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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington

Petitioner,

vs.

JOEL CONDON

Appellant/Respondent

Yakima Cause No. 09-1-00544-9
The Honorable Judge David A. Eloffson

**RESPONDENT'S
SUPPLEMENTAL BRIEF**

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STATEMENT OF FACTS

Joel Condon and Jesus Lozano planned to rob a drug dealer, whom they believed had cash and cocaine in his house.¹ RP 790-792, 794. Mr. Condon had a handgun. RP 739, 797. Their information about the drug dealer proved incorrect. The two men broke into the wrong house. RP 735, 738. Once inside, they encountered Carmelo Ramirez. Ramirez either grabbed Lozano and held him in a chokehold, or tried to take Mr. Condon's gun from him. RP 745, 797.

Mr. Condon shot Ramirez twice in quick succession. RP 746, 775-781. He fired the two shots so quickly that Ramirez's wife, who was also in the house, believed he'd only fired once. RP 746. Mr. Condon did not shoot Ramirez in the head or aim for his heart. Instead, he shot him in the leg and the arm. The leg shot went through both of Ramirez's thighs. The shot in the arm passed through his elbow, entering his chest cavity. RP 1001-1002.

Ramirez did not die immediately. RP 642-643, 746-747. Instead, he went outside and asked a friend to take him to the hospital. He lost consciousness on the way, and died at the clinic. RP 642-643, 646, 746. Mr. Condon and Lozano fled the house before Ramirez went outside. RP 746-747.

¹Mr. Condon has consistently denied involvement in the offense. At trial, he contested an identification made by Ramirez's wife. CP 279-287. He argued the identification issue on appeal as well. Appellant's Opening Brief, pp. 24-28. The primary evidence against him at trial came from Lozano, who only identified Mr. Condon as the shooter after receiving a significant benefit for his cooperation. *See* Appellant's Opening Brief, pp. 9-10, 24-28; RP 788, 818-819. The Supreme Court did not accept review of any issues relating to the identity of the shooter. Mr. Condon presents his statement of the case and arguments in keeping with this procedural posture.

Mr. Condon talked about the offense in jail with an inmate named Bruce Davis.² He did not say that he'd premeditated the killing, or even that he'd intended to kill Ramirez. According to Davis, Mr. Condon said he'd "screwed up on a home invasion." RP 1001. Davis testified that Mr. Condon said he'd shot twice, and that one round "hit [Ramirez] in the leg and the other one hit him in the arm and the one that hit him in the arm went all of the way through into his chest and that's what killed him." RP 1001-1002. Mr. Condon also noted to Davis Lozano's luck at emerging unscathed from the altercation:

the kid's lucky he didn't get shot too because he was right here... [Ramirez] still had a hold of him -- had a hold of the kid when [Mr. Condon] shot him. RP 1004.

The state charged Mr. Condon with premeditated murder and first-degree felony murder.³ These two offenses were charged in the alternative. CP 1-2.

At the conclusion of the evidence, Mr. Condon asked the court to instruct the jury on second-degree intentional murder. RP 1030, 1049, 1076; CP 336-358. He argued that second-degree intentional murder is a lesser-included offense of premeditated murder and that the facts suggested he committed only the lesser charge. RP 1049-1057; 1076-1081.

The trial judge refused to instruct on second-degree intentional murder. The judge apparently believed that the alternative charge of felony murder precluded instruction on second-degree intentional murder. RP 1030, 1049, 1076, 1082-1085.

² Mr. Condon denies this conversation took place; he vigorously challenged Davis's credibility at trial. RP 805-822, 1145.

³ Burglary and/or robbery were the underlying felonies of the felony murder charge. The state also charged first-degree burglary and second degree unlawful possession of a firearm. CP 1-2.

The court also concluded that the evidence did not support instruction on second-degree intentional murder. RP 1082-1085.

The court did not instruct the jury to consider both alternative charges. Instead, the court directed jurors to consider the premeditated murder charge first. The instructions indicated jurors could only consider the felony murder charge if they acquitted Mr. Condon of premeditated murder, or found themselves unable to agree on that charge. CP 220.

The jury did not return a verdict on the felony murder charge. Instead, jurors convicted Mr. Condon of premeditated murder,⁴ and left blank the verdict form relating to felony murder. CP 305-310.

