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STATE OF WASHINGTON

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NO. 83452-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner

v.

KRISTINA GRIER,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Rosanne Buckner, Judge

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ANSWER TO AMICUS CURIAE

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A. ARGUMENT

1. THE LACK OF LESSER OFFENSE INSTRUCTION PREJUDICED GRIER.

The State, as petitioner, nowhere argues to this Court that counsel's failure to request lesser offense instructions was harmless. The State has only argued defense counsel was not deficient in failing to request instruction. The Washington Association of Prosecuting Attorneys (WAPA), as amicus curiae, argues Grier was not prejudiced from the lack of a lesser offense instruction. Br. at 17-20.

This Court will not address arguments raised only by amicus. Citizens for Responsible Wildlife Management v. State, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) (citing Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1, 140 Wn.2d 403, 413, 997 P.2d 915 (2000)). "[T]he case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by 'friends of the court.'" Long v. Odell, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (quoting Lorentzen v. Deere Mfg. Company, 245 Iowa 1317, 1323, 66 N.W.2d 499 (1954)). This Court should therefore decline to consider WAPA's argument regarding prejudice.

Regardless, WAPA's claim does not bear scrutiny. WAPA asserts the failure to give a lesser offense instruction is always harmless where the

evidence is sufficient to convict because jurors are presumed to follow instructions and will never convict for the only crime available unless the State proved its case beyond a reasonable doubt. Br. at 18-20.

The United States Supreme Court has already rejected the basis for WAPA's argument: "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction — in this context or any other — precisely because he should not be exposed to *the substantial risk* that the jury's practice will diverge from theory." Keeble v. United States, 412 U.S. 205, 212, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973) (emphasis added).

The lesser offense rule "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Keeble, 412 U.S. at 212-13. This result is avoided when the jury is given the option of finding a defendant guilty of a lesser included offense, thereby giving "the

defendant the full benefit of the reasonable-doubt standard." Beck, 447 U.S. at 634.

In reaching its dubious conclusion that the lack of lesser offense instruction is not prejudicial, WAPA ignores the reason why lesser offense instructions are important and how the availability of lesser offense instructions can influence a jury's deliberative process.

Jurors are human beings faced with a difficult choice, not unfeeling machines operating in an environment divorced from reality. The Supreme Court in Beck recognized the uncontroversial proposition that "[j]urors are not expected to come into the jury box and leave behind all that their human experience has taught them." Beck, 447 U.S. at 642 (quoting Jacobs v. State, 361 So.2d 640, 652 (Ala. 1978) (Shores, J., dissenting)). To expect a jury to ignore the pervasive reality of crime in society and "to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience." Beck, 447 U.S. at 642 (quoting Jacobs, 361 So.2d at 652 (Shores, J., dissenting)).

The jury's deliberative process is different when it is given an opportunity to acquit on a greater offense while still convicting on a lesser offense. "The element the Court in Beck found essential to a fair trial was

not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." Spaziano v. Florida, 468 U.S. 447, 455, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). The goal of the lesser offense rule "is to eliminate the distortion of the factfinding process." Spaziano, 468 U.S. at 455. The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of the charged offense, but simply to avoid setting the defendant free.<sup>1</sup>

Whether error is harmless is not determined by the existence of sufficient evidence to affirm a conviction. Rather, the crucial consideration is what impact the error may reasonably have had on the jury's decision-making process. The lack of a lesser offense instruction where one should be given distorts the jury's deliberative process, leading to a conviction that otherwise may not have been happened. The rationale for how the absence of lesser offense instruction influence jury deliberation due to the court's failure to give one is equally applicable to

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<sup>1</sup> Spaziano addressed the rationale in relation to capital cases, but that rationale is equally applicable to non-capital cases, as shown by the Beck Court's (a capital case) reliance on Keeble (a non-capital case). Beck, 447 U.S. at 633-34.

the situation wherein the defendant is denied the jury's consideration of the lesser offense due to trial counsel's failure to offer such an instruction.

WAPA's assertion that no prejudice can result from the lack of a lesser offense instruction conflicts with this Court's own precedent. This Court has never held failure to give such a lesser offense instruction may be harmless where there is evidence to support such instruction. State v. Parker, 102 Wn.2d 161, 164, 166, 683 P.2d 189 (1984).

