NO. 95478-0
NO. 34347-2-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID STEWART LEWIS, APPELLANT

COURT OF APPEALS, DIVISION III
NO. 34347-2-III

STATE'S ANSWER TO PETITION FOR REVIEW

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Cases

Statutes, Rules, and Constitutional Provisions

I. IDENTITY OF RESPONDING PARTY.

The responding party is the State of Washington, by and through the Grant County Prosecuting Attorney's Office.

II. STATEMENT OF RELIEF SOUGHT

The State asks this Court to hold that lack of a judiciable controversy precludes discretionary review and to deny Lewis's Petition pursuant the requirements of RAP 13.4(b) and established precedent prohibiting advisory opinions.

III. FACTS RELEVANT TO THE PETITION.

Division Three of the Washington Court of Appeals found no prejudice when trial counsel failed to request lesser-included criminal trespass instructions on two burglary counts, rejecting Appellant David Stewart Lewis's claim of ineffective assistance. *State v. Lewis*, No. 34347-2-III (December 7, 2017). The Court assumed "for argument sake that Lewis was entitled to the [lesser included] instruction." *Id.* at 12-13.

The Court of Appeals also refused Lewis's request to overrule this Court's decision in *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011), noting it lacked authority to do so. *Id.* at 27. Lewis urged the lower court, as he does here, to consider strong criticism of this Court's reasoning in *Grier* expressed by the Ninth Circuit Court of Appeals (Ninth Circuit) in *Crace v. Herzog*, 798 F.3d 840, 847 (9th Cir. 2015). The Ninth Circuit

found this Court's reasoning flawed in both *Grier* and in its opinion in *Crace*,[1] to the extent these decisions required a presumption "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." *Crace*, 798 F.3d at 847. Calling this Court's methodology "a patently unreasonable application of *Strickland*[2] . . . unworthy of deference . . .", the Ninth Circuit held "wrong" the assumption "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." *Id.* at 847-48.

Although it lacked authority to overrule *Grier*, Division Three "recognize[d] that a federal court may eventually, on collateral review, impose its view of ineffective assistance of counsel under principles of the United States Constitution." *Lewis*, No. 34347-2-III at 27. The lower court noted "the Washington Supreme Court blends a tactically driven presentation by counsel with lack of prejudice. The court also conflates the question of sufficiency of evidence with prejudice." *Id.* at 22.

Division Three analyzed *Crace* and *Grier* in depth before

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[1] *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 280 P.3d 1102 (2012).
[2] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

concluding it "need not choose between the definition of prejudice under *Grier* or under *Crace*. Even under the laxer test found in *Crace*, Lewis cannot show prejudice [from counsel's failure to request lesser-included criminal trespass instructions on two of three burglary counts]." *Id.* at 27.

Lewis does not challenge this conclusion, nor any other aspect of his proceedings below. He asks this Court to accept review solely to determine whether its decision in *Grier* "is both incorrect and harmful," as asserted by the Ninth Circuit in *Crace* and discussed in the lower court's opinion affirming his convictions.

III. ARGUMENT

A. STANDARD OF REVIEW

Whether this Court should revisit the reasoning that led to its decisions in *Grier* and *Crace* is a question of law, subject to de novo review. *See, e.g., Detention of Peterson v. State*, 145 Wn.2d 789, 808, 42 P.3d 952 (2002) (determination of proper review standard for sexually violent predator proceedings depend on whether question presented is one of fact or a mixed question of law and fact).

B. LEWIS IDENTIFIES A DORMANT, MOOT ISSUE IN WHICH HE HAS NO GENUINE, DIRECT, OR SUBSTANTIAL INTEREST. THIS COURT SHOULD NOT ACCEPT REVIEW BECAUSE THERE IS NO JUSTICIABLE CONTROVERSY, RENDERING ANY OPINION ADVISORY ONLY.