Division III reversed Mr. Condon's conviction for premeditated murder. The court based its decision on the trial judge's failure to instruct on second-degree intentional murder. Opinion, pp. 1, 10-17. The court refused to dismiss the premeditated murder charge, finding the evidence sufficient for conviction. Opinion, pp. 8-10.

ARGUMENT

I. MR. CONDON'S CONVICTION FOR PREMEDITATED MURDER VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE OF PREMEDITATION.

A. Standard of Review

The Supreme Court reviews constitutional questions *de novo*. *State v. Lynch*, --- Wn.2d ---, 309 P.3d 482, 484 (Sept. 19, 2013). A challenge to the sufficiency of the evidence requires the court to view the evidence in the light most favorable to

⁴ Jurors also voted to convict on the burglary and UPF charges. CP 305-310.

the prosecution. *State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012). A reviewing court must reverse for insufficient evidence if no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Id.*

B. The prosecution failed to prove that Mr. Condon premeditated the intent to kill Ramirez.

The state must prove each element of a charged crime beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If the state fails to prove an essential element, due process mandates dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

A conviction for aggravated first-degree murder requires proof that the accused person premeditated the intent to kill, RCW 9A.32.030. The trial court defined premeditated for the jury using an instruction based on WPIC 26.01.01:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point in time [sic]. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 217.

The state must prove actual deliberation, not merely the opportunity to deliberate. *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986). The state may rely on circumstantial evidence to prove premeditation, but only if “the inferences drawn by the jury are reasonable and the evidence supporting the jury’s finding is substantial.” *State v. Gentry*, 125 Wn.2d 570, 599, 888 P.2d 1105 (1995).

Thus, for example, manual strangulation by itself does not prove premeditation. *Bingham*, 105 Wn.2d at 828. By contrast, multiple blunt force injuries to the skull followed by strangulation with a rope or cord may suffice. *State v. Gibson*, 47 Wn. App. 309, 312, 734 P.2d 32 (1987).

1. Even when taken in a light most favorable to the prosecution, the evidence does not establish premeditation.

Here, even when considered in a light most favorable to the state, the evidence does not prove Mr. Condon premeditated the intent to kill Ramirez. According to Lozano, the two men entered the house to rob a drug dealer, not to kill Ramirez. RP 792. Neither Mr. Condon nor Lozano ever made any statements showing intent to kill anyone. RP 628-1019. In fact, according to Davis, Mr. Condon later said that he'd "screwed up" a robbery, not that he'd successfully committed murder. RP 1004.

In addition, the physical evidence shows Mr. Condon did not intend to kill Ramirez. He did not shoot Ramirez in the head or through the heart. Instead, one shot went through both legs, the other passed through Ramirez's elbow before entering his torso. RP 775-781.

Furthermore, the sequence of events does not suggest premeditation. Instead, things unfolded in a manner suggesting that Mr. Condon reacted quickly to a fluid situation. He did not shoot Ramirez as soon as the two men entered the house. RP 738-746. Instead, he only fired after Ramirez took action against him and Lozano. RP 745, 797. He did not pause after the first shot, either to reflect on his actions or to ensure that his second shot would kill Ramirez. RP 746. Nor did he

fire a third time, even though the first two shots left Ramirez alive. RP 642-643, 747. When Mr. Condon left the house, Ramirez had not even lost consciousness, much less expired. RP 642-643, 646, 747. Had Mr. Condon premeditated the intent to kill Ramirez, he could have ensured his death by shooting him a third time before leaving the house.

Even when taken in a light most favorable to the prosecution, the evidence does not establish premeditation. Nothing suggests that Mr. Condon intended to kill Ramirez or acted “after any deliberation.” Nor did the state prove he formed a “settled purpose” to kill Ramirez. Nor does any evidence establish “a design to kill... deliberately formed” over “more than a moment” in time. CP 217; RCW 9A.32.020.

The state produced insufficient evidence of premeditation. The court must reverse Mr. Condon’s conviction and dismiss the premeditated murder charge with prejudice. *Smalis*, 476 U.S. at 144.

2. The Court of Appeals based its sufficiency analysis on *dicta*, which this court should not adopt as law.

Relying on language from *Bingham*, the Court of Appeals concluded that the evidence showed premeditation: “the evidence that Mr. Condon brought a loaded handgun to the Ramirez/Gregorio residence, intended to commit a robbery, and wielded the handgun when he kicked in the door is sufficient evidence to support the element of premeditation.” Opinion, p. 10.

