Supreme Court No. 1016034

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

BRANDON ROBERT HANKEL,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

UNITED STATES SUPREME COURT CASES

I. ISSUES PRESENTED FOR REVIEW

1. Is there a significant constitutional issue and does the Court of Appeals decision conflict with another case concerning the defense attorney's strategy of pursuing an "all-or-none" defense? Was the defense attorney's strategy in pursuing an "all-or-none" approach deficient and did it prejudice the defendant?

    a) Was *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011), approving of an all-or-none strategy, correctly decided?

        i) Concerning the first prong of *Strickland*, are *Crace* and *Grier* consistent in holding that a defense attorney is not deficient by pursuing an "all-or-none" strategy regarding lesser included offenses?

        ii) Concerning the second prong of *Strickland*, can the *Crace* case be distinguished from this case because a judge, not a jury, was the

fact finder, the trial judge was decisive about the defendant's guilt on Burglary in the Second Degree, and the Washington jury instructions, unlike the federal instructions, explicitly require a jury to make a decision about the charged crime before considering the lesser included crime?

b) Is *State v. Classen*, 4 Wn. App. 2d 520, 422 P.3d 489 (2018) a fact-specific case and it not inconsistent with *Grier?*

2. Is the Court of Appeals decision in conflict with other published decisions regarding a judge's authority at a bench trial to find the defendant guilty of a lesser offense whether asked to or not?

II. STATEMENT OF THE CASE

On September 6, 2019, Giana Marquardt was preparing for her classes as a physical education teacher at Kennewick High School in her office in an annex gym. RP at 40-41. A

man entered the building and Ms. Marquardt identified the defendant as that man. RP at 41-42.

Ms. Marquardt was alone in the building. RP at 42. The man was standing within five feet from her. RP at 42. She knew he should not be there; he was too old to be a student and Ms. Marquardt felt he was looking around in a manner that her instincts told her not to engage with him. RP at 43. To be nice, Ms. Marquardt engaged in the following conversation:

Ms. Marquardt: "Can I help you?"

Defendant: "Can you help me?"

Ms. Marquardt: "Can I help you?"

Defendant: "What time is it?"

Ms. Marquardt: "8:03"

Defendant: "What?"

Ms. Marquardt: "8:03"

RP at 43. Ms. Marquardt showed the defendant her watch. RP at 47-48. The defendant was now about 1-2 feet from her, he put his hands on the doorframe and gave her a look that caused

her to freeze. RP at 44. He then said, "I'm going to fuck you." RP at 44. (For the sake of decorum, the State will abbreviate this word as "f---" in this response.)

Her only thought was to get away from him. RP at 44. She backed up and slammed her office door in his face, causing it to lock automatically. RP at 44, 49. She telephoned for help, the defendant saw her calling and ran away. RP at 45. Ms. Marquardt testified this was the most vulnerable she has felt in her life. RP at 46. About 30 minutes later Ms. Marquardt was still very upset, distraught, and crying according to Officer Rosane, the school resource officer. RP at 73.

Officer Rosane received the report at 8:06 A.M. and saw the defendant fleeing and pursued him to a house where he was trying to hide under a pile of leaves. RP at 64, 66. The defendant said multiple times, "I just asked her what time it was, and she freaked out." RP at 66.

The defendant had previously been served with a Notice of Exclusion which prohibited him from going to any schools within the Kennewick School District. RP at 36-37.

A prior act of the defendant was admitted under ER 404 (b). On May 1, 2013, Jacqueline Aman arrived to work about 7:00 A.M. at her job as the executive assistant to the city manager and mayor at the Kennewick City Hall. RP at 81-82. As she got out of her car, the defendant was standing 12 inches from her face. RP at 82. She felt terrified and unsafe. The defendant said to her, "Is this where I'm going to fuck you at?" RP at 84. Ms. Aman started running toward the City Hall, the defendant followed her but did not get into the building. RP at 84.

At the trial court, the State represented that the City Hall and the Kennewick High School are 0.3 miles apart, that both Ms. Marquardt and Ms. Aman are of a similar age, middle-aged females, similar looking, and that the defendant confronted them when there was no one else present. RP at 12-13. The

trial court allowed Ms. Aman's testimony under ER 404 (b), to show the defendant's motive and /or a common scheme or plan. RP at 80.

The trial court found the defendant guilty of Burglary in the Second Degree with Sexual Motivation.

State's Comments regarding Defendant's Statement of Facts:

What did the defendant say to Ms. Marquardt?

Ms. Marquardt's direct testimony was that the defendant said to her, "I'm going to f--- you." RP at 44. She stated that he either said, "I'm going to f--- you," or "I want to f---you." RP at 48. She was shown a police report in which she said the defendant told her, "I want to f---you," but was not asked if that refreshed her recollection or if she wanted to change her testimony. RP at 49.

