S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

January 9, 2006

Opinion No. 06-006

Sequential Instructions for Jury Consideration of Lesser-Included Offenses

QUESTION

Is the trial court required to instruct the jury that it must reach a unanimous not guilty verdict on the principal charge before it can consider a lesser-included offense, or may the trial court instruct the jury to consider the lesser-included offense if the jurors do not agree on the verdict for the principal charge?

OPINION

While many appellate opinions have approved the giving of sequential, "acquittal first," instructions, no court has required that such an instruction be given. Furthermore, no court has addressed the propriety of "acquittal first" instructions in light of *State v. Burns,* 6 S.W.3d 453 (1999), and its progeny. However, an instruction that directs the jury to take up the offenses charged in sequence starting with the most serious and to consider a lesser charge if no agreement concerning the greater can be reached is, in our view, fully consistent with the rationale of *Burns.*

ANALYSIS

The Court of Criminal Appeals has held repeatedly that sequential, or "acquittal first," jury instructions are appropriate. Beginning with *State v. Rutherford*, 876 S.W.2d 118, 119-120 (Tenn. Crim. App. 1993), the court has recognized that while the jury has a duty to determine the grade of the offense, sequential instructions do not violate this duty and do not preclude the jury from considering lesser-included offenses. *See also State v. Raines*, 882 S.W.2d 376, 381-82 (Tenn. Crim. App. 1994); *State v. McPherson*, 882 S.W.2d 365, 375 (Tenn. Crim. App. 1994). The Tennessee Supreme Court has affirmed the lower court's ruling on sequential instructions, publishing a portion of that court's opinion as an appendix. *See State v. Mann*, 959 S.W.2d 503, 521 (Tenn. 1997). In numerous cases following *Mann*, the propriety of sequential instructions has been approved. *See State v. Stanley Earl Cates*, No. E2003-02648-CCA-R3-CD, 2004 WL 2951976 (Tenn. Crim. App. Dec. 20, 2004); *State v. Joe A. Gallaher*, No. E2001-01876-CCA-R3-CD, 2003 WL 21463017, (Tenn. Crim. App. June 25, 2003); *State v. Augustine John Lopez, III*, No. M2003-2307-CCA-R3-CD, 2005 WL 1521826 (Tenn. Crim. App. June 28, 2005); *Earnest Gwen Humphrey*, No. M2003-01489-CCA-R3-CD, 2005 WL 2043778 (Tenn. Crim. App. August 25, 2005); *State v. Jerry Dale Tigner, Jr.*, No. W2004-01935-CCA-R3-CD, 2005 WL 2259252 (Tenn. Crim. App. September 15, 2005).

In *Gallaher*, the Court of Criminal Appeals addressed the issue of sequential jury instructions as follows:

> We acknowledge that this court's opinions do not contain separate authority for holding that sequential instructions are proper. And we acknowledge that some jurisdictions see due process problems relating to sequential instructions based on the wording of [these instructions]. However, the defendant ignores the importance of the present state of the law in Tennessee. We are bound by published precedent. Moreover, we view the supreme court's publication of parts of this court's opinion in *Mann* as an appendix to mean more than the court's acquiescence in this court's opinion. Therefore, based on controlling authority, we conclude that the trial court did not err in giving sequential instructions.

Although, arguably, sequential instructions are not the same as "acquittal first" instructions, the terms were used interchangeably in *Mann* and have been blended in other decisions. Our courts have never drawn a distinction between an instruction that requires the jury to consider the charged offense and the lesser-included offenses in sequential order and an instruction that requires the jury to acquit the defendant of the charged offense before considering each lesser offense in order.

However, in *State v. Burns*, the Supreme Court rejected the "rational basis for acquittal" test from the Model Penal Code and held instead that a lesser-included offense instruction should be given whenever there is proof in the record from which a rational juror could choose to convict the defendant of the lesser offense. *Id.* at 468-469. Later, the Court held that a defendant's constitutional right to a jury trial is implicated when the jury is not permitted to consider all offenses supported by the evidence. *State v. Ely*, 48 S.W.3d 710, 727 (Tenn. 2001). The holding in *Ely* also clearly established that an erroneous failure to charge lesser-included offenses will result in reversal on review unless the error was harmless beyond a reasonable doubt. *Id.* Our courts have not yet addressed whether "acquittal first" instructions comport with the rationale of *Burns* and its progeny.

The rationale underlying *Burns* is fully honored, in our view, by an instruction that merely directs the jury to take up the offenses charged in sequence starting with the most serious and to consider lesser charges *if no agreement can be reached* as to a more serious charge in the sequence. Such instructions promote efficiency by supplying an orderly structure for the jury's deliberations and at the same time insure that the jury is afforded the opportunity to reach a unanimous verdict concerning every charge in the sequence consistent with the defendant's rights as *Burns* conceives them to be.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

RACHEL E. WILLIS
Assistant Attorney General

Requested by:

Al Schmutzer
District Attorney General
125 Court Avenue, Suite 301E
Sevierville, TN 37862