The court's decision rests on *dicta* and flawed reasoning. In *Bingham*, the court found evidence of death by strangulation insufficient to prove premeditation.⁵ *Bingham*, 105 Wn.2d at 827. Although the *Bingham* court speculated that the "planned presence of a weapon" could suggest premeditation, this observation was wholly unnecessary to the court's decision, since the defendant in *Bingham* did not use a weapon. *Id.* The *Bingham* court's statements regarding the "planned presence of a weapon" amounted to *dicta*. See, e.g., *Bennett v. Smith Bundy Berman Britton*, PS, 176 Wn.2d 303, 317, 291 P.3d 886 (2013) (Madsen, C.J., concurring). The *dicta* in *Bingham* do not control this case. Nor should the court adopt the *Bingham dicta* and give them force.⁶

The Court of Appeals should not have relied on *Bingham*. Mr. Condon and his codefendant planned to commit robbery. They brought a gun with them to facilitate that crime. They did not enter the house planning to commit murder. No evidence suggests they would have killed anybody had the robbery gone smoothly. Under these circumstances, the "planned presence" of a weapon did not establish premeditated intent to commit murder.

⁵This was so even though the evidence showed the defendant applied pressure continuously for 3-5 minutes. *Id.*, at 822. This 3-5 minute period exceeded the amount of time Mr. Condon took to react to the struggle. The *Bingham* court also cited *State v. Tikka*, 8 Wn. App. 736, 509 P.2d 101 (1973). *Tikka* involved a prison murder, in which one inmate held the victim while another stabbed him five times. *Id.*, at 737. The evidence showed coordination and planning, and clearly established premeditation. The facts in *Tikka* differ substantially from the facts in this case.

⁶ To support its holding, the Court of Appeals cited another case that relied on the *Bingham dicta*. Opinion, p. 10 (citing *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1990)). In *Massey*, the defendant confessed he'd killed the victim to prevent him from identifying a codefendant. *Massey*, 60 Wn. App. at 135. In addition, the defendants shot the victim in the head and the stomach, and stabbed him seven times. *Id.*, at 134. Under these circumstances, the court found the evidence sufficient to establish premeditation. The court cited *Bingham* and the fact that the defendant brought a gun to the crime scene. *Massey*, 60 Wn. App. at 145. However, the confession evidence and the number of wounds inflicted established premeditation, even without proof that the defendant brought a handgun to the scene. *Id.*, at 145.

The prosecution failed to prove that Mr. Condon premeditated the intent to kill Ramirez. His conviction for aggravated first-degree murder violated his right to due process. *Winship*, 397 U.S. at 361. The court must reverse the conviction and dismiss the charge with prejudice. *Smalis*, 476 U.S. at 144.

II. THE TRIAL COURT’S REFUSAL TO INSTRUCT ON SECOND-DEGREE INTENTIONAL MURDER VIOLATED MR. CONDON’S STATUTORY AND CONSTITUTIONAL RIGHTS TO HAVE THE JURY CONSIDER APPLICABLE LESSER-INCLUDED OFFENSES.

A. Standard of Review

The Supreme Court reviews constitutional errors *de novo*. *Lynch*, 309 P.3d at 484. The Supreme Court also reviews *de novo* a trial judge’s refusal to give a requested instruction if the refusal rests on an issue of law. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

B. The trial judge infringed Mr. Condon’s unqualified statutory right to instructions on a lesser-included offense.

An accused person has an “unqualified” statutory right to instructions on an applicable inferior-degree offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984); RCW 10.61.003; RCW 10.61.010. The right attaches if “even the slightest evidence” suggests that the person may have committed only the inferior offense. *Parker*, 102 Wn.2d at 163-164.

The trial court and any reviewing court must view the evidence in a light most favorable to the instruction’s proponent. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The court must instruct on included offenses,

even in the face of contradictory evidence or inconsistent defense theories.⁷ *Id.*, at 456-461.

1. The Court of Appeals correctly found that the evidence entitled Mr. Condon to instructions on second-degree intentional murder.

