurors from discussing or weighing the option of a lesser-included offense while formally deliberating on the charged offense. However, the plain text of that statute does not demonstrate a legislative intent to so strictly circumscribe the deliberative process. Had the legislature intended to do so, it would have done so explicitly.

2. The legislative history of ORS 136.460 establishes that the legislature intended only to provide a structure for jury deliberations.

The text and context of ORS 136.460(2) establish that the legislature intended to provide structure to deliberations, not to bar jurors from discussing or weighing lesser-included offenses. However, even without finding the statutory text ambiguous, this court may consider and weigh legislative history to the extent that it is helpful. *Gaines*, 346 Or at 172-73. Here, the legislative history supports defendant's proposed construction.

---

[3] ORS 136.460(4) provides: "If the jury is unable to reach a decision on the original charge, the state and defendant may stipulate that the jury may consider any lesser included offense."

ORS 136.460 was enacted in 1997 via Senate Bill (SB) 613, and the text has remained unchanged since that time. Or Laws 1997, Ch 511. The bill was supported by both prosecutors and crime victims' rights organizations. Testimony, Senate Committee on Crime and Corrections, SB 613, March 31, 1997, Tape 50, Side A (statement of Multnomah County Deputy District Attorney John Bradley). Deputy District Attorney Bradley noted that the proposal was inspired by an ongoing concern that juries were not aware that mistrials resulting from hung juries could be retried and were therefore unduly pressured into compromising on a lesser-included offense. *Id.*[4]

---

[4] Bradley noted that a source of inspiration for the legislation was a law review article: David F. Abele, *Jury Deliberations and the Lesser Included Offense Rule: Getting the Courts Back in Step*, 23 UC Davis L Rev 375 (1990). The record does not establish that he submitted that article to the legislative committee, but if he had done so the legislators would have read the following:

> "More importantly, the step approach does not violate a defendant's right to a lesser included offense instruction. Courts universally recognize a defendant's right to jury instructions explaining lesser included offenses when the evidence warrants such instructions. Courts, however, disagree over the approach judges should use in giving these instructions.
>
> "The lesser included offense instruction benefits defendants by informing juries of the alternatives to verdicts of acquittal or conviction on the charged offense. The step approach, disagreement instruction, and unstructured approach *all equally apprise juries of their verdict options*. A court's act of giving the instruction benefits a defendant regardless of the type of instruction that the court gives."

Abele, *Jury Deliberations* 23 UC Davis L Rev at 388-89 (emphasis added).

One witness in support of the legislation testified that the purpose of the proposal was simply to change the "order of deliberation." Testimony, House Judiciary Committee Subcommittee on Criminal Justice, SB 613, May 27, 1997, Tape 128, Side A (statement of Multnomah County Deputy District Attorney Chuck French). French explained that the legislation informed juries that they must acquit before they could move on to lesser charges. *Id.* The bill would alleviate a concern among prosecutors that jurors might believe that they had to reach a verdict or the defendant would be set free, and therefore might be excessively willing to compromise. Testimony, House Judiciary Committee Subcommittee on Criminal Justice, SB 613, May 27, 1997, Tape 128, Side A (statement of Marion County District Attorney Dale Penn).

At no point in any discussion of the bill did a witness or legislator suggest that the intent was to bar juries from *discussing* lesser-included offenses or weighing those instructions while deliberating on the charged offense. Rather, as the plain text suggests, the purpose of the measure was to specify the order in which deliberations must be completed and charges resolved. For the reasons discussed below, it would not be improper for the members of a jury to discuss and weigh lesser-included offenses, and there is no indication that such a prohibition was the intent of the legislation.

3. Maxims of statutory interpretation support defendant's proposed interpretation of ORS 136.460(2).

Because the intent of the "acquittal first" statute is clear from the text, context, and legislative history, this court need not turn to the final level of analysis, general maxims of statutory construction. If it does reach that analysis, however, this court should interpret the statute in such a way as to avoid constitutional concerns. *State v. Kitzman*, 323 Or 589, 602, 920 P2d 134 (1996) ("[W]hen one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional, courts will assume that the legislature intended the constitutional meaning.").