In Parker, the trial court committed prejudicial error in failing to instruct on reckless driving as a lesser offense to felony flight from a police officer, even though there was no dispute that the evidence was sufficient to convict for the greater offense. Parker, 102 Wn.2d at 162, 166. The Court of Appeals, in affirming conviction, wrongly presumed from the jury's verdict of guilt on felony flight that the intoxication defense presented for the greater offense was rejected and a retrial would produce no different result. Id. at 166. This type of reasoning was improper because it ignored "the fact that the jury had no way of using the intoxication evidence short of outright acquitting Parker, because they were never told that the option of the lesser-included offense existed." Id. Parker refutes WAPA's argument that there is no possibility of prejudicial error when the jury is not instructed on a lesser offense.

The lack of a lesser offense instruction distorts the deliberative process by restricting the jury's consideration of the evidence in relation to the full range of crimes available on which to convict. See State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987) ("The failure to give the criminal trespass instruction restricted the jury's consideration of the evidence on the burglary charge. Short of outright acquitting Southerland of burglary, the jurors had no opportunity to use Southerland's denial of remaining on the premises with the intent to commit a crime because they were never told the lesser included offense of criminal trespass existed."). In Grier's case, the lack of instruction on manslaughter precluded the jury from taking into account the less culpable mental states associated with that lesser crime in determining guilt.

A trial court's wrongful failure to instruct on a lesser offense when one is requested is prejudicial when, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Southerland, 109 Wn.2d at 391. This is at least the same standard of prejudice used for ineffective assistance of counsel claims. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

There is no justifiable reason that a different type of prejudice analysis should prevail when the failure to give a lesser offense instruction stems from counsel not asking for one as opposed to the trial court not giving one. In the latter case, the jury was deprived of considering the lesser offense issue due to an error made by the trial court. In the former case, the jury was deprived of considering the lesser offense issue due to an error made by trial counsel. To the jury, it makes no difference whether the trial court or defense counsel deprived it of an opportunity to consider a lesser offense. The jury never knows why it was not given the option of convicting on a lesser offense. Who is responsible has no bearing on whether there is a reasonable probability that the lack of such instruction influenced the jury's deliberations and, ultimately, the outcome.

Even if WAPA's boilerplate assertion that jurors are presumed to follow instructions could potentially demonstrate that no error occurred in failing to allow the jury to consider lesser offense instructions, such an assertion does not carry the day here.

The jury in this case could not rationally have found by unanimous vote that Grier was guilty of murdering Owen but not find Grier was armed with a firearm during the commission of the offense for purposes of the special verdict. CP 118-19, 121. As recognized by the Court of Appeals, the jury held Grier criminally culpable for Owen's death, which

undisputedly was caused by a gunshot, and found her guilty of second degree murder of Owen, whose death was undisputedly caused by a fatal gunshot. State v. Grier, 150 Wn. App. 619, 645, 208 P.3d 1221 (2009). Yet the jury also found Grier was not armed with a firearm when she murdered Owen, as shown by their answering "no" on the firearm special verdict form. Id. These inconsistent verdicts support an inference that the jury believed Grier should be held accountable for causing Owen's death, but that it also had reservations about her level of culpability. Id.

Jurors are presumed to follow instructions absent evidence in the record to the contrary. State v. Davenport, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984). That presumption is rebuttable. Id. at 763. In Davenport, for example, the presumption that jurors follow the court's instruction to disregard argument made by counsel not supported by the law was rebutted by the fact that jurors sent a note to the trial court in apparent response to the improper argument. Id. at 763-64.

The inconsistent verdicts in Grier's case are analogous to the juror's note in Davenport. Both are indications that the jury did not follow the court's instructions. Indeed, the United States Supreme Court recognizes inconsistent verdicts demonstrate the jury has not followed the court's instructions. United States v. Powell, 469 U.S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). The assessment of prejudice in an ineffective

assistance appeal should proceed on the assumption that the jury acted according to the law. Strickland, 466 U.S. at 694-95. Even assuming that assumption can mechanically be applied to situations where the error distorts the deliberative process, it is forcefully rebutted here.