The trial court entered Finding of Fact No. 11, "The defendant then put his hands on the door frame, leaned to his right and told Ms. Marquardt, 'I want to f--- you.'" The State did not cross appeal regarding that Finding of Fact No. 11.

However, it is not supported by substantial evidence. In any event, the trial court found the defendant guilty even assuming the defendant said the less inculpatory, "I want to f--- you."

Did the trial judge struggle with the State's proof?

The defendant writes, "Judge Swanberg's subsequent and lengthy comments reveal he struggled with the State's proof that Hankel intended to commit a crime in the school building." Br. of Appellant at 11. In the Petition for Review, the defendant goes further by writing, "the trial judge was quite clearly inclined to convict on a lesser offense to the exclusion of the greater." PRV at 25-26. There is nothing in the record to support these statements. In fact, the trial judge tipped his hand by saying, "So, elements of trespass in the second—first degree would be a lesser included, if it was charged or requested by the defense or charged by the state as a lesser-included offense. *But this might be irrelevant anyway*." RP at 99 (emphasis added.)

Contrary to struggling with the decision, the trial judge did not ask the parties if they wanted a recess after both parties rested. RP at 91. He did not request time to think about his decision after closing arguments. RP at 98.

Consider in addition the way the trial judge described the defendant's conduct:

- The defendant's intent was "to address or confront a female and make a sexual comment to her that would scare that person out of their wits." RP at 100.
- The defendant's actions were "reprehensible." RP at 100,
- Those acts would cause any reasonable person to be terrified. RP at 101.
- That the defendant likes to find women in a vulnerable situation and make sexual statements that puts them in great fear for their safety. RP at 102.
- That the defendant's behavior shows his motive is to cause fear in the victims that he accosts. RP at 106.

- That the defendant's behavior was "deranged" and "twisted" and was done to allow him to enjoy seeing the terrorized reaction of women. RP at 107.
- The trial judge concluded that the defendant went onto the school grounds where he was not permitted and did so with intent to cause a woman to be fearful that he was going to sexually assault her. RP at 107.

There were several questions posed by the trial judge, which should be considered as an outline of the issues in the case, not as a struggle with the evidence. For example, the trial judge said, "What evidence has been presented to actually establish that?" RP at 101. "The Court considering that 404 (b) evidence can consider for purposes of what was meant by the statement, 'I want to f--- you,' in other words, what was the defendant trying to accomplish by doing that?" RP at 106.

III. ARGUMENT

A. The defense attorney's performance was not deficient and did not prejudice the defendant; there is no significant issue of constitutional

law, and the Court of Appeals decision does not conflict with another case.

1. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011), approving of an all-or-none strategy, was correctly decided.

The defendant relies on *Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015). *Crace* was a three-strikes case, in which the defendant, who was hearing voices and seeing things, ran at a police officer with a sword. *Id.* at 843-44. He dropped the sword about 50 feet away from the officer. *Id.* at 844. He continued to run toward the officer until he was about seven feet away at which point the defendant complied with orders and got on the ground. *Id.* The defense attorney filed a declaration stating that the "only reason [he] did not offer a lesser included instruction for unlawful display of a weapon was because [he] did not consider it." *Id.* at 852. Mr. Crace was found guilty of the lesser included offense of Attempted Assault in the Second Degree and was sentenced to life without possibility of parole under Washington's three strikes law.

The *Crace* court reversed the conviction finding that the defense attorney's failure to request the Unlawful Display instruction was based on a "misunderstanding of law" rather than a deliberate or strategic decision. The *Crace* court went on to state that the defense attorney's actions were manifestly unreasonable even if he had consciously chosen not to request the lesser included instruction. The *Crace* court stated that it may be reasonable for a defense attorney to opt for an "all-or-none" strategy on some occasions, but not on a three-strikes case and not when the trial court has already given a lesser-included instruction. *Id.* at 852-53.

The *Crace* court also found the defendant was prejudiced because a jury might conclude that the evidence was a "better fit for the lesser included offense." *Id.* at 847.

a. Concerning the first prong of *Strickland*, *Crace* and *Grier* are consistent that a defense attorney is not deficient by pursuing an "all-or-none" strategy.

Grier, 171 Wn.2d at 34, commented that a fair assessment of an attorney's performance must not be made in hindsight and a reviewing court must "evaluate the conduct from counsel's perspective at the time." *Grier* also said a defendant who is entitled to lesser included instructions may choose to forgo such instructions. *Id.* at 42. The inclusion or exclusion of lesser included offense instructions is a tactical decision for which defense attorneys require significant latitude. *Id.* at 39. The *Grier* court noted that a defendant who wishes to try for a total acquittal can do so.