The United States Supreme Court has not explicitly held that criminal defendants in non-capital cases have a constitutional right to lesser-included jury instructions. Nevertheless, it has recognized the importance of such instructions to a fair trial, explaining in a capital case, "While we have never held that a defendant is entitled to a lesser-included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard." *Beck v. Alabama*, 447 US 625, 637, 100 S Ct 2382, 65 L Ed 2d 392 (1980).

In *Keeble v. United States*, a non-capital case, the United States Supreme Court interpreted the Major Crimes Act to support the giving of a lesser-included instruction and avoided a constitutional question, explaining,

> "We cannot say that the availability of a third option-convicting the defendant of simple assault-could not have resulted in a different verdict. Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, *it is nevertheless clear that a construction of the Major Crimes Act to preclude such an instruction would raise difficult constitutional questions.* In view of our interpretation of the Act, those are questions that we need not face."

412 US 205, 213, 93 S Ct 1993, 36 L Ed 2d 844 (1973) (emphasis added). Thus, while not explicitly establishing the existence of a constitutional right to lesser-included instruction, the Court has recognized that refusal to provide one may conflict with a criminal defendant's due process rights.

In its brief, the state cites three cases for the proposition that it can be constitutionally permissible to refuse to provide a lesser-included instruction, *Hopkins v. Reeves*, 524 US 88, 118 S Ct 1895, 141 L Ed 2d 76 (1998), *Spanziano v. Florida*, 468 US 447, 104 S Ct 3154, 82 L Ed 2d 340 (1984), and *Hopper v. Evans*, 456 US 605, 102 S Ct 2049, 72 L Ed 2d 367 (1982). The state is correct that those cases discuss various situations in which the Court held it was not unconstitutional to fail to give a lesser-included instruction. In *Hopkins*, the defendant sought a lesser-included instruction on second-degree murder and manslaughter. 524 US at 92. However, 100-year-old Nebraska case law

established that neither of those crimes was a lesser-included offense of the charged crime, felony murder. 524 US at 95. In *Spanziano*, the defendant sought a lesser-included instruction as to an offense whose statute of limitations had run and refused to waive the statute of limitiations. 468 US at 454-55. In *Hopper*, the Court found that the requested lesser-included offense was simply not supported by the evidence, a necessary precursor to the giving of the instruction. 456 US at 613.

In none of the three cases cited by the state did the Court hold that it is constitutionally permissible to fail to give a lesser-included instruction when such instruction is required by law. Rather, the cases stand for the uncontroversial proposition that a lesser-included instruction need not be given in all cases. Here, by contrast, all parties agree that the instruction was required, and insulating a trial court's refusal to provide such an instruction from appellate review threatens a defendant's due process rights and creates a constitutional question where none need exist.

B. Jurors' deliberations on a charged offense may be properly and permissibly influenced by the existence of a lesser-included offense.

An examination of the statutory text, context, and legislative history makes clear that the legislature had no intention of barring discussion of the existence of lesser-included offenses. The legislature was no doubt aware of the sanctity with which a jury's deliberative processes is viewed and did not intend

to interfere with that process beyond providing a formal structure to outline the order in which a jury must render verdicts. Jurors' deliberations may be properly influenced by the availability of a lesser-included offense without any violation of the "acquittal first" rule because the instruction on a lesser-included offense serves multiple purposes, including focusing the attention of the jury on an element in particular dispute and placing it in the broader context of a spectrum of culpability.

Here, the attempt instruction would have focused the jury's attention on the disputed element of the status of the spoon handle – that is, whether or not it was a weapon. The Supreme Court of Connecticut, in noting that a harmlessness rule such as the one proposed by the state here would render the right to a lesser-included instruction "a hollow entitlement, indeed," explained the important role such an instruction can play in highlighting particular elements for the jury. *State v. Tomlin*, 266 Conn 608, 639-40, 835 A2d 12 (2003). In *Tomlin*, the defendant was convicted of manslaughter in the first degree with a firearm, and argued that he had been improperly denied instructions on the lesser-included offenses of manslaughter in the second degree and criminally negligent homicide. *Id.* at 610.