"Juries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity." State v. Goins, 151 Wn.2d 728, 733, 92 P.3d 181 (2004). Jury lenity is a plausible explanation for the jury's inconsistency here. Goins, 151 Wn.2d at 738. It cannot be ignored that a jury may exercise lenity in the difficult cases such as this one, where the jury wishes to avoid an all-or-nothing verdict. Powell, 469 U.S. at 66. Jury compromise is an equally plausible explanation. The inconsistent verdicts show one or more jurors may have agreed to convict on the only charge presented to them in exchange for an agreement by other jurors not to punish Grier further by means of the special firearm verdict.

WAPA claims inconsistent verdicts do not establish prejudice. Br. at 18. That claim is overstated. They do not establish prejudice for the purpose of vacating the count on which a defendant was convicted. Goins, 151 Wn.2d at 738. But the significance of inconsistent verdicts finds compelling application in the situation presented here, where the reviewing court looks to the record to determine whether the outcome may have been different had the jury been presented with the opportunity to

find guilt on a lesser offense. This is not a case where Grier is asking for review of the inconsistent verdicts. Rather, Grier points to the inconsistent verdicts as evidence that the jury was inclined towards lenity or compromise and, had the jury been given the opportunity to convict of a lesser offense rather than convict Grier of the highest offense, may well have done so.

WAPA argues jurors are told under standard instructions not to consider a lesser offense if they find the defendant is guilty of the charged offense and that, since the jury found Grier guilty as charged, it could not have properly considered any lesser offense. Br. at 19 (citing WPIC 155.00). This flawed reasoning highlights the problematic nature of the error in Grier's case. WAPA assumes the jury would have reached the same result had it received standard lesser offense instructions and been given an opportunity to convict of a lesser offense. The jury in Grier's case was not given any such opportunity. That the jury could not have considered any lesser offense in the absence of instruction allowing them to do so begs the question of what may have happened if such instruction had been given.

"A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." In re

Detention of Pouncy, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). Reversible error occurs "[w]hen the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial." State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968).

Prejudice in an ineffective assistance case is established when confidence is undermined in the outcome. Thomas, 109 Wn.2d at 226. This standard of prejudice is in accord with the definition of reversible error advanced by this Court in Martin. It is also in accord with Keeble, where the United States Supreme Court found prejudicial error from the lack of a lesser offense instruction because the jury could rationally have convicted the defendant of a lesser offense if that option had been presented. Keeble, 412 U.S. at 213. The Court reversed because it could not say that the availability of a third option — convicting the defendant of lesser offense — could not have resulted in a different verdict. Keeble, 412 U.S. at 213. The same holds true here.

2. COUNSEL'S DECISION NOT TO REQUEST INSTRUCTION ON A LESSER OFFENSE WAS DEFICIENT PERFORMANCE.

The benchmark for judging any claim of ineffectiveness is whether counsel's conduct resulted in a trial that cannot be relied on as having produced a just result. Strickland, 466 U.S. at 686. As an entity presumably interested in seeing justice done in Grier's case, WAPA shows markedly little interest in actually examining its particular facts.

Instead, it wants a judicial pronouncement from this Court that defense counsel cannot, as a matter of law, be ineffective in failing to seek a lesser offense instruction. That is WAPA's agenda. Strickland, however, does not establish "mechanical rules." Strickland, 466 U.S. at 696. To the contrary, the Strickland inquiry is fact-specific, requiring examination of "the totality of the evidence." Id. at 695. The question of whether counsel's performance was ineffective is therefore not amenable to any per se rule and turns on the facts of an individual case. State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

This flows from the indisputable fact that the constitutional right to effective assistance "exists, and is needed, in order to protect the fundamental right to a fair trial." Id. at 684. This Court should decline

WAPA's invitation to turn a blind eye to whether counsel's failing deprived Grier of her right to a fair trial.

