

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of
HOYT CRACE,
Petitioner.

NO. 85131-0

RESPONSE TO STATE'S
MOTION FOR DISCRETIONARY
REVIEW

BY RONALD R. CRIBB, CLERK

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SUPREME COURT
STATE OF WASHINGTON

A. IDENTITY OF RESPONDING PARTY

Hoyt Crace, Petitioner, seeks the relief designated in Part B.

B. STATEMENT OF RELIEF REQUESTED

Deny the State's Motion for Discretionary Review. Because this is a PRP, the State's pleading is incorrectly titled a "Petition for Review." See RAP 16.14(c).

C. FACTS

Hoyt William Crace was convicted of attempted second degree assault, first degree criminal trespass, and second degree malicious mischief.

On August 16, 2003, after consuming a large amount of drugs, Crace fell asleep or partially overdosed while watching the movie "Planet of the Apes."

The opinion below continues:

When he awoke, it was dark outside. Crace testified that he heard and saw things, grew terrified, and became convinced that he was going to be murdered. He ran screaming from his trailer, trying to find the home of two elderly women who

1 lived nearby; instead, he entered Rita Whitten's trailer by mistake. Crace tried to
2 tell Whitten about his fears but, when she kept screaming, he quickly left.

3 Before Crace's entry, Whitten was in her living room watching television while
4 her baby slept in the bedroom. According to Whitten, Crace burst through the
5 front door, screaming about being pursued. After rifling Whitten's kitchen cabinets
6 and drawers, Crace ran out of her home. According to Crace, he went outside and
7 found the elderly women's trailer and spoke to them, but he did not stay there
8 because he still thought that humans or demons were trying to murder him.

9 Crace returned to his trailer, took a sword off the wall, and ran down the street
10 screaming for help. Apparently someone contacted the police, because on August
11 17, 2003, at 2:25 AM, Pierce County Sheriff's Deputy Theron Hardesty received a
12 call from dispatch directing him to a possible burglary in progress at a residence in
13 a mobile home park. As Hardesty exited his car, a man approached him and stated
14 that an unknown male had burst into his neighbor's home and then fled. The man
15 said that the unknown male had run about two blocks to the north and that he was
16 armed with a sword.

17 Hardesty found Crace and when Crace saw Hardesty's flashlight beam, he ran
18 toward the light with his sword in hand. Crace made eye contact with Hardesty
19 and ran full speed toward him. As Crace ran, he yelled, " 'They are after me,
20 someone help me.' " Report of Proceedings (RP) at 83.

21 Hardesty could see a long, metal object in Crace's hand and, as Crace drew closer,
22 Hardesty identified the object as a sword. Hardesty drew his gun and directed
23 Crace to drop the sword. Crace kept running at Hardesty and Hardesty repeated his
24 command to drop the sword. According to Crace, when he realized that an officer
25 held the flashlight, he remained too frightened to drop the sword or to stop. Crace
26 dropped the sword when he was approximately 50 feet from Hardesty but he
27 continued running toward Hardesty. Hardesty repeatedly commanded Crace to get
28 on the ground. According to Crace, he did not obey the direction to lie down on
29 the ground because he was scared and still too far away from the officer. Crace
30 finally complied when he was five to seven feet from Hardesty.

157 Wn.App. at 88-91.

Crace's defense was that he did not and could not form the required intent,
although he admitted to doing the actions described previously. Not only did Crace
testify that that he never formed the intent to injure or frighten the police officer:

1 Dr. Vincent Gollogly, a [] psychologist, testified for the defense. He said that
2 Crace's voluntary intoxication led to a delusional state. Gollogly also concluded
3 that Crace could not realize the nature of his actions due to drug ingestion.
4 Gollogly explained that, in his opinion, Crace could not accurately appraise the
5 situation, although he could still engage in goal-directed behavior. Gollogly
6 believed that Crace panicked and thought unclearly at the time of the offense.
7 Gollogly testified that Crace could not form the requisite intent to commit
8 assault, malicious mischief, or criminal trespass.

9 157 Wn.App. at 91, n.2.

10 The trial court instructed the jury not only on the charged offenses, but also on the
11 lesser included offense of attempted second degree assault. Despite giving one lesser
12 included instruction, Crace's trial counsel did not request and the trial court did not
13 instruct the jury on the additional lesser included offense of unlawful display of a
14 weapon. The lesser included offense of attempted assault was a "most serious offense."
15 As a result, Crace faced a life sentence on that count—the same sentence that
16 accompanied the original charge. In contrast, unlawful display of a weapon is a gross
17 misdemeanor with a one year maximum sentence.
18

19 The jury deadlocked on the second degree assault charge, but found Crace guilty
20 of attempted second degree assault. The jury also convicted him of first degree criminal
21 trespass and second degree malicious mischief. Finally, it found that Crace was armed
22 with a deadly weapon at the time of the attempted assault. Under the Persistent Offender
23 Accountability Act, RCW 9.94A.555, the trial court sentenced Crace to life without the
24 possibility of early release based on two previous violent convictions. He was sentenced
25 to 29 months on the other felony and a suspended sentence on the malicious mischief
26 misdemeanor.
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1 D. ARGUMENT

