Washington Law Review

Volume 85 | Number 3

8-1-2010

State v. Grier and the Erroneous Adoption of the "Punishment-Based" Standard of Review for Ineffective Assistance of Counsel Claims Based on All-or-Nothing Strategies

Jacque St. Romain

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

 Part of the Criminal Procedure Commons

Recommended Citation

Jacque St. Romain, Notes and Comments, *State v. Grier and the Erroneous Adoption of the "Punishment-Based" Standard of Review for Ineffective Assistance of Counsel Claims Based on All-or-Nothing Strategies*, 85 Wash. L. Rev. 547 (2010).
Available at: https://digitalcommons.law.uw.edu/wlr/vol85/iss3/12

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

Copyright © 2010 by Washington Law Review Association

STATE V. GRIER AND THE ERRONEOUS ADOPTION OF THE "PUNISHMENT-BASED" STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BASED ON ALL-OR-NOTHING STRATEGIES

Jacque St. Romain

Abstract: In June 2009, the Washington State Court of Appeals, Division II, reversed Kristina Grier's second-degree murder conviction in *State v. Grier*.[1] The court concluded that Grier had received ineffective assistance of counsel because her attorney failed to request jury instructions for any lesser-included offenses, choosing instead to pursue an all-or-nothing defense strategy. That same month, Division I issued a contrary opinion, finding the pursuit of an all-or-nothing strategy reasonable. The Washington State Supreme Court has granted certiorari and will soon hear oral arguments in *Grier*. This Comment reviews federal and state courts' approaches to questions of ineffective assistance of counsel involving all-or-nothing strategies and argues that, when the Washington State Supreme Court resolves *State v. Grier*, it should review attorneys' strategic decisions under a highly deferential standard. This standard would align with state precedent and federal practice and would preserve trial attorneys' discretion, provide defendants with a true adversarial process, and repair the split *State v. Grier* created.

INTRODUCTION

The lesser-included-offense doctrine has existed since the 1600s, when common law authorized juries to convict a defendant charged with murder of the "lesser offense" of manslaughter if the evidence supported the lesser charge.[2] The lesser-included-offense doctrine "provides that a criminal defendant may be convicted at trial of any crime supported by the evidence which is less than, but included within, the offense charged by the prosecution."[3] The doctrine, originally created to aid the prosecution where it could not prove all elements of the crime charged, is now recognized as being potentially beneficial to both parties.[4]

---

1. 150 Wash. App. 619, 208 P.3d 1221 (2009).

2. Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 376 (2005).

3. James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 6 (1995).

4. Beck v. Alabama, 447 U.S. 625, 633–34 (1980) ("This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged. But it has long been recognized that it can also be beneficial to the defendant because it affords the

A defendant has the right to request that the jury receive lesser-included-offense instructions where evidence suggests the defendant might have committed a less serious offense than the crime charged.[5] For example, a defendant charged with second-degree murder has the right to request a jury instruction for any lesser-included offenses of which the evidence suggests the defendant may instead be guilty, such as first- and second-degree manslaughter.[6] Providing lesser-included-offense instructions provides the jury with more options because "[w]hen a charged offense involves one or more lesser included offenses . . . a jury not only has the options of acquittal or conviction of the charged offense, but also the options of acquittal or conviction of each lesser included offense."[7] This approach can benefit the defendant who would face a lower penalty if found guilty of a lesser offense.[8]

However, while defendants have the right to such instructions, some—for instance, those charged with commission of a noncapital crime[9]—might not want them. In a noncapital murder trial, for example, "[o]ne legitimate trial strategy for the defendant . . . is an 'all-or-nothing' one in which the defendant seeks acquittal while realizing that the jury might instead convict of murder."[10] Under this strategy, the defendant chooses to limit the jury's options and thereby risk the greater conviction in the hope that the jury will acquit. Defendants who take this gamble usually do so because they fear that, if presented with intermediate options, the jury will reach a compromise verdict, finding the defendant guilty of the lesser offense.[11]

If the gamble fails, a defendant may challenge an attorney's use of an all-or-nothing strategy through a claim of ineffective assistance of counsel.[12] Defendants often raise this issue on appeal, hoping the courts

---

jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." (internal citations omitted)).