The Court of Appeals viewed the evidence in a light most favorable to Mr. Condon and “readily determine[d] it could support a verdict of second degree murder to the exclusion of premeditated murder.” Opinion, p. 13. Specifically, eyewitness testimony allowed the jury to conclude that

Mr. Condon shot Mr. Ramirez in reaction to Mr. Ramirez trying to wrest the handgun from him, or that he shot Mr. Ramirez because Mr. Lozano was turning purple from Mr. Ramirez's chokehold. This affirmative evidence suggesting that Mr. Condon acted intentionally, but impulsively, would not support the element of premeditation required for first degree premeditated murder.
Opinion, p. 13.

As the Opinion makes clear, the record contains at least “slight[] evidence” that Mr. Condon committed second-degree murder but not premeditated first-degree murder.⁸ RCW 9A.32.050. When taken in a light most favorable to Mr. Condon, the evidence affirmatively shows that he acted without premeditation. Mr. Condon fired only after Ramirez began wrestling with Lozano. He fired two shots in very quick

⁷ Furthermore, the court must instruct on a lesser offense even when the prosecution files alternative charges, if the lesser offense is included within either alternative. *State v. Schaffer*, 135 Wn.2d 355, 359, 957 P.2d 214 (1998). This is true even where the lesser is not included within the second alternative. *Id.* In *Schaffer*, the trial court refused to instruct on manslaughter as a lesser-included offense of first-degree premeditated murder. The Supreme Court reversed, even though the jury convicted on the alternative charge of second-degree felony murder. *See also State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (a defendant charged with alternative charges of intentional and felony murder “is entitled to instructions on lesser included offenses if she requests them.”)

⁸ As argued elsewhere in this brief, the prosecution’s evidence was insufficient to establish that Mr. Condon premeditated the intent to commit murder.

succession. He shot Ramirez through the thighs and in the arm rather than in the head or directly through his heart. RP 775, 797.

The trial judge should have granted Mr. Condon's request to have the jury pass on the inferior offense of second-degree murder. The court's failure to instruct the jury on second-degree murder requires reversal. *Parker*, 102 Wn.2d at 164.

2. The trial judge applied the wrong legal standard by failing to take the evidence in a light most favorable to Mr. Condon.

The trial judge should have taken the evidence in a light most favorable to Mr. Condon. *Fernandez-Medina*, 141 Wn.2d at 456. Instead, the trial court interpreted the evidence in favor of the prosecution. The court's decision was thus based on the wrong legal standard. First, the judge should have noted the prosecution's failure to produce direct evidence of premeditation. Mr. Condon made no statements establishing a settled purpose, intent to kill, or deliberation that lasted more than a moment. RP 1082-1084; CP 217; RCW 9A.32.020.

Second, the judge should have noted that circumstantial evidence suggested lack of premeditation. The incident unfolded rapidly, leaving little time for Mr. Condon to consider his actions. All the witnesses suggested Mr. Condon responded spontaneously to a fluid situation. Mr. Condon didn't aim at Ramirez's head or heart. The fatal shot actually hit Ramirez in the elbow before lodging in his torso. Davis testified that Mr. Condon admitted "screw[ing] up" a robbery rather than bragging about a successful murder. RP 811-814, 1001, 1082-1084.

Third, the judge improperly distorted certain evidence in a manner that favored the prosecution. Seven months after the shooting, Mr. Condon remarked on Lozano's luck (because Mr. Condon could have accidentally shot Lozano during

the struggle). RP 1004. Inexplicably, the court interpreted this remark as proof of Mr. Condon's "reflective" and "cool" demeanor at the time of the shooting. RP 1001, 1084. When taken in a light most favorable to the defense, Mr. Condon's remark suggests that he fired the shots wildly toward the struggling pair, without premeditating the intent to kill Ramirez. The judge also misquoted Davis's summary of Mr. Condon's statements in a manner that favored the prosecution's theory.⁹ RP 1084.

The record shows that the trial court did not take the evidence in a light most favorable to Mr. Condon. Nor did the judge even mention the "slight[] evidence" test. RP 1082-1084; *Parker*, 102 Wn.2d at 163-164. The trial judge applied the wrong legal standard. Under the correct legal standard, the judge should have instructed the jury on second-degree intentional murder. *Id*; *Fernandez-Medina*, 141 Wn.2d at 456.

3. The trial judge applied the wrong legal standard by rejecting Mr. Condon's proposed instructions for reasons contrary to established Supreme Court precedent.