2 *Introduction*

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4 The Court of Appeals correctly decided this case by applying existing precedent.
5 As a result, this case does not involve either a novel issue of constitutional law; the need
6 to correct an incorrect line of lower court precedent; or the need to settle a lower court
7 “split” on a particular issue. RAP 13.4(b).
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10 Unlike other reported ineffectiveness cases involving the failure to offer an
11 instruction on a lesser included offense, this was a case where a lesser included
12 instruction was given without objection. However, because of the “three strikes” law,
13 that lesser did not result in a lower penalty. The precise question in this case then is
14 whether trial counsel was unreasonable in failing to offer an *additional* lesser—one with
15 a one year maximum, a sentence likely to have resulted in no additional penalty (given
16 the other crimes that Crace admitted to and the jury convicted him of)—and where that
17 lesser was entirely consistent with Crace’s defense. While there are certainly cases where
18 the failure to request a lesser is not ineffective, this is decidedly not one of them.
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22 Further, the ineffectiveness harm standard applied by the court below is the exact
23 harm standard from *Strickland*, which itself was a post-conviction case. *Strickland v.*
24 *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Where a defendant
25 has proven ineffectiveness and thereby established a reasonable likelihood of a different
26 outcome at trial (but for the deficient performance), he has—by definition—established
27 the actual and substantial prejudice necessary for post-conviction relief. This Court
28 should not accept review only to reaffirm a harm standard that has existed for decades.
29
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1 *The Harm Standard for an Ineffectiveness Claim in a Post-Conviction*
2 *Proceeding*

3 In a PRP, a petitioner claiming constitutional error or fundamental defect at trial
4 must show that he was *actually and substantially prejudiced* by the error. *In re Personal*
5 *Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

7 When a petitioner establishes ineffective assistance of counsel (deficient
8 performance that resulted in prejudice), he has necessarily demonstrated that he was
9 actually and substantially prejudiced by the error. *See In re Dalluge*, 152 Wn.2d 772,
10 100 P.3d 279 (2004). Conversely, a petitioner who claims IAC and establishes deficient
11 performance, but not a reasonable probability of a different trial outcome, is not actually
12 and substantially prejudiced by the error.

13 In *Dalluge*, the issue was ineffective assistance of appellate counsel, nevertheless
14 the court made it clear that satisfaction of the *Strickland* harm standard establishes the
15 requisite level of prejudice necessary to grant a PRP. This Court held:

16 Under the second prong of the ineffective assistance of appellate counsel test, this
17 court has required that the petitioner show that he was ‘actually prejudiced by the
18 failure to raise or adequately raise the issue.’ *Id.*; *see also Lord*, 123 Wash.2d at
19 314, 868 P.2d 835. In *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145
20 L.Ed.2d 756 (2000), the United States Supreme Court reiterated that the proper
21 standard for evaluating claims of ineffective assistance of appellate counsel
22 derives from the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104
23 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Smith*, 528 U.S. at 285, 120 S.Ct. 746. The
24 Court held that Robbins was required to demonstrate prejudice, “[t]hat is, he must
25 show a reasonable probability that, but for his counsel's unreasonable failure to
26 file a merits brief, he would have prevailed *on his appeal*.” *Smith*, 528 U.S. at
27 285-86, 120 S.Ct. 746 (emphasis added) (the Supreme Court's requirement that
28 the defendant must show ‘a reasonable probability that, but for counsel's
29 unprofessional errors, the result *of the proceeding* would have been different.’)
30 (emphasis added) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). As noted
 above, had appellate counsel raised the issue of the trial court's failure to remand

1 for a de novo hearing, Dalluge would have been entitled to a de novo *Dillenburg*
2 hearing. Therefore, we conclude that Dalluge was prejudiced by his appellate
3 counsel's ineffective assistance.

4 *Id.* at 788. See also *In re PRP of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001) (Granting
5 PRP after finding "Brett has shown by a preponderance of the evidence there is a
6 reasonable probability that, but for counsel's errors, the results of his trial would have
7 been different."); *In re PRP of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004) (Granting
8 sentencing relief on an IAC claim where there is a reasonable probability that, absent the
9 error, the jury "would have concluded that the balance of aggravating and mitigating
10 circumstances did not warrant death.").

