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STATE OF WASHINGTON

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NO.83452-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

KRISTINA R. GRIER, Respondent.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases such as this one that have the potential of engendering a large number of unnecessary retrials.

II. ISSUES PRESENTED

1. Defense counsel made a strategic decision not to seek an instruction on a lesser offense. This decision could have resulted in the defendant's outright acquittal. The defendant expressly agreed with this strategy. Does the record establish that this decision was outside the wide range of reasonable professional conduct, so as to establish deficient performance?

2. The constitutional test for prejudice requires the court to assume that the jury followed its instructions. Under the instructions in this case, the jury could have convicted only if it was unanimously convinced beyond a reasonable doubt that the defendant committed all elements of the offense charged. That conclusion would require the jury to reject any lesser offense that was offered. Assuming that counsel's actions were deficient, has the defendant established that the error resulted in prejudice?

III. RELEVANT FACTS

The defendant, Kristina Grier, was charged by corrected amended information with murder in the second degree for the death of Gregory Scott Owen. CP 6-7. The State also alleged a firearm sentencing enhancement.

Id.

Ms. Grier's attorney proposed instructions on the lesser offenses of manslaughter in the first and second degrees. CP 59, 61, 65. These instructions, however, were withdrawn with Ms. Grier's express consent. 7RP 852.

The jury was instructed that it could only return a verdict of guilty if it unanimously found that the State proved, beyond a reasonable doubt, each of the elements of the crime of second degree murder. *See* CP 104 and 116. The jury determined that the State met its burden, and found Ms. Grier guilty of murder. CP 120.

Ms. Grier appealed her conviction, contending that her counsel was ineffective in failing to ask for a lesser included instruction. *State v. Grier*, 150 Wn. App. 619, 208 P.3d 1221 (2009), *review granted*, 167 Wn.2d 1017 (2010). In granting her relief, the Court of Appeals found that Ms. Grier stood a good chance of acquittal on the sole charge because of "the sparse evidence of an intentional murder", and a good chance of conviction on manslaughter because of "evidence supporting a reckless or negligent

shooting.” *Grier*, 150 Wn. App. at 632-33. Believing that this decision has spawned an ever-increasing number of ineffective assistance of counsel claims based upon the foregoing of lesser included instructions and that the preventative of obtaining an express on-the-record waiver from the defendant of any lesser included jury instructions presents other problems, WAPA respectfully submits this amicus curiae brief.

IV. ARGUMENT

A. A TACTICAL DECISION WILL NOT SUPPORT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Defense counsel in this case made a strategic decision not to seek a jury instruction on a lesser included offense. Presumably, this decision was based upon the “sparse evidence of an intentional murder” and “the corresponding evidence supporting a reckless or negligent shooting.” *Grier*, 150 Wn. App. at 632-33. Ms. Grier expressly approved of her counsel’s decision. 7RP 852. When this decision, which maximized Ms. Grier’s odds of acquittal, did not pan out, Ms. Grier claimed that the decision constituted ineffective assistance of counsel. To establish this claim, Ms. Grier must show that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1984); *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). She has failed to make either showing.

In determining whether counsel's performance was deficient, the court applies a "highly deferential" standard that includes a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689; *Benn*, 120 Wn.2d at 665. If defense counsel's conduct can be fairly characterized as legitimate trial strategy or tactics, it does not constitute deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Accordingly, defendant must show on the record the absence of legitimate strategic or tactical reasons supporting defense counsel's challenged conduct. *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002).

The strategy of foregoing instructions on lesser included offenses can have major advantages. In theory, the all or nothing defense tactic is effective when one of the elements of a crime is highly disputed and the State has failed to establish every element beyond a reasonable doubt; in that situation, the jury must acquit the defendant based on a reasonable doubt about proof of that element. *State v. Breitung*, 155 Wn. App. 606, 230 P.3d 614 (2010); see *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). "[W]hether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry." *Breitung*, 155 Wn. App. at 616; *State v. Hassan*, 151 Wn. App. 209, 219, 211 P.3d 441 (2009).

Despite the advantages of an “all or nothing” strategy, some cases have been willing to second-guess defense counsel's decision not to seek an instruction on a lesser offense. In five cases, the Court of Appeals has found such decisions ineffective. *Breitung*; *State v. Smith*, 154 Wn. App. 272, 223 P.3d 1262 (2009); *Grier*; *State v. Pittman*, 134 Wn. App. 376, 166 P.3d 720 (2006); *State v. Ward*, 125 Wn. App. 243, 104 P.2d 670 (2005). In contrast, the Court held similar decisions to be legitimate tactical choices. See *Breitung*, 155 Wn. App. at 625-26 (Penoyar, J., dissenting) (citing *Hassan and King*).