The trial court must instruct on a lesser-included offense when requested by the defense and supported by the evidence. *Parker*, 102 Wn.2d at 163-164. This remains true even when the state charges two crimes in the alternative. *Schaffer*, 135 Wn.2d at 358-359. The court must give appropriate instructions on a lesser-

⁹ According to Davis, Mr. Condon said "I wish I would have shot the little f*cker because if I did I wouldn't be here right now." The court rephrased this as "[I] probably should have shot [Lozano] too." RP 1004, 1084. The court's inaccurate paraphrase implies that Mr. Condon intended to kill Ramirez, and should have intentionally killed Lozano as well.

included offense even if one of the charged alternatives does not include the lesser offense. *Id.*; see also *Grier*, 171 Wn.2d at 42.

The trial judge apparently misunderstood this. RP 1082-1084. The court improperly required Mr. Condon to satisfy the *Workman*¹⁰ test for both alternative charges. The court denied Mr. Condon's request because first-degree felony murder does not include the lesser charge of second-degree intentional murder, RP 1084.

As the Court of Appeals recognized, the trial judge applied the wrong legal standard by requiring Mr. Condon to satisfy the *Workman* test for both charges.¹¹ Opinion, p. 10-17. The failure to instruct on second-degree murder violated Mr. Condon's unqualified right to have the jury consider the inferior-degree offense. *Parker*, 102 Wn.2d at 163-164.

In addition, the jury's verdict makes this appeal the same as any other appeal where the court refused to instruct on a lesser-included offense. The jury did not enter a verdict as to the felony murder charge.¹² In other words, because the jury did not consider felony murder, Mr. Condon's case resembles the "normal" case involving lesser-included instructions. See, e.g., *Parker*. It is as if the state charged Mr. Condon only with premeditated murder, and the court failed to instruct on the lesser-included offense of intentional murder. Because the jury did not consider the alternative charge of felony murder, that charge does not factor into the analysis.

¹⁰ *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

¹¹ Furthermore, the state abandoned this argument in the Court of Appeals. Opinion, p. 11 n. 1.

¹² The trial court instructed jurors not to consider felony murder if they convicted Mr. Condon of premeditated intentional murder. CP 220.

The court must reverse Mr. Condon's conviction and remand the case for a new trial. *Id.* Upon retrial, the court must instruct on the lesser offense of second-degree murder. *Id.*

C. The trial judge infringed Mr. Condon's state and federal due process rights to instructions on a lesser-included offense.

The government may not deprive a person of liberty without due process. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.¹³ Washington courts balance three factors when evaluating due process claims involving state criminal procedures.¹⁴ *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). These factors include (1) the private interest, (2) the risk of error under current procedure and the probable value of additional procedures, and (3) the government's interest in maintaining the existing procedure. *Id.* This three-factor test applies when Washington courts apply the Fourteenth Amendment in criminal cases.¹⁵ It also applies under Wash. Const. art. I, § 3.¹⁶

¹³ In some contexts, art. I, § 3 provides greater protection than does the Fourteenth Amendment's due process clause. See, e.g., *State v. Bartholomew*, 101 Wn.2d 631, 639-640, 683 P.2d 1079 (1984).

¹⁴ Federal courts do not apply this test to state criminal proceedings; instead, they apply the *Patterson* test. *Medina v. California*, 505 U.S. 437, 444-445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992)) (citing *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). This is because federal courts are loathe to "construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson*, 432 U.S. at 201; see also *Medina*, 505 U.S. at 445 (quoting *Patterson*). A federal court will not invalidate a state criminal procedure "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson*. 432 U.S. at 201-202. Washington courts are not constrained in this way. The *Medina* decision applies only to federal review of state court proceedings. *Patterson*, 432 U.S. at 201; *Medina*, 505 U.S. at 445. State courts need not adopt the *Patterson* standard when reviewing criminal procedures. State courts may apply a more protective test under the Fourteenth Amendment, despite the U.S. Supreme Court's adoption of the *Patterson* standard in federal court. Because *Medina* and *Patterson* deviate from *Mathews* only as a result of federalism, this court must apply *Mathews* balancing to Mr. Condon's procedural due process claim.