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14 Indeed, *Strickland* was a post-conviction case. In *Strickland*, the Court first
15 explained that a reasonable probability was less than a preponderance of the evidence.
16 *Id.* at 694 ("An ineffective assistance claim asserts the absence of one of the crucial
17 assurances that the result of the proceeding is reliable, so finality concerns are somewhat
18 weaker and the appropriate standard of prejudice should be somewhat lower. The result
19 of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if
20 the errors of counsel cannot be shown by a preponderance of the evidence to have
21 determined the outcome."). In adopting this prejudice standard, the Court took note that
22 it was reviewing a *habeas* case where (like a PRP) the burden of establishing prejudice
23 lies with petitioner. The Court, however, noted:

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28 The principles governing ineffectiveness claims should apply in federal collateral
29 proceedings as they do on direct appeal or in motions for a new trial. As indicated
30 by the 'cause and prejudice' test for overcoming procedural waivers of claims of
error, the presumption that a criminal judgment is final is at its strongest in
collateral attacks on that judgment. An ineffectiveness claim, however, as our

1 articulation of the standards that govern decision of such claims makes clear, is an
2 attack on the fundamental fairness of the proceeding whose result is challenged.
3 Since fundamental fairness is the central concern of the writ of habeas corpus no
4 special standards ought to apply to ineffectiveness claims made in habeas
proceedings.

5 *Id.* at 698. See also *Hill v. Lockhart*, 28 F.3d 832, 839 (8th Cir. 1994) (“it is unnecessary
6 to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner
7 in a habeas case has presented a constitutionally significant claim for ineffective
8 assistance of counsel.”). Indeed, since ineffectiveness is a violation of the constitutional
9 right to counsel, one could argue that on direct appeal the State should bear the burden of
10 proving the harmlessness of the error beyond a reasonable doubt. While that is not the
11 standard that has been adopted, it is not a reason to require a defendant to prove “double”
12 prejudice in an ineffectiveness case brought in a PRP.
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17 Therefore, it is clear that the court below correctly concluded that Crace did not
18 need to show some additional degree of harm beyond the harm required in order to find
19 ineffective assistance of counsel.
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21 This Court should not accept review where the court below correctly applied an
22 existing and uncontroversial constitutional harm standard.
23

24 *Ineffectiveness from Failing to Offer an Additional Lesser—One that Would Have*
25 *Made a Difference in the Penalty*

26 This was not an “all or nothing” case. This was not a case where the issue was
27 whether or not to have the jury instructed on a lesser included offense. The jury *was*
28 instructed on a lesser included offense. Instead, this case involved the failure to instruct
29 the jury on a *second* lesser included—one that would have resulted in no additional
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1 penalty at best and only a slight additional penalty at worst, instead of the same “life
2 without release” sentence that accompanied the lesser that was given and which the jury
3 returned.
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5 The decision below, which incidentally rejected Crace’s claims of jury
6 misconduct, recognized that this case involved the application of settled law to a
7 compelling set of facts:
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10 Viewed in the light most favorable to Crace, the evidence presented at trial could
11 have allowed the jury to find Crace was unable to form the intent necessary to
12 commit second degree assault or attempted second degree assault. Thus, Crace
13 satisfies the factual prong of the *Workman* test, entitling him to an instruction on
14 the lesser included offense of unlawful display of a weapon.

15 Because conviction of only that lesser crime would have resulted in a sentence of
16 less than a year instead of a life sentence, Crace meets the deficient performance
17 prong of *Strickland*: Pursuing an all-or-nothing strategy in these circumstances
18 was not a reasonable trial tactic. *See State v. Smith*, 154 Wn. App. 272, 278-79,
19 223 P.3d 1262 (2009); *State v. Grier*, 150 Wn. App. 619, 642-44, 208 P.3d 1221
20 (2009), *review granted*, 167 Wn.2d 1017 (2010); *State v. Pittman*, 134 Wn. App.
21 376, 387-89, 166 P.3d 720 (2006); *Ward*, 125 Wn. App. at 249-50. We do not
22 here establish a rule that pursuing an all-or-nothing strategy is *per se* defective
23 performance or ineffective assistance of counsel—we merely cannot discern any
24 legitimate reason why Crace’s attorney failed to request an instruction for the
25 lesser included offense of unlawful display of a weapon. We hold that Crace’s
26 attorney’s trial tactics were not reasonable given the disparity between the
27 sentence for unlawful display of a weapon and his life sentence for attempted
28 second degree assault.

29 159 Wn.App. at 108-09 (footnotes omitted).

30 This case is much different from *Grier*. There simply is no imaginable, must less
reasonable tactical decision to allow a jury to consider a lesser that results in the same
mandatory life penalty as the greater charge, but not offer a lesser that results in a minor
penalty at worst and no additional penalty at best. This case involves no “Monday

1 morning quarterbacking.” Instead, it involves the straightforward application of
2 ineffectiveness law to Crace’s case. There was no reason to remand this case for an
3 evidentiary hearing because trial counsel could offer no reasonable explanation for not
4 objecting to one lesser, but then failing to offer another, especially considering the stark
5 differences in penalties and the proffered defense.
6

7
8 Review is not warranted.

9
10 E. CONCLUSION

11 Based on the above, this Court should deny review.

12 DATED this 12th day of October, 2010.

13
14 /s/Jeffrey E. Ellis
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Attached for filing, please find my response to the State's motion for discretionary review. I certify that I served this pleading on opposing counsel by simultaneously sending this email and its attachment to Sr. Pierce County DPA Kathleen Proctor.

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