Cases that have rejected an “all or nothing” strategy have objected to that strategy as “risky.” *Breitung*, 155 Wn. App. at 616-17; *Grier*, 150 Wn. App. at 644; *Pittman*, 134 Wn. App. at 390; *Ward*, 125 Wn. App. at 250. This is not a valid objection. Trial is inherently risky. Most strategic decisions that a trial lawyer makes involve risk. With regard to lesser offense instructions, both options are risky. Refusing such instructions involves the risk that the jurors will disregard their instructions and convict the defendant of the crime charged, when they might otherwise have convicted of a lesser offense. Requesting such instructions likewise involves risk – that the jurors will obey their instructions and convict the defendant of a lesser offense, when they might otherwise have acquitted. Balancing these risks is the job of trial counsel, not the court.

This balance involves consideration of numerous factors that only vaguely appear in the record, if they appear at all. How credible are the witnesses? How sympathetic or unsympathetic are the jurors? How likely are the jurors to follow their instructions? What sentence is the court likely to impose for the greater or lesser crime? What would be the impact of that sentence on the defendant? How much is the defendant willing to risk in order to gain an outright acquittal? Since an appellate court cannot answer these questions, it has no business substituting its judgment for that of the person who can answer them – namely, trial counsel.

In assessing attorney performance, the court is required to make “every effort ... to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. Yet an assessment of an “all or nothing” strategy is inevitably based primarily on hindsight. If the strategy succeeds in winning outright acquittal, no one will complain. The strategy will only be criticized if it fails.

The opposite strategy of seeking a lesser included offense instruction could also be criticized in hindsight, with equal or greater justification. Suppose that defense counsel requests such an instruction, and the defendant is convicted of the lesser offense. The defendant could plausibly claim that this conviction resulted solely from counsel's “error.” Since the jury evidently had a reasonable doubt as to an element of the charged crime, they

would have been required to acquit – if only defense counsel had not given them a way to avoid acquittal. *See United State v. Harley*, 990 F.2d 1340, 1343-44 (D. C. Cir.), *cert. denied*, 510 U.S. 885 (1993) (rejecting argument that defense counsel was ineffective for failing to object to lesser offense instruction). This is a stronger argument than the one raised by the defendant in the present case, since it rests on the assumption that the jurors would follow their instructions. If an attorney's decision is open to opposite challenges depending on the case's outcome, then all of those challenges rest on hindsight. Without the use of hindsight, counsel's actions cannot be characterized as deficient.

1. The Court of Appeals' Test for Determining Whether the Foregoing of Lesser Offense Instructions Was a Legitimate Tactical Choice Does Not Properly Take into Consideration the Strong Presumption of Effective Assistance in Determining Whether the Decision to Seek Acquittal Was a Legitimate Trial Strategy

In deciding whether rejecting lesser offense instructions is a legitimate tactic, the Court of Appeals generally considers three factors:

- (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.

Breitung, 155 Wn. App. at 615; *Hassan* 151 Wn. App. at 219; *but see Smith*, 154 Wn. App. at 278-79 (finding deficient performance without analyzing

these factors). The application of the three factors produces inconsistent results that “do not properly take into consideration the strong presumption of effective assistance in determining whether the decision to seek acquittal was a legitimate trial strategy.” *Hassan*, 151 Wn. App. at 221 n. 6.

a. Difference in maximum penalties

In some of the cases where counsel has been held ineffective, there has been a large difference between the penalties for the charged offense and the lesser offense. *Ward*, 125 Wn. App. at 249 (85-89 month range for charged offenses; 12 month maximum for lesser offense); *Grier*, 150 Wn. App. at 641-42 (123-220 month range for charged offense; 21-27 month range for lesser offense). In other cases, where counsel has been held ineffective, the difference between the penalty for the charged offense and the lesser offense have been comparable to the difference in cases where counsel’s decision not to seek a lesser offense was affirmed. *Compare Breitung*, 155 Wn. App. at 615 (13-17 months for charged offense, 12 month maximum for lesser offense); *Pittman*, 134 Wn. App. at 388-39 (charged offense had 9-10½ month range, lesser offense had 90-day maximum), *with Hassan*, 219-20 (the range was 6+ - 18 months for the charged offense, and the maximum for the lesser offense was 90 days).