¹⁵ This Court has twice remarked on the appropriate test for evaluating due process claims in criminal cases. The court declined to apply *Mathews* in *State v. Heddrick*, 166 Wn.2d 898, 904 n. 3, 215 P.3d 201 (2009). However, the court did not analyze art. I, § 3, and appellant did not provide a *Gumwall* analysis. Furthermore, the *Heddrick* court made no mention of the federalism concerns that prompted the appli-

(Continued)

Under *Mathews*, courts must instruct on applicable lesser-included offenses. The magnitude of the private interest at stake, the risk of error when jurors do not have the chance to consider a lesser-included offense, and the absence of any real countervailing government interest all weigh in favor of this result.

cation of a different standard in *Medina* and *Patterson*. *Id.* In a later case, the court declined to reach the issue, finding in favor of the state under either the *Mathews* standard or the standard set forth in *Medina*. *State v. Brousseau*, 172 Wn.2d 331, 346-49 n. 8, n. 9., 259 P.3d 209 (2011).

¹⁶ Generally, independent analysis of a provision of the state constitution must be justified under the six nonexclusive *Gunwall* criteria. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). *Gunwall* may be unnecessary here, because Mr. Condon asks the court to do no more than apply the traditional federal standard for evaluating procedural due process claims. Nonetheless, a brief *Gunwall* analysis follows:

The language of the state provision. The strong and direct language of art. I, § 3 establishes a concern for individual rights. The acknowledgment that the state may deprive a person of rights suggests the need to balance such rights against state interests. The *Mathews* test meets this need.

Differences between the state and federal provisions. Identity of language does not end the inquiry under this factor. Instead, the state constitution may depart from federal law where justified by policies underlying the constitutional guarantee. *State v. Davis*, 38 Wn. App. 600, 605 n. 4, 686 P.2d 1143 (1984). The federalism concerns discussed by the U.S. Supreme Court do not apply to art. I, § 3. *Medina*, 505 U.S. at 445.

State constitutional and common law history. While no legislative history suggests that art. I, § 3 differs from the federal provision; this does not mean they are coextensive. Nor does the common law preclude application of the balancing test outlined in *Mathews*. The Supreme Court has noted that *Mathews* sets the minimum standard in civil cases, so the state constitution “would not provide less due process protection” than that required under *Mathews*. *In re Dependency of MSR*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012), *reconsideration denied* (May 9, 2012), *as corrected* (May 8, 2012).

Pre-existing state law. Washington has a long tradition of balancing competing interests in criminal cases. For example, the Supreme Court long ago balanced the competing interests attached to conflicting presumptions in rape cases. *State v. Jones*, 80 Wash. 588, 596, 142 P. 35 (1914). Pre-existing state law suggests that balancing tests are consistent with art. I, § 3.

Structural differences between the two constitutions. This factor always supports an independent constitutional analysis. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (Young I).

Matters of local concern. State criminal procedure is a local concern. *Medina*, 505 U.S. at 445.

Conclusion: Five of the six *Gunwall* factors support an independent application of art. I, § 3. The remaining factor does not prohibit application of the *Mathews* balancing test. Accordingly, art. I, § 3 requires analysis of criminal procedures using the balancing test set forth in *Mathews*.

1. Every criminal case involves a compelling private interest: the accused person's fundamental right to freedom from restraint.

A proceeding that may result in confinement involves the “most elemental of liberty interests,” one described as “almost uniquely compelling.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). *Mathews* balancing requires significant procedural safeguards when a person faces even brief confinement in a civil proceeding. *Turner v. Rogers*, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011); *Addington v. Texas*, 441 U.S. 418, 433, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). The private interest in serious cases—such as the murder prosecution here—surpasses that in most situations involving a brief loss of freedom. Thus, the private interest here weighs heavily in favor of requiring instruction on a lesser-included offense as a matter of due process.

2. Failure to instruct on an applicable lesser-included offense creates a significant risk of error at a criminal trial.

In federal court, an accused person has the right to instructions on a lesser-included offense. *Stevenson v. United States*, 162 U.S. 313, 322-323, 16 S.Ct. 839, 40 L.Ed. 980 (1896).¹⁷ Similarly, in all capital proceedings, due process requires instruction on applicable lesser-included offenses. U.S. Const. Amend. XIV; *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).¹⁸

¹⁷ The federal rule is “beyond dispute.” *Keeble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). Any other rule would present “difficult constitutional questions.” *Id.*, at 212-213.