> [T]he ABA's emphasis on client participation in this decision making process reinforces the subjective nature of this decision and suggests that court should be loath to second-guess the defendant's approach, risky or not. *In sum, the complex interplay between the attorney and the client in this area leaves little room for judicial intervention*.

Id. at 39-40. (Emphasis added).

Crace endorsed the "all-or-none" strategy in some cases. "In certain circumstances, it may be reasonable for a defense attorney to opt for an 'all-or-nothing' strategy, forcing the jury

to choose between convicting on a severe offense and acquitting the defendant altogether." *Crace,* 798 F.3d at 852. In footnote 4 the *Crace* court stated, "Nothing we have said here affects a defense attorney's ability to make a strategic decision to forgo a lesser-included-offense instruction in order to force the jury into an 'all-or-nothing' decision. The reasonableness of that decision would be examined under the performance prong of *Strickland." Id.* at 849 n.4. In *Crace,* the problem was the defense attorney was unaware he could request a lesser-included instruction for a crime that would have spared the defendant from a life sentence without possibility of parole.

Here, the defense attorney made a deliberate and strategic decision to not pursue a lesser included option. RP at 34, 99. She was also in good communication with her client about the possibility of waiving a jury trial, she spoke with the defendant about his decision not to testify, she went over the presentence investigation prior to sentencing, and she spoke with him about whether he would allocate at his sentencing. CP 7-8; RP at 90,

111, 120. The defendant had committed a Criminal Trespass, but he and his attorney wanted the court to consider only whether he had committed a Burglary. This was not similar to the defense attorney in *Crace.* The defense attorney's communication with the defendant would be applauded by the *Grier* court: "Thus, assuming that defense counsel has consulted with the client in pursuing an all or nothing approach, *a court should not second-guess that course of action,* even where, by the court's analysis, the level of risk is excessive and a more conservative approach would be more prudent." (Emphasis added.) *Grier,* 171 Wn.2d at 39.

There is nothing inconsistent between *Grier* and *Crace* regarding whether a defense attorney can pursue an "all-or-none" strategy.

b. Concerning the second prong of *Strickland,* the *Crace* case can be distinguished from this case because a judge, not a jury, was the fact finder, the trial judge was decisive about the defendant's guilt on Burglary in the Second Degree and

the Washington jury instructions, unlike the federal instructions, explicitly require a jury to make a decision about the charged crime before considering the lesser included crime.

The *Crace* holding on prejudice from an "all-or-none" strategy was based on the jury making the decision about guilt.

> But it does not require a court to presume—as the Washington Supreme Court did—that, because a *jury* convicted the defendant of a particular offense at trial, *the jury* could not have convicted the defendant on a lesser included offense based upon evidence that was consistent with the elements of both. To think that *a jury*, if presented with the option, might have convicted on a lesser included offense is not to suggest that *the jury* would have ignored its instructions. On the contrary, it would be perfectly consistent with those instructions for *the jury* to conclude that the evidence presented was a better fit for the lesser include offense. The Washington Supreme Court thus was wrong to assume that, because there was sufficient evidence to support the original verdict, *the jury* necessarily would have reached the same verdict even if instructed on an additional lesser included offense. As the Supreme Court has recognized in a related context, *a jury* presented with only two options—convicting on a single charged offense or acquitting the defendant altogether— "is likely to resolve its doubts in favor of conviction" even if it has reservations about one of the elements of the charged offense, on thinking that "the defendant is

> plainly guilty of some offense." (Citations.) It is therefore perfectly plausible that *a jury* that convicted on a particular offense at trial did so despite doubts about the proof of that offense—doubts that, with "the availability of a third option," could have led it to convict on a lesser included offense. Making this observation does not require us to speculate that *the jury* would have acted "lawlessly" if instructed on an additional, lesser included offense or to question the validity of the actual verdict. Rather, it merely involves acknowledging that *the jury* could "rationally" have found conviction on a lesser included offense to be the verdict best supported by the evidence. . . . What *Keeble* teaches us is that a lesser-included-offense instruction can affect *a jury's perception* of reasonable doubt: the same scrupulous and conscientious jury that convicts on a greater offense when that offense is the only one available could decide to convict on a lesser included offense if given more choices.

Crace, 798 F.3d at 847-48 (emphasis added.)

