



1           ORS 475.005(22) reads, “‘Ultimate user’ means a person who lawfully possesses a  
2 controlled substance for the use of the person or for the use of a member of the household of the  
3 person or for administering to an animal owned by the person or by a member of the household of  
4 the person.”

5           The evidence admitted at trial proved defendant had small quantities of gamma-  
6 hydroxybutyric acid and gamma-butyrolactone. Although containers containing unidentified  
7 substances were also admitted into evidence, the state did not prove what those other substances  
8 were and this court is not permitted to speculate as to their identities.

9           Defendant testified that the substances he possessed were for his personal use.

10          Assuming that gamma-hydroxybutyric acid and gamma-butyrolactone are controlled  
11 substances as the court has found and held up to this point, defendant was permitted by law,  
12 specifically ORS 475.125(3)(c), to possess them as he was the ultimate user of them.

13          The jury’s having inferred an intent on defendant’s part to distribute gamma-hydroxybutyric  
14 acid and gamma-butyrolactone should not and cannot be held against defendant. The jury was  
15 improperly instructed. Had the jury been correctly instructed as requested by defendant, the jury  
16 could not have made the inference it did. The jury should have been instructed that mere  
17 possession is not evidence of intent to distribute. *State v. Pollock*, 189 Or App 38, 44-45, 73 P.3d  
18 297 (2003) *affirmed* 337 Or 618, 102 P3d 684 (2004); *State v. Garcia*, 120 Or App 485, 488, 852  
19 P2d 946 (1993) (prosecution witnesses’ testimony quantity possessed inconsistent with personal  
20 use essential to state’s case); *State v. Fulmer*, 105 Or App 334, 337, 804 P2d 515 (1991)  
21 (prosecution witnesses’ testimony quantity possessed inconsistent with personal use coupled with  
22 defendant’s possession of \$290 in small denomination bills in sock essential to state’s case).

23          Defendant anticipates the court will focus on the words, “unless otherwise prohibited,”  
24 found at ORS 475.125(3)(c) and be inclined to rule that defendant’s possession was “otherwise  
25 prohibited.” The court must eschew that focus as the words, “unless otherwise prohibited” are so  
26

1 utterly and completely vague as to constitute an unconstitutional limit on lawful possession of a  
2 controlled substance.

3 Defendant's possession of gamma-hydroxybutyric acid and gamma-butyrolactone for  
4 personal use is and was lawful.

5 DATED: January 9, 2006.

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James E. Leuenberger OSB 89154  
Attorney for defendant

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**Certificate of Delivery**

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I handed a true copy of this document to David Vill or his associate, Lane County District  
11 Attorney's Office, 125 E 8th Ave Rm 400, Eugene, OR 97401.

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James E. Leuenberger

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

COPY

STATE OF OREGON, )  
 ) Lane County Circuit  
 ) Court No. 20-05-12434  
 )  
 Plaintiff-Respondent, )  
 )  
 )  
 v. ) CA A130770  
 )  
 )  
 RICHARD HANS NORLAND, )  
 )  
 )  
 Defendant-Appellant. ) **ORDER OF DISMISSAL  
AND APPELLATE JUDGMENT**

On December 20, 2005, appellant filed a notice of appeal from a judgment entered on December 19, 2005. At the time the notice of appeal was filed, a motion in arrest of judgment was pending in the trial court, which rendered the judgment non-final. However, the filing of the notice of appeal terminated the trial court's jurisdiction to rule on the motion in arrest of judgment. ORS 136.535. ORCP 64 F and G. Therefore, the notice of appeal was filed prematurely. Alternative Realty v. Michaels, 90 Or 280, 753 P2d 411 (1988).

A motion in arrest of judgment must be heard and determined by the court within 55 days of the entry of the judgment, or it is deemed denied on the next day. Propp v. Long, 313 Or 218, 831 P2d 685 (1992). In this case, that time began to run upon entry of judgment, but was suspended upon the filing of the notice of appeal. The time will begin to run again once the trial court reacquires jurisdiction to rule on the motion upon issuance of the appellate judgment terminating this appeal.

Appeal dismissed.

JAN - 4 2006

DATE



CHIEF JUDGE

c:  James E. Leuenberger  
 Mary H. Williams  
 Honorable Jack A. Billings  
 Lane County Transcript Coordinator  
 Lane County Trial Court Administrator

**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondent

No costs allowed.  
 Costs allowed, payable by:

Appellate Judgment JAN - 4 2006  
Effective Date:

Court of Appeals  
(Seal)

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97301-2563

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