5. *See* Hopper v. Evans, 456 U.S. 605, 611 (1982).

6. FED. R. CRIM. P. 31(c) ("The defendant may be found guilty of . . . an offense necessarily included in the offense charged.").

7. David F. Abele, *Jury Deliberations and the Lesser Included Offense Rule: Getting the Courts Back in Step*, 23 U.C. DAVIS L. REV. 375, 376 (1990).

8. Amanda Peters, *Thirty-One Years in the Making: Why the Texas Court of Appeals' New Single-Method Approach to Lesser-Included Offense Analysis Is a Step in the Right Direction*, 60 BAYLOR L. REV. 231, 235 (2008).

9. *Beck*, 447 U.S. at 644–45 (holding that lesser-included offenses must be provided in capital cases).

10. Watts v. State, 885 N.E.2d 1228, 1233 (Ind. 2008).

11. *Id.*

12. Michael T. Judge, Comment, *Control and Direction of the Defense: The All-Or-Nothing Defense Tactic in the Context of Ineffective Representation*, 10 GEO. MASON U. L. REV. 209, 209

will overturn their convictions and allow them new trials. Courts examining such claims look to the particular facts of each case to determine the tactical decision's reasonability.[13] Like any trial strategy, the all-or-nothing approach "has both potential risks and potential rewards," and parties deciding on tactics "must weigh these risks and rewards."[14]

In response to the risky nature of the all-or-nothing strategy, courts employ different tests when analyzing use of the doctrine in capital and noncapital cases. While the United States Supreme Court has never addressed the issue directly, in one case the Court struck down a state law that forbade the inclusion of jury instructions presenting lesser-included offenses in a death-penalty case.[15] Federal courts have subsequently interpreted that case as requiring lesser-included-offense jury instructions in all capital cases, thus effectively banning all-or-nothing strategies in those trials.[16] In noncapital cases, however, most federal courts continue to recognize all-or-nothing strategies as legitimate trial tactics that deserve high deference upon review.[17]

States have taken different approaches to the all-or-nothing strategy. Presumably fearing the tactic might increase the chance of an erroneous conviction, state legislators in California and Tennessee have, in the past, gone so far as to mandate the inclusion of lesser-included-offense instructions for noncapital cases, effectively banning the use of all-or-nothing strategies altogether.[18] In seven states where legislatures have not statutorily banned all-or-nothing strategies, courts "have

---

(1987).

13. State v. Hassan, 151 Wash. App. 209, 219, 211 P.3d 441, 446 (2009) ("The determination of whether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry.").

14. Patrick D. Pflaum, *Justice Is Not All or Nothing: Preserving the Integrity of Criminal Trials Through the Statutory Abolition of the All-or-Nothing Doctrine*, 73 U. COLO. L. REV. 289, 300 (2002).

15. Beck v. Alabama, 447 U.S. 625, 637–38 (1980) (holding that a law forbidding the inclusion of any lesser-included-offense instructions in a capital case violates the Eighth Amendment).

16. *See* Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257, 274–77 (1999).

17. *See infra* notes 58–61 and accompanying text.

18. *See* CAL. PENAL CODE § 1159 (1989) ("The jury, or the judge . . . may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged . . . ."); TENN. CODE ANN. § 40-18-110(a) (1997) ("It is the duty of all judges charging juries . . . wherein two (2) or more grades . . . of offenses may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the party of the defendant to do so.") (amended in 2001 to allow for such strategies, stating that the failure of a judge to provide lesser-included-offense instructions where not requested may not be presented as a ground for relief); *see also* Pflaum, *supra* note 14, at 316.

promulgated common-law rules to accomplish the same end."[19] The remaining states have continued to allow the all-or-nothing strategy in noncapital cases, leaving the decision of whether to pursue such a strategy up to the parties.[20]