Perhaps sensing the facts of Grier's case are not on its side, WAPA directs a good deal of its amicus brief towards railing, not against Grier's case, but against decisions in other cases that have assessed whether counsel's decision to forego lesser offense instruction was a legitimate tactic. For example, WAPA complains some courts have found a difference in maximum penalties between the greater and lesser offenses supported deficient performance when, according to WAPA, the difference in penalties was not all that significant. Br. at 8-9. WAPA, however, concedes there was in fact a large difference in penalties for the charged offense and the lesser offense in Grier's case. Br. at 8. 16 years separated the top of the standard range for second degree murder from the top of the standard range for second degree manslaughter. Grier, 150 Wn. App. at 641-42 (second degree murder carried a standard range of 123 to 220 months, whereas second degree manslaughter carries a standard range of 21 to 27 months).

WAPA also contends there is a high likelihood that a lesser offense instruction will turn a potential acquittal into a conviction if the defendant has a defense that applies only to the greater offense. Br. at 10. Again, that contention does not apply to Grier's case, where the Court of Appeals

properly recognized Grier's self-defense and defense of another claims applied to both the charged offense (murder) and the lesser offense (manslaughter). Neither WAPA nor the State dispute this fact. Indeed, WAPA concedes if the defenses apply equally to both crimes, the defendant has little to lose by seeking an instruction on a lesser offense. Br. at 10.

WAPA further claims cases that have found ineffective assistance in failing to request lesser offense instructions have objected to an "all or nothing" strategy as "risky" and that this is an invalid basis for finding deficient performance because trials and most strategic decisions are "risky." Br. at 5.

WAPA misreads the case law and improperly frames the issue. In determining deficient performance, the question is not whether a decision is risky. The question is whether counsel's decision is *unreasonably* risky; i.e., whether "it was an objectively unreasonable tactical decision for defense counsel to force the jury to find either that the greater offense occurred or that no offense occurred (the "all or nothing" tactic)." Grier, 150 Wn. App. at 635. This standard falls squarely within the Strickland test for establishing deficient performance. Strickland, 466 U.S. at 687 (deficient performance is that which falls below an objective standard of reasonableness).

WAPA complains counsel's decision cannot be characterized as deficient except through hindsight. Br. at 6-7. This is wrong. The hindsight problem is avoided by reconstructing the circumstances of counsel's challenged conduct and evaluating the conduct from counsel's perspective at the time the decision was made. Strickland, 466 U.S. at 689. There is no reason why that analytical process cannot be applied to counsel's decision to forego a lesser offense instruction. The Court of Appeals did just that in Grier's case. It considered the circumstances known to Grier's counsel at the time the decision to forego lesser offense instruction was made and justifiably reached the conclusion that no legitimate tactical reason to forego lesser offense instruction appeared in the record. Grier, 150 Wn. App. at 623-30, 640-44.

In addressing deficiency, WAPA elevates abstraction over facts. Jurors were faced with the brute fact that a man is dead. A bullet from Grier's gun went through Owen and killed him. Based on the evidence presented at trial, Grier was the only person in a position to shoot Owen. There is strong reason to believe jurors, as a collection of ordinary human beings, wanted to hold Grier accountable for Owen's death and were loathe to simply let her walk away with a complete acquittal. Competent counsel recognizes these factors in deciding whether the jury should be offered the opportunity to convict of a lesser crime.

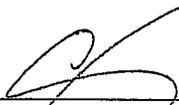
Whether the State proved the intent element of the murder charge beyond a reasonable doubt was debatable. There was, however, overwhelming evidence that Grier was guilty of some offense: Owen's being shot and killed was highly disproportionate to his advancing toward Grier and shoving her. Grier, 150 Wn. App. at 643. This disproportionate response undermined the self-defense claim on the second degree murder charge. "Given the testimony about Grier's attitude toward and obsession with guns and in light of the discrepancy between the amount of force with which Owen had advanced compared to his ending up shot to death, it was highly risky to rely on the chance that the jury would find Grier justified in acting in self-defense." Id. at 644. This is a reasonable conclusion. Grier's attorney was deficient in failing to request lesser offense instructions on manslaughter.

B. CONCLUSION

For the reasons stated, this Court should affirm the Court of Appeals decision reversing conviction and remanding for a new trial.

DATED this 10<sup>th</sup> day of September 2010.

Respectfully Submitted,  
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