The Connecticut Supreme Court first determined that those offenses were lesser-included offenses and that the jury should have been instructed on those offenses *Id.* at 635. It then turned to the state's harmlessness argument, similar

to the one advanced here. *Id.* The court noted the state's argument that its prior case law "which requires a trial court to instruct the jury that it cannot deliberate on lesser-included offenses until it unanimously has concluded that the defendant is not guilty of the greater offense, effectively overruled" a prior decision rejecting such a harmlessness argument. *Id.*

The Connecticut court rejected that argument. It explained that, while it did not "encourage or advocate compromise in the deliberation process, we emphasize that jury instructions on lesser included offenses serve another vital role." *Id.* at 638. That role is to inform the jury that a defendant's conduct may fall somewhere on a spectrum of culpability. *Id.* at 638-39. In *Tomlin*, where the disputed element differentiating the various levels of offenses was the defendant's mental state, the role served by the provision of the instruction was to inform the jurors that "the defendant's particular state of mind at the time he committed the crime may fall within one of many requisite mental states and that each requisite mental state serves as an element for a distinct crime." *Id.* at 639. Despite the provision of an "acquittal first" instruction, "the failure of a court to inform the jury of these subtle distinctions could result in very serious harm to defendants because the jury supposedly would deliberate under the false impression that the defendant's state of mind reasonably does not fall within the ambit of the elements of distinct crimes." *Id.*

In the instant case, defendant requested an "attempt" instruction. Had the court given the instruction, as the state now concedes it was required to do, that instruction would have informed the jury that an attempt occurs when a defendant "intentionally engages in conduct that constitutes a substantial step toward the commission of that crime." UCrJI 1040. In the context of this case, that instruction would have emphasized to the jury the importance of a central disputed element, whether defendant's spoon handle was, in fact, a weapon.[5] Thus, in addition to providing an additional verdict that the jury could select, it would also serve the additional role of highlighting that element and properly

---

[5] The drafters of the Uniform Criminal Jury Instructions recognized the comparative function of lesser included instructions and provided a mechanism to allow the trial courts to make the comparison explicit in Uniform Criminal Jury Instruction 1014, which provides:

> "The court has instructed you about the proof required for the charged offense of _____.
>
> "The court has also instructed you about the proof required for the lesser included offense[s] of _____.
>
> "The difference[s] in the proof required in the charged offense as compared to the lesser included offense[s] [is / are] as follows:
>
> "[Explain difference(s), e.g., assault I requires proof of intentionally causing serious physical injury by means of a deadly (or dangerous) weapon. Assault II requires proof of intentionally (or knowingly) causing serious physical injury—no weapon element required. Assault III required proof of recklessly causing . . . (etc.).]"

informing the jury that it must consider the status of the spoon while deliberating on the charged offense.

Defendant's trial counsel, in his closing argument, repeatedly focused the jury's attention on whether the spoon handle was a weapon and asked the jury to find that it was not. Tr. 141, 143. However, what he did not argue, what he *could* not argue with any hope of success, was that defendant may have attempted to make the handle into a weapon but had not succeeded in doing so – that he had intended to commit the charged offense and taken a substantial step towards that commission, but had not completed the offense. This court cannot say that the requested jury instruction, which would have highlighted the importance of the status of the weapon and informed the jury of its full range of choices, could not have affected the deliberation on the charged offense.

In addition, the state's proposed rule of law does not square with the concept of a defendant's "right" to a lesser-included instruction. *See Bowen*, 340 Or at 515 (quoting *State v. Washington*, 273 Or 829, 836, 543 P2d 1058 (1975), in describing "right" to a lesser-included offense instruction). If the state is correct, the presence of a lesser-included jury instruction could never benefit a defendant because its presence could never influence a jury to acquit on a charged offense. In other words, a defendant would never want a lesser-included offense option because it only provides a mechanism to convict a

defendant after an acquittal and cannot in any way alter the deliberations on the charged offense.