The *Crace* court was concerned about the effect on the jury of not having an option. Since this was a bench trial, there is little danger that the trial judge did not do what he thought was appropriate. If the trial judge thought the State had not proven the crime of Burglary in the Second Degree, he would have found the defendant not guilty of that charge, whether

there was a lesser included offense available or not. In this case, the trial judge thought the discussion of lesser included offenses was "irrelevant," did not need any time to collect his thoughts, and concluded that the defendant went onto the school grounds where he was not allowed with the intent to cause a woman to be fearful he would sexually assault her. RP at 99, 107.

There is a distinction between the Washington State instructions on lesser included crimes in WPIC 155.00 and the federal jury instruction, 20.05, on lesser included offense which may explain the *Crace* holding. Washington law requires a jury to first consider the charged crime. Only if the jury acquits the defendant or is deadlocked can the jury consider a lesser include offense. There is no such requirement in instruction 20.05. The jury is allowed to consider whether the evidence is, in the words of *Crace* "a better fit", for the lesser included or the original charge. *Crace,* 798 F.3d at 847.

Finally, with all due respect to the *Crace* court, to hold that an "all-or-none" strategy is available to a defense attorney and to then say that the strategy will always prejudice a defendant is not consistent. Either the strategy is available to defense attorneys, as the *Crace* court said in footnote 4 and at 852, or it is not available because it necessarily prejudices the defendant.

2. *State v. Classen*, 4 Wn. App. 2d 520, 422 P.3d 489 (2018) was a fact-specific case and it is not inconsistent with *Grier*.

The defendant cites *State v. Classen*, 4 Wn. App. 2d 520, 422 P.3d 489 (2018), but there are several differences between that case and the case herein. First, it was a jury trial; this was a bench trial with little chance that the Judge would give a compromised verdict. As the *Classen* court stated, "the jury (given the defense attorney's closing argument quoted below) was likely to resolve all doubts in favor of convicting Classen of the only assault offense before it, second degree assault." *Id.* at 542.

Second, in *Classen*, the defense attorney's only statement regarding a Second-Degree Assault charge, was "[Classen] is guilty of assault. There is no question about that. What kind of assault is it? That's the question." *Id*. The *Classen* court concluded that this argument did not amount to any strategy at all and was an admission that the defendant committed second degree assault. *Id.* The defense attorney herein was a strong advocate for her client and gave compelling, but not convincing, reasons to find him not guilty.

Third, the *Classen* court at 541, cited *State v. Hassan*, 151 Wn. App. 209, 211 P.3d 441 (2009) as authority for when a lesser included jury instruction could not be given. *Hassan* at 218-20, cited *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004), which was abrogated by *Grier*. The *Classen* court never used the *Grier* court's analysis of the interplay between the defendant and the defense attorney leading to the conclusion that there is little room for judicial intervention in the issue of an "all-or-none" strategy. The defense attorney's closing

statement in *Classen* was by itself ineffective and led to the conclusion that the defendant must be guilty of Second-Degree Assault.

B. The Court of Appeals decision is not in conflict with other published decisions regarding a judge's authority at a bench trial to find the defendant guilty of a lesser offense whether asked to or not.

The defendant characterizes the Court of Appeals decision as refusing to recognize that a judge in a bench trial lacked the authority to convict the defendant of a lesser included offense when he was not charged with that offense and the defense did not request the judge consider a lesser-included offense. That is incorrect. The Court of Appeals herein noted a split of authority and, rather than resolving the split of authority, stated that the issue was inconsequential to the verdict. The trial judge found the defendant guilty of the charged crime, Burglary in the Second Degree. There was no need to address a lesser included instruction. See Court of Appeals decision at 13-15.

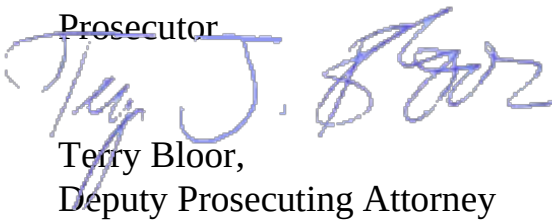
Since the Court of Appeals decision did not wade into which line of cases was correct, there is no conflict between that decision and any published case.

IV. CONCLUSION

Accordingly, the petitioner for review should be denied. This document contains 3,537 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 9th day of February, 2023.

ERIC EISINGER
Prosecutor



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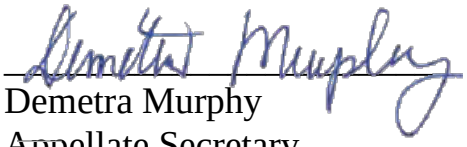
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

David Koch Nielsen Koch & Grannis, PLLC 2200 6th Ave., Ste 1250 Seattle, WA 98121	☒ E-mail service by agreement was made to the following parties: sloanej@nwattorney.net

Signed at Kennewick, Washington on February 9, 2023.



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