For more than 100 years, Washington State courts have given great deference to defense counsel in questions of effective assistance of counsel,[21] and, in line with that deferential standard, neither the courts nor the legislature have banned the use of all-or-nothing strategies in noncapital trials. However, in three decisions over the last five years, Washington courts have strayed from that approach.[22] Most recently, in *State v. Grier*, Division II of the Court of Appeals overturned a noncapital murder conviction because an attorney unsuccessfully utilized an all-or-nothing strategy.[23] In reversing the conviction, Division II relied on a "punishment-based" standard[24] that Division I had applied in two prior cases.[25]

Part I of this Comment discusses the federal courts' highly deferential standard for ineffective assistance of counsel claims based on all-or-nothing strategies in noncapital cases. Part II details the similarly deferential approach Washington courts have traditionally used when analyzing such claims. Part III examines the fractured approach of Division I of the Court of Appeals, culminating in its rejection of its own "punishment-based" standard in *State v. Hassan*.[26] Part IV examines Division II's subsequent adoption of the "punishment-based" standard in *State v. Grier* and the split that it created. Finally, Part V argues that the Washington State Supreme Court should apply a highly deferential standard when it resolves *State v. Grier* and thus uphold the right of

---

19. The seven states with such a common law rule are Minnesota, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, and South Carolina. *See* Pflaum, *supra* note 14, at 316.

20. *See id.* at 317.

21. *See infra* note 66 and accompanying text. In 1984, the United States Supreme Court announced a highly deferential test for reviewing ineffective counsel claims, and Washington has adopted that test as its own. State v. Jeffries, 105 Wash. 2d 398, 418, 717 P.2d 722, 733–34, *cert. denied*, 497 U.S. 922 (1986) (adopting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

22. *See*, *e.g.*, State v. Ward, 125 Wash. App. 243, 104 P.3d 670 (2004); State v. Pittman, 134 Wash. App. 376, 166 P.3d 720 (2006); State v. Grier, 150 Wash. App. 619, 208 P.3d 1221 (2009).

23. 150 Wash. App. at 644, 208 P.3d at 1234 (2009).

24. "Punishment-based" standard is the term this Comment uses to describe the method Division I and Division II have used to determine the reasonability of trial strategies. The standard compares the high-end of the standard sentencing range for the crime charged with that of the lesser-included offense that could have been proposed and determines the reasonability of the strategy based on how great the difference is between the sentencing ranges.

25. The two cases were *Ward* and *Pittman*. *See* discussion *infra* Part III.

26. 151 Wash. App. 209, 211 P.3d 441 (2009).

attorneys and clients to employ all-or-nothing tactics in noncapital trials. Applying a highly deferential standard aligns with United States and Washington State Supreme Court precedent, preserves trial attorneys' discretion, provides defendants with a true adversarial process, and repairs the split *State v. Grier* created, once again providing clear guidance to lower courts.

I. FEDERAL JURISPRUDENCE SUGGESTS INEFFECTIVENESS CLAIMS FOR ALL-OR-NOTHING TACTICS IN NONCAPITAL CASES SHOULD RECEIVE DEFERENCE

The United States Constitution guarantees criminal defendants the right to have assistance from an attorney.[27] The United States Supreme Court has interpreted this guarantee as requiring not only assistance of counsel, but *effective* assistance of counsel.[28] To that end, the Court created a highly deferential test for determining when an attorney has been ineffective. In *Beck v. Alabama*,[29] the Court specifically addressed all-or-nothing strategies only in the capital context, where it prohibited a state from precluding lesser-included-offense instructions.[30] Most federal courts have chosen not to extend that limitation to noncapital cases. Instead, they utilize a highly deferential standard when reviewing ineffective assistance of counsel claims regarding all-or-nothing trial strategies.

A. The United States Supreme Court Mandates a Highly Deferential Standard of Review for Claims of Ineffective Assistance of Counsel

The right to an attorney is the most basic and pervasive right that the Sixth Amendment provides.[31] The United States Supreme Court has

---

27. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . and to have the Assistance of Counsel for his defence.").

28. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); *see also* Ronald L. Rahal, Note, Wilson v. Mintzes*: A Case of Ineffective Assistance or Denial of Counsel of Choice?*, 17 U. TOL. L. REV. 615, 622–30 (1986).

29. 447 U.S. 625 (1980).

30. *Id.*

31. *See* United States v. Cronic, 466 U.S. 648, 654 (1984) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." (internal quotation and citation omitted)); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

interpreted "effective assistance" as the right to have a true adversarial process[32] and has held that when such an adversarial proceeding occurs, the right guaranteed by the Sixth Amendment is satisfied, even when defense counsel makes demonstrable errors in judgment and tactics.[33]

In *Strickland v. Washington*,[34] the United States Supreme Court laid out a two-prong test for determining when a court must deem defense counsel ineffective.[35] Under this test, a defendant must first show that the defense attorney's performance was so deficient and included errors so serious that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment.[36] Second, the defendant must show that this deficient performance prejudiced the case—that the errors actually deprived the defendant of a fair trial, thus calling into question the validity of the verdict.[37] If the attorney's error did not affect the outcome, then the claim fails, regardless of how deficient the representation may have been.[38]

In this way, the *Strickland* Court stressed the heavy burden placed on a defendant to prove ineffective assistance of counsel.[39] The Court mandated that judicial scrutiny of a defense attorney's performance be "highly deferential" in order to "eliminate the distorting effects of hindsight."[40] A reviewing court must defer to counsel's strategic decision to present, or to forgo, a particular defense theory where the decision falls within the wide range of professionally competent assistance.[41] *Strickland* mandates that a court reviewing an ineffective assistance of counsel claim must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of

---

32. *Cronic*, 466 U.S. at 656 ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.").

33. *Id.*

34. 466 U.S. 668 (1984).

35. *Id.* at 687.

36. *Id.*

37. *Id.* at 694 (noting that under the second prong, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

38. *Id.* at 697.

39. *Id.* at 689.

40. *Id.*

41. *Id.*; United States v. Layton, 855 F.2d 1388, 1419–20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988).

counsel's conduct."[42] Courts may not view the attorney's actions through hindsight but instead must focus on what transpired in preparation for and at the trial.[43]

The United States Supreme Court has repeatedly emphasized the deferential nature of review that courts should apply to ineffective assistance of counsel claims.[44] However, the Court has only specifically addressed the necessity of lesser-included-offense instructions in the context of capital crimes.

B. Federal Courts Have Forbidden All-or-Nothing Tactics in Death Penalty Cases, but Have Generally Declined to Extend that Bar to Noncapital Cases

Though the United States Supreme Court has not specifically addressed whether a defense attorney would be ineffective by choosing to pursue an all-or-nothing strategy, the Court held in *Beck v. Alabama* that the Alabama state legislature could not forbid a jury from hearing lesser-included-offense instructions in a death penalty case.[45]

In *Beck*, the United States Supreme Court invalidated an Alabama statute that prohibited the state's courts from giving lesser-included-offense instructions to a jury when a defendant was charged with committing a capital offense.[46] The Court noted that while the common law lesser-included-offense rule was originally intended to aid the prosecution, it might also benefit defendants,[47] and thus it "has long been 'beyond dispute that the defendant is entitled to an instruction on a lesser

---

42. *Strickland*, 466 U.S. at 690.

43. *Id.*

44. *See* Rompilla v. Beard, 545 U.S. 374, 381 (2005) (noting "hindsight is discounted by pegging adequacy to counsel's perspective at the time investigative decisions are made and by giving a heavy measure of deference to counsel's judgments" (internal quotations and citations omitted)); Bell v. Cone, 535 U.S. 685, 698 (2002) (acknowledging that "judicial scrutiny of a counsel's performance must be highly deferential and that every effort must be made to eliminate the distorting effects of hindsight" (internal quotations and citation omitted)); Burger v. Kemp, 483 U.S. 776, 795 (1987) ("In any ineffectiveness case, a particular decision . . . must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (citing *Strickland*, 466 U.S. at 691)); Darden v. Wainwright, 477 U.S. 168, 185 (1986) ("As we recognized in *Strickland*: [j]udicial scrutiny of counsel's performance must be highly deferential." (internal quotation omitted)).