The Washington Supreme Court does not render advisory

opinions. *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920, 927 (1994) (citing *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938)). Supreme Court jurisdiction over an issue requires a justiciable controversy. *State v. Eggleston*, 164 Wn.2d 61, 76, 187 P.3d 233 (2008). Lewis does not assert a justiciable controversy in this case, nor can he. A justiciable controversy is:

> (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973) (quoted with approval in *Eggleston*, 164 Wn.2d at 76-77). "These elements must coalesce, otherwise the court steps into the prohibited area of advisory opinions." *Diversified*, 82 Wn.2d at 815 (request for declaratory action unripe when injured party's potential claim was an "unpredictable contingency.") *Id.* at 736.

Lewis has not identified an actual, present and existing dispute between parties having genuine and opposing interests. He does not challenge the ultimate decision of the Court of Appeals that, because substantial evidence in his case supported only the higher crime of

burglary, he cannot show prejudice under either the arguably harsher "*Grier* standard" or the "laxer" test established by the Ninth Circuit in *Crace*. *Lewis, supra,* No. 34347-2-III at 27.

The Court of Appeals engaged in an exhaustive analysis of standards for determining prejudice in claims of ineffective assistance of counsel, starting with the "general standard of prejudice," under which Lewis had to "show something less than a likelihood of acquittal on the two convictions for burglary in order to establish prejudice." *Lewis, supra,* No. 34347-2-III at 17-18. After a meticulous discussion of *Grier* and the Ninth Circuit's ruling in *Crace,* the Court concluded "that we need not choose between the definition of prejudice under *Grier* or under *Crace*. Even under the laxer test found in *Crace*, Lewis cannot show prejudice." *Id.* at 27. Resolution of the *Grier/Crace* issue thus cannot be "final and conclusive" in Lewis's case.

The issue is irrelevant to Lewis's case. Any decision by this Court concerning its reasoning in *Grier* will have no effect on Lewis's conviction and sentence, rendering disagreement dormant or moot. This Court ordinarily refuses to consider a question that has become moot, "though it may do so when matters of continuing and substantial public interest that are likely to recur are involved." *In re Post-Sentence in re Combs*, 353 P.3d 631, 631 (Wash. 2015) (denying review when sentence

at issue had long since expired) (citing *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). A similar federal standard for review of moot issues, occasionally cited by Washington courts, is whether the issue is "capable of repetition, yet evading review." *Roe v. Wade*, 410 U.S. 113, 161, 93 S. Ct. 705; 35 L. Ed. 2d 147 (1973); *In re Dependency of H.*, 71 Wn. App. 524, 528, 859 P.2d 1258 (1993). Although the question of whether this Court should revisit its reasoning in *Grier* might arise in the future, it does not evade review. If the issue arises, it may properly be brought by any appellant having a direct and substantial interest in the ongoing viability of this Court's reasoning in *Grier*. Lewis's claim, however, does not involve interests that are direct and substantial. The outcome of Lewis's case is now determined and will not change. His interest is theoretical and academic and would benefit only unidentified, hypothetical appellants at some future time.

This Court should decline to give an advisory opinion solely to prevent this issue from arising later. Decisions of the Ninth Circuit Court of Appeals do not control this Court. "The Washington State Supreme Court has the same duty and authority as a federal circuit court to apply the United States Constitution and United States Supreme Court opinions in criminal matters." *State v. Lord*, 161 Wn.2d 276, 287, 165 P.3d 1251 (2007) (citing U.S. CONST. art. VI, § 2; 28 U.S.C. § 2254(d)(1)). The

matter should be addressed only if it arises in a case in which the reviewing court eschews the Ninth Circuit's *Crace* analysis in favor of the standard established in *Grier*.

V. CONCLUSION

This Court should conclude Lewis fails to identify an actual, present and existing dispute involving genuine, direct, and substantial opposing interests between himself and the State.

This Court should deny Lewis's Petition for Review.

DATED this 21st day of February, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

That on this day I served a copy of the State's Answer to Petition for Review in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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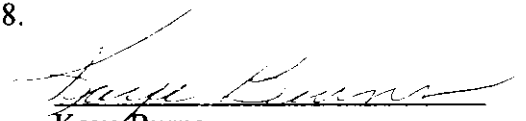

Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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