¹⁸ Although the *Beck* court explicitly reserved ruling noncapital cases (*Beck*, 447 U.S. at 638, n.14), subsequent decisions have eroded the distinction between capital cases and those resulting in life imprisonment without the possibility of parole. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The federal circuit courts have wrestled with the question, but only in the context of *habeas corpus*
(Continued)

Failing to instruct on applicable lesser-included offenses increases the risk of error at trial. Such a failure “diminish[es] the reliability of the guilt determination,” and “enhances the risk of an unwarranted conviction.” *Beck*, 447 U.S. at 638.¹⁹

Without instruction on a lesser-included offense, the accused person is

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 U.S. at 212-213.

In other words, failure to instruct on a lesser-included offense creates a risk of conviction even in the absence of proof beyond a reasonable doubt, “simply because the jury wishes to avoid setting [the defendant] free.” *Vujosevic*, 844 F.2d at 1027. The risk of error may increase when conviction does not carry the death penalty: in such cases jurors might find themselves *more* willing to convict despite

proceedings, where significant procedural bars foreclose a definitive answer. A plurality of federal circuit courts believe that refusal to instruct on a lesser-included offense may violate due process in cases not involving the death penalty. Of these, the third circuit has unequivocally extended *Beck* to noncapital cases. *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). Four circuits will address the issue on *habeas* review if the refusal to instruct threatens a fundamental miscarriage of justice. Courts adopting this approach include the first, sixth, seventh, and eighth circuits. *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990); *Scott v. Elo*, 302 F.3d 598, 606 (6th Cir. 2002); *Robertson v. Hanks*, 140 F.3d 707, 711 (7th Cir. 1998); *DeBerry v. Wolff*, 513 F.2d 1336, 1339 (8th Cir. 1975). The second circuit has refused to consider the issue on *habeas* review, citing a different procedural bar. *Jones v. Hoffman*, 86 F.3d 46, 48 (2d Cir. 1996). The fourth circuit apparently takes this approach as well. *Stewart v. Warden of Lieber Corr. Inst.*, 701 F.Supp.2d 785, 793 (D.S.C. 2010) (citing unpublished case); *see also Leary v. Garraghty*, 155 F.Supp.2d 568, 574 (E.D. Va. 2001). The D.C. circuit has not faced the issue. The remaining circuit courts—the fifth, ninth, tenth, and eleventh circuits—adhere to a general rule of “automatic nonreviewability” in *habeas* proceedings. *Trujillo v. Sullivan*, 815 F.2d 597, 603 (10th Cir. 1987); *see also Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984); *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004); *Perry v. Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987).

¹⁹ Providing jurors with three options—guilty, not guilty, or guilty of a lesser charge—“ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard.” *Beck*, 447 U.S. at 634.

the absence of proof on one element, since erroneous conviction will not result in execution of the innocent.

The second *Mathews* factor weighs in favor of requiring appropriate instruction on lesser-included offenses.

3. The government benefits from proper instruction on applicable lesser-included offenses.

The third *Mathews* factor requires examination of the public interest, including “the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. Appropriate instructions on lesser-included offenses benefit the state. The public interest therefore weighs in favor of a rule requiring such instruction.

First, prosecutors have a duty to act in the interest of justice. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). No prosecutor should seek what the *Beck* court described as an “unwarranted conviction.” *Beck*, 447 U.S. at 638. Second, proper instruction on an included offense allows jurors to convict of a lesser charge when they might otherwise acquit the defendant of the charged crime.²⁰ Juries will convict defendants of the appropriate offense when the state cannot prove the charged offense. Third, unwarranted conviction on a greater charge wastes resources by incarcerating people for longer periods than necessary or appropriate. Instruction on applicable lesser-included offense reduces the possibility that offenders will receive longer sentences than they deserve.

²⁰ As the *Beck* court noted, this rationale underlies the common law origin of the practice. *Beck*, 447 U.S. at 633.

The public interest weighs in favor of requiring appropriate instruction on lesser-included offenses.

4. Due process requires trial courts to instruct jurors on applicable lesser-included offenses.

All three *Mathews* factors weigh in favor of a rule requiring courts to instruct jurors on applicable lesser-included offenses when warranted by the evidence and requested by the defendant. *Mathews*, 424 U.S. at 333. The significant private interest, the likely benefits of additional procedural protections, and the benefit flowing to the state all favor such instruction. *Mathews*, 424 U.S. at 333.