This kind of analysis comes close to reading the first factor out of existence. In most cases involving a lesser offense, there will be some

difference between the penalty for the greater offense and that for the lesser offense. If a 5- or 7- month difference is sufficient to render counsel ineffective, then counsel is almost always required to seek an instruction on a lesser offense. See *Smith*, 154 Wn. App. at 278-79 (finding counsel ineffective despite absence of any difference between sentencing ranges for “greater” and “lesser” offense). Such a requirement, however, “would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.” *Strickland*, 466 U.S. at 688-89.

b. Defense theory of the case

This factor has been construed in disparate ways that provide no guidance to trial counsel. The first application of the factor was in *Ward*. There, the defenses were the same on the greater and lesser offense. The Court of Appeals, therefore, believed that the instruction on the lesser offense had “little or no cost” to the defendant. If the jury accepted his defenses, it would acquit him on all charges. If it rejected them, it might still convict him on only the lesser charge. Consequently, the court concluded that this factor indicated that counsel was ineffective in not seeking an instruction on a lesser offense. *Ward*, 151 Wn. App. at 429-50. In *Hassan*, the court applied a similar analysis to reach the opposite conclusion. There, the defendant admitted the lesser offense but denied the charged offense. The court viewed

this as a factor supporting counsel's decision not to seek a lesser offense instruction. *Hassan*, 151 Wn. App. at 220. In *Breitung*, the court applied a different analysis to similar facts. There, the defendant testified that an assault occurred but denied that it involved a gun. The court concluded that this testimony made counsel's decision not to seek a lesser included offense instruction unreasonable. *Breitung*, 155 Wn.2d at 616.

If the only defenses apply equally to both crimes, the defendant may have little to lose by seeking an instruction on the lesser offense. If the jury accepts the defenses, it should acquit of any crime. If it rejects the defenses, it will probably convict on the greater offense. The availability of the lesser offense might give them an opportunity to compromise rather than convict. In contrast, if the defendant has a defense that applies only to the greater offense, he has a great deal to lose from an instruction on a lesser offense. If the jury accepts his defense, and there is no lesser offense, the jury will have the duty to return a verdict of not guilty. If, on the other hand, the jury has the alternative of convicting on a lesser offense, it may well do so. Under such circumstances, there is a high likelihood that a lesser offense instruction will turn a potential acquittal into a conviction.

c. Overall risk to defendant

In applying this factor, the Court of Appeals has looked to the strength of the evidence as to the charged offense and the lesser offense. With regard

to the evidence on the greater offense, the court has said that a lesser offense instruction was necessary when the State's case was weak. *Grier*, 150 Wn.2d at 642-43; *Pittman*, 134 Wn. App. at 390. In *Ward*, however, the court said that such an instruction was necessary because the defendant's denial of guilt rested on his own testimony, which was impeached. *Ward*, 125 Wn. App. at 250. In other words, the instruction was necessary in *Ward* because the State's evidence was strong.

With regard to the evidence on the lesser offense, the Court of Appeals has said that an "all or nothing" strategy was improper because of strong evidence that the defendant committed that offense. *Breitung*, 155 Wn. App. at 617; *Grier*, 150 Wn. App. at 643; *Pittman*, 134 Wn. App. at 388. The court has likewise said the opposite: that an "all or nothing" strategy was justified by the defendant's testimony that he committed the lesser offense. *Hassan*, 150 Wn. App. at 220.

Ultimately, this factor turns on the court's assumption that the jury might convict the defendant as charged because they believe that he was guilty of something. *Breitung*, 155 Wn. App. at 616-17; *Grier*, 150 Wn. App. at 643; *Pittman*, 134 Wn. App. at 390; *Ward*, 125 Wn. App. at 250. In the present case, the instructions required the jurors to acquit if they had a reasonable doubt as to any element. CP 104. Acquittal is, of course, a better outcome for the defendant than conviction on a lesser offense. Thus, any

benefit to the defendant from a lesser offense instruction would primarily arise from a fear that the jury would not follow the instructions.

Under the facts of this case, counsel could reasonably conclude that likelihood of this was small. The evidence established a basis for believing that Ms. Grier possessed a reasonable belief that the victim posed an imminent risk of harm to herself or her son. *Grier*, 150 Wn. App. at 638. If the jurors had not believed that an intentional assault or murder occurred, there is no reason to believe that they would have felt compelled to disregard their instructions and convict Ms. Grier of something, simply because she recklessly or negligently used excessive force to protect herself and her son.

As a result, if the jury was presented with an "all or nothing" choice, there was a substantial likelihood of an outright acquittal. On the other hand, if the jury was given the possibility of conviction on a lesser offense, there was a strong possibility of such a conviction.