Finally, the court's failure to provide the instruction may have affected the trial in an additional way. Although the state focuses exclusively on the jury's deliberations, defendant requested the instruction at the outset of trial. The trial court erroneously ruled that it would not give the instruction before seating the jury. Tr. 5. Defendant's trial strategy may well have been altered by the knowledge that the jury would not be instructed on the lesser-included attempt crime. In other words, to analogize this court's "right for the wrong reasons" doctrine, we cannot say that record in this case is "materially * * * the same one that would have been developed" had the court not erred. *Outdoor Media Dimensions Inc. v. State*, 331 Or 634, 660, 20 P3d 180, 196 (2001). The state's harmlessness argument is premised on the reasoning that defense counsel would not have adjusted the theory of the case in any manner, despite the absence of the required jury instruction. There is no support for that argument.

C. Even if ORS 136.460(2) was intended to bar jurors from giving any thought to the existence of a lesser-included alternative instruction, there is an overwhelming probability that they would not follow that instruction.

The "acquittal first" instruction, properly understood, merely informs the jury of the order in which it must decide criminal charges and provides structure

to its deliberations. It does not bar members of the jury from acknowledging, or even discussing, the existence of a lesser-included offense while considering the primary offense. With that understanding, there is no reason to assume that a jury would not follow the instruction. However, the state's argument that the trial court's failure to give a lesser-included jury instruction could not make any difference in a jury's deliberation on the charged offense depends on a narrow interpretation of the word "consider" in ORS 136.460(2), such that the instruction would preclude the jury from giving any weight to the lesser-included option. Pet. Br. at 19. For the reasons set out above, that is not what that statute requires. Even if it did, however, members of a standard jury would likely fail to rigidly adhere to such a strict requirement and therefore the trial court's failure to give a required lesser-included instruction would remain harmful.

Although jurors are generally presumed to follow their instructions, this court has acknowledged that that presumption does not always hold true. In *State v. White*, for example, this court held that certain forms of prosecutorial misconduct were sufficiently egregious that a simple instruction telling the jury to disregard what it had heard was insufficient to remedy the error. 303 Or 333, 343, 736 P2d 552 (1987). Generally, however, the state is correct that jurors are "assumed to have followed their instructions, absent an overwhelming

probability that they would be unable to do so." *State v. Terry*, 333 Or 163, 177, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002).[6]

The phrase "overwhelming probability" in *Terry* can be traced back to the United States Supreme Court. *Terry* quotes the above from *State v. Smith*, 310 Or 1, 26, 791 P2d 836 (1990), which in turns cites *Greer v. Miller*, 483 US 756, 766 n 8, 107 S Ct 3102, 97 L Ed 2d 618 (1987). That case in, in turn, cited both *Richardson v. Marsh*, 481 US 200, 208, 107 S Ct, 1702, 95 L Ed 2d 176 (1987), from which it quoted the phrase "overwhelming probability," and *Bruton v. United States*, 391 US 123, 136, 88 S Ct 1620, 20 L Ed 2d 476 (1968). Those cases involved curative jury instructions where the Court assessed a jury's ability to disregard potentially inflammatory evidence.

If the state is correct, and the "acquittal first" instruction requires that a jury not acknowledge or discuss the existence of a lesser-included offense option until a formal acquittal on the charged offense, it is certain that many jurors would fail to apply that instruction. Put simply, jurors negotiate and

---

[6] There is some reason to question the foundations of this presumption. Comprehensive studies of jury deliberations are rare, but those that exist suggest the jurors often discuss forbidden topics. For example, an Arizona study that recorded actual deliberations found that "in the vast majority of [civil] jury deliberations (85%), there was at least a passing mention of either the defendant's or the plaintiff's insurance. Jurors discussed insurance on average four times during deliberations. Valerie P. Hans, *Inside the Black Box: Comment on Diamond and Vidmar*, 87 Va L Rev 1917, 1926 (2001) (footnotes omitted).