The Supreme Court should adopt the *Beck* court's reasoning, and hold that failure to instruct on a lesser-included offense violates due process when the evidence supports such an instruction and the accused person requests it. Here, the court's instructions forced jurors to either acquit or convict Mr. Condon. They did not have "the 'third option' of convicting on a lesser included offense..." *Beck*, 447 U.S. at 634.

The trial court's refusal to instruct the jury on second degree murder violated Mr. Condon's due process right to a fair trial. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *Vujosevic*. The court must reverse his conviction and remand the case to the superior court. *Id.* Upon retrial, the court must instruct jurors on any applicable lesser-included offenses.

- D. The court's failure to instruct on second-degree intentional murder prejudiced Mr. Condon because the evidence supported the proposed instructions.
 1. A reviewing court may not find harmless any violation of the statutory right if the evidence supports instruction on the lesser-included offense.

The statutory right to an appropriate inferior-degree offense instruction is “absolute.” *Parker*, 102 Wn.2d at 164. When warranted by the evidence and requested by the defendant, failure to give such an instruction requires reversal. *Id.* Washington courts adopted this rule more than a century ago.²¹ Because the court deprived Mr. Condon of his statutory right to instruction on second-degree murder, this court must reverse his conviction. *Parker*, 102 Wn.2d at 164.

2. A reviewing court may not find harmless any violation of the due process right if the evidence supports instruction on the lesser-included offense.

Courts presume prejudice from a showing of constitutional error. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Violation of a constitutional right requires reversal unless the state proves harmlessness beyond a reasonable doubt. *Id.* The prosecution must establish that the error was “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case.” *Id.*

A due process violation stems from refusal to instruct when the evidence supports the requested instructions. Under such circumstances, the state cannot show harmless error: if the evidence supports instructions on a lesser-included offense, refusal to give the instructions will never be trivial, will always prejudice

²¹ See, e.g., *State v. Young*, 22 Wash. 273, 60 P. 650 (1900) (Young II). Courts have recognized only two exceptions to this rule. First, a reviewing court need not reverse when the jury rejects an intermediate included offense. Thus, for example, failure to instruct on manslaughter does not require reversal harmless when the jury convicts on first-degree murder and rejects the inferior degree offense of second-degree murder. *State v. Guilliot*, 106 Wn. App. 355, 369, 22 P.3d 1266 (2001). Second, a court need not reverse convictions for companion charges unrelated to the included offense. *State v. Southerland*, 109 Wn.2d 389, 391, 745 P.2d 33 (1987) (reversal of assault charges not required where trial court erroneously failed to instruct on trespass as a lesser-included offense of burglary; error found harmless “as to the assault convictions.”). Neither exception applies here.

the defendant's substantial rights, and will always have a potential impact on the outcome. *Id.*

Here, the evidence supported Mr. Condon's request for instructions on second-degree intentional murder, as outlined above. This evidentiary support for the requested instructions establishes prejudice. The trial court's failure to give the requested instructions deprived Mr. Condon of his state and federal due process right to have the jury pass on the lesser-included offense. *Vujosevic*, 844 F.2d at 1027. His conviction for premeditated first-degree murder must be reversed. *Lorang*, 140 Wn.2d at 32.

CONCLUSION

The state produced insufficient evidence of premeditation. The Supreme Court should reverse the Court of Appeals on this issue, and remand for a new trial. The state may not retry Mr. Condon for aggravated first-degree murder.

In addition, the trial court infringed Mr. Condon's statutory and due process rights to have the jury consider a lesser-included offense. The Supreme Court should affirm the Court of Appeals' decision and remand the case for a new trial. On retrial, the court must allow jurors to pass on the lesser-included offense of second-degree murder.

Respectfully submitted on December 9, 2013.

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of the Supplemental Brief, postage pre-paid, to:

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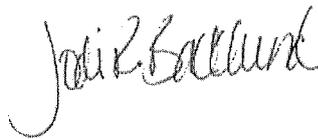
With the permission of the recipient(s), I emailed an electronic version of this brief to:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE STATE OF WASHINGTON THAT
THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 9, 2013.



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Attached is the Respondent's Supplemental Brief.

Thank you.

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