Putting this into numbers, counsel might reasonably estimate a 50% chance of conviction and a 50% chance of acquittal, if the jury was not instructed on the lesser offenses of manslaughter. If such instructions were given, counsel might reasonably estimate a 40% chance of conviction as charged, a 40% chance of conviction on one of the lesser offenses, and a 20% of acquittal. Assuming that the judge would impose the maximum

permissible sentence,¹ these estimates lead to the following computation:

	No lesser offense instruction given	Lesser offense instructions given
Probability of conviction of second degree murder/ expected sentence	50%/280 months	40%/280 months
Probability of conviction of first degree manslaughter/ expected sentence	0%	20%/162 months
Probability of conviction of second degree manslaughter/ expected sentence	0%	20%/63 months
Probability of acquittal	50%	20%
Average expected outcome	140 months (50% x 280)	157 months (40% x 280 + 20% x 162 + 20% x 63)

Under this computation, the better strategy is not to request an instruction on a lesser offense. The decreased possibility of conviction as charged is more than outweighed by the decreased possibility of outright acquittal.

Realistically, it is unlikely that defense counsel performed his analysis in such a mathematical fashion. The record is clear, however, that he carefully discussed the advantages and disadvantages of each course of conduct with Ms. Grier and he obtained her express agreement to the “all or nothing” strategy. 7RP 852. This was proper.

¹The maximum permissible sentences include the charged firearm enhancement, as defense counsel could not reasonably anticipate that the jury would convict of the offense, but reject the enhancement.

The wisdom of an "all or nothing" strategy depends on numerous personal factors. An attorney can and should mold his decisions around the defendant's evaluation of these factors. To illustrate the problems involved, suppose that a defendant is given two options: (1) a 50% chance of a 280-month sentence with a 50% chance of acquittal; (2) a 100% chance of a 140-month sentence. In the long run, these two options will lead to the same average period of confinement. An individual defendant, however, cares nothing about "the long run" or "average periods of confinement." She only cares about which option will be better for her.

Some defendants might prefer to avoid risk. They might look on 280 months as the equivalent of a life sentence. They might be reluctantly willing to accept a sentence of 140 months, to avoid the possibility of a sentence twice that long.

Other defendants might have a greater tolerance for risk. They might view an 140-month sentence as being almost equally harmful as a 280-month sentence. They could believe that 140 months in prison would cost them everything they consider important: their families, their friends, their jobs, and their possessions. Such a defendant would never give up a substantial possibility of acquittal in order to obtain a shorter sentence.

For this kind of issue, the defendant's wishes should have heavy weight. The issue concerns the objectives of representation, not just the

means. Is the client's objective to minimize the possibility of confinement, or to minimize its length? Under RPC 1.2(a), "a lawyer shall abide by a client's decisions concerning the objectives of representation." If the defendant's objective is to maximize the chance of acquittal, the lawyer should not request a jury instruction that would increase that chance – even if it also reduces the chance of conviction as charged.

Defense counsel here made a strategic decision. He carefully considered the legal options available in light of the relevant facts and his client's wishes. "[S]trategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. This Court has no basis for challenging that "virtually unchallengeable" decision.

2. The Court of Appeals' Overly Detailed and Inconsistently Applied Test Interferes With the Attorney-Client Relationship and Prejudices Defendants

The U.S. Supreme Court has warned of the dangers of setting excessive standards to govern defense counsel's decisions:

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89.

The 3-part test utilized by the Court of Appeals exemplifies the kind of "detailed rules" condemned in *Strickland*. By now, defense attorneys are probably aware of that court's seeming dislike for the "all or nothing" strategy. They may well believe that a decision not to seek a lesser offense instruction will be challenged, but a decision to seek one will not be. This gives them a strong temptation to base strategic decisions on what the courts will approve, rather than on what is best for their clients. This kind of judicial pressure is an improper interference with the constitutional right to counsel. The losers will be defendants in future cases who end up convicted, when more prudent tactics may have led to their acquittal. *See, e.g., State v. Jensen*, 138 N.M. 254, 118 P.3d 762, 767 (2005) (recognizing that, as a tactical matter, arguing a lesser included offense could dilute the defense under the "all-or-nothing tactic"); *People v. Medina*, 221 Ill. 2d 394, 851 N.E.2d 1220, 1228, 303 Ill. Dec. 795 (2006) (recognizing that when a lesser-included offense instruction is tendered, a defendant is "exposing himself to potential criminal liability, which he otherwise might avoid, and is in essence stipulating that the evidence is such that a jury could rationally convict him of the lesser-included offense.").