compromise during their deliberations, despite the fact that they are charged to simply apply the facts to their instructions. One study asked individual jurors, "If it were entirely up to you as a one-person jury, what would your verdict have been in this case?" Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 Geo LJ 1567, 1576 (2011) (quoting Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, 6 J. Empirical Legal Stud. 513, 520 (2009)). That study determined that 54 percent of verdicts reached by juries "were rendered with at least one juror whose 'one-person' verdict diverged from the final verdict." Larsen, 99 Geo LJ at 1576. In other words, a majority of cases included in the study had a negotiated or compromise verdict. Such verdicts are, of course, not improper, because "factfinders, not unlike negotiators, are permitted the luxury of verdicts reached by compromise." *County Court of Ulster County, N. Y. v. Allen*, 442 US 140, 168, 99 S Ct 2213, 2230, 60 L Ed 2d 777 (1979) (Burger, C.J., concurring). However, those verdicts do demonstrate that jurors engage in a process other than the mechanical application of their instructions to the facts.

A recent real-world example demonstrates that jurors may immediately discuss lesser-included offenses even when provided with instructions requiring them to acquit on a charged offense before considering a lesser-included offense. George Zimmerman was acquitted in the high-profile case of the death of Trayvon Martin on July 13, 2013. Lizetter Alvarez, *Zimmerman Is Acquitted*

in Trayvon Martin Killing, New York Times, July 13, 2013 (available online at http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html) (last visited August 8, 2013). In that case, the jury was instructed as follows:

> "In considering the evidence, you should consider the possibility that although the evidence may not convince you that George Zimmerman committed the main crime of which he is accused, there may be evidence that he committed other acts that would constitute a lesser included crime. *Therefore, if you decide that the main accusation has not been proved beyond a reasonable doubt, you will next need to decide if George Zimmerman is guilty of any lesser included crime*. The lesser crime indicated in the definition of Second Degree Murder is:
>
> "Manslaughter"

(http://www.flcourts18.org/PDF/Press_Releases/Zimmerman_Final_Jury_Instructions.pdf) (emphasis added). Even in the face of that instruction, one juror has stated in an interview that the manslaughter option was immediately considered, describing an initial vote of the six jurors at the outset of deliberations as "three not guilties, one second degree murder and two manslaughters." Transcript, *Exclusive Interview With Juror B-37*, Anderson Cooper 360, July 15, 2013 (available online at http://transcripts.cnn.com/transcripts/1307/15/acd.01.html) (last visited August 8, 2013).

This court has acknowledged that there are situations in which the presumption that a jury adheres to its instructions must give way. Under

defendant's proposed interpretation – that the "acquittal first" instruction merely governs the order of formal deliberations – there is no reason a properly instructed jury could not abide by its instructions. However, it is unlikely that any jury would adhere to a strict rule barring any discussion or weighing of the existence of a lesser-included option. As the United States Supreme Court has explained,

> "[A] defendant is entitled to a lesser offense instruction – in this context or any other – precisely because *he should not be exposed to the substantial risk that the jury's practice will diverge from theory*. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction."

Keeble 412 US at 212-13. Here, even if the state's strict interpretation of the "acquittal first" instruction is correct, defendant should nevertheless not be deprived of the benefit of a lesser-included offense instruction because the evidence shows that a jury is unlikely to follow such a rule.

CONCLUSION

Defendant had a statutory right to a lesser-included jury instruction that was not provided. The jury should have been informed of their full range of permissible verdicts, including the attempt offense that he requested. Had that instruction been given, it may have affected the jury's deliberations. This court cannot say that the error was harmless and should affirm the Court of Appeals decision.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

DANIEL C. BENNETT OSB #073304
DEPUTY PUBLIC DEFENDER
Dan.Bennett@opds.state.or.us

Attorneys for Defendant-Appellant
Daniel Steven Zolotoff

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,575 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 8, 2013.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

DANIEL C. BENNETT OSB #073304
DEPUTY PUBLIC DEFENDER
Dan.Bennett@opds.state.or.us

Attorneys for Defendant-Appellant
Daniel Steven Zolotoff