45. 447 U.S. 625, 637 (1980).

46. *Id.* at 638.

47. *Id.* at 633–34.

included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'"[48]

The Court explained that, "[w]here 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."[49] The Court found it particularly likely that the jury would find in favor of conviction when the evidence indicated the defendant was unquestionably guilty of a serious violent offense, even where some doubt existed as to an element that would warrant conviction of the capital offense.[50] The Court reasoned that the risk of an unwarranted conviction "cannot be tolerated in a case in which the defendant's life is at stake."[51] While the Court held only that a defendant in a capital case is constitutionally entitled to lesser-included-offense instructions,[52] federal courts have interpreted *Beck* as *requiring* that such instructions be provided, regardless of whether a defendant wants or requests them.[53] The Supreme Court has subsequently refined its holding in *Beck*.[54]

---

48. *Id.* at 636 (quoting Keeble v. United States, 412 U.S. 205, 208 (1973)). In making this determination, the Supreme Court relied on a previous decision, *Keeble v. United States*. There, the Native American defendant had been charged with assault with intent to commit great bodily injury under the Major Crimes Act of 1885. The defendant requested the lesser-included-offense instruction of simple assault, but the trial court refused, finding itself unauthorized to provide such an instruction under the Act. The Supreme Court reversed, holding that defendants have a right to have lesser-included-offense instructions provided to the jury, noting,

> It is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution had 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-included offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from that theory. 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 doubts in favor of conviction.

Keeble, 412 U.S. at 212–13.

49. *Beck*, 447 U.S. at 634 (quoting *Keeble*, 412 U.S. at 212–13).

50. *Id.* at 637.

51. *Id.*

52. *Id.*

53. *See* Carpenter, *supra* note 16.

54. The U.S. Supreme Court has refined *Beck* in three ways. Initially, it clarified that *Beck* allows for lesser-included-offense instructions only where they are legally warranted. Then, it clarified that lesser-included-offense instructions are only necessary where they are warranted by the evidence. Finally, in *Schad v. Arizona*, the Court held that a defendant's rights are not violated where some lesser-included-offense instructions are provided, even if those instructions fail to include all available options. *See* Spaziano v. Florida, 468 U.S. 447, 456–57 (1984) (holding that where the statute of limitations has run out on lesser-included offenses, the defendant can either waive the statute of limitations or be tried without the lesser-included offenses provided because they are not legally warranted); Hooper v. Evans, 456 U.S. 605, 610 (1982) (holding that only instructions that are warranted by the evidence may be provided); Schad v. Arizona, 501 U.S. 624 (1991).

However, because of the way federal courts subsequently interpreted the opinion, all-or-nothing strategies may no longer be employed in capital offense cases.[55]

While the U.S. Supreme Court has yet to address whether defendants may utilize the all-or-nothing strategy in noncapital cases,[56] seven federal circuit courts of appeals considering the question outside the context of ineffective assistance of counsel have held that the all-or-nothing strategy is sometimes permissible.[57] The four federal circuit courts that have specifically addressed all-or-nothing strategies within an ineffective assistance of counsel context—the Sixth,[58] Seventh,[59]

---

55. *See* Pflaum, *supra* note 14, at 307.

56. Deanna Hall, Note, *The "Third Option": Extending the Lesser-Included Offense Doctrine to the Noncapital Context*, 29 HOFSTRA L. REV. 1333, 1341 (2001).

57. *See, e.g.*, Tata v. Carver, 917 F.2d 670, 672 (1st Cir. 1990) (holding that the exclusion of lesser-included-offense instructions in noncapital cases does not qualify as a "fundamental miscarriage of justice" and thus does not warrant reversal); Valles