In short, the "all or nothing" strategy is a strategic choice that presents both advantages and disadvantages. Balancing them is a decision that must

be made by trial counsel. Only hindsight can tell whether the strategy succeeded or failed. Reviewing courts lack any valid basis for second-guessing counsel's decision. Their attempt to do so threatens the constitutionally-protected independence of counsel.

The current rule that virtually guarantees a new trial whenever an "all or nothing" defense fails, presents an additional risk that trial courts will seek an on the record, personal waiver from the defendant of any lesser included instructions. Such a colloquy might inappropriately influence the defendant one way or the other and could intrude into the attorney-client relationship. *See, e.g., Medina*, 851 N.E.2d at 1225-29. *Cf. State v. Thomas*, 128 Wn.2d 553, 910 P.2d 475 (1996) (identifying reasons why trial courts are not required to obtain an express waiver of the right to testify).

B. THERE IS NO POSSIBILITY THAT AN INSTRUCTION
ON A LESSER OFFENSE WOULD HAVE CHANGED
THE RESULT

Even if counsel's decision were deemed deficient, that would not by itself justify reversal of the conviction. Ms. Grier must also establish prejudice. This requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

In a number of prior cases, the Court of Appeals has held that the absence of a lesser offense instruction was prejudicial. These cases have taken two approaches. A few simply speculated that a lesser offense instruction might have led to a different result. *Breitung*, 155 Wn. App. at 618-19; *Smith*, 154 Wn. App. at 278-79 ; *Pittman*, 134 Wn. App. at 390. Others, have pointed to specific events surrounding the jury deliberations. *Grier*, 150 Wn. App. at 644-45 (inconsistencies in verdicts); *Ward*, 125 Wn. App. at 251 (jury inquiry). In the present case, the Court of Appeals rested its prejudice decision on the inconsistencies in the verdicts. But, inconsistent verdicts do not establish prejudice and may not be interpreted as a windfall to the State at the defendant's expense. *United States v. Powell*, 469 U.S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984); *State v. Goins*, 151 Wn.2d 728, 92 P.3d 181 (2004).

When, as here, sufficient evidence supports the jury's verdict of guilt, a conclusion of prejudice must rest purely on speculation. Such speculation is improper.

In making the determination whether [counsel's] errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and

impartially applying the standards that govern the decision.

Strickland, 466 U.S. at 694-95.

In the present case, the jurors were instructed that they could convict Ms. Grier only if they found each element of the crime proved beyond a reasonable doubt. This included the element that Ms. Grier acted intentionally. CP 104. They were further instructed that their verdict had to be unanimous. CP 116. There is no claim that the evidence was insufficient. Consequently, this Court is required to presume that the jurors did in fact unanimously find that intentional murder was proved beyond a reasonable doubt. Given that mandatory assumption, there is no possibility that an instruction on a lesser offense would have changed the result. Under standard instructions, jurors are told not to consider a lesser offense if they find the defendant guilty of the charged offense. WPIC 155.00; *see State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991) (approving WPIC 155.00). Since the jury here did find the defendant guilty as charged, it could not have properly considered any lesser offense.

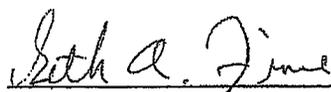
To conclude that a lesser offense instruction would have changed the verdict, this Court must make one of two possible assumptions. The Court might assume that the jury was not actually persuaded beyond a reasonable doubt that Ms. Grier committed an intentional act. Or it might assume that the jury did find this element but would nevertheless have compromised on

a lesser offense if given the opportunity to do so.

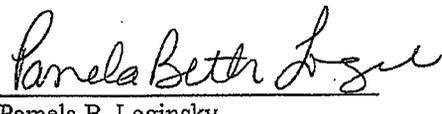
Under *Strickland*, both of these assumptions are improper. The first assumes that the jurors ignored their instructions and convicted Ms. Grier without proof that she was guilty. The second assumes that, given the chance, the jurors would have ignored their instructions and engaged in nullification. A finding of prejudice from ineffective assistance cannot be based on this kind of guesswork.

The verdict shows that the jury was convinced beyond a reasonable doubt that Ms. Grier was guilty as charged. Given this jury decision, no instruction on a lesser offense could have changed the result. Even if counsel's actions could be considered deficient, no prejudice could have resulted. *See generally, Medina*, 851 N.E.2d at 1229; *Autrey v. State*, 700 N.E.2d 1140, 1142 (Ind. 1998).

Respectfully submitted this 19th day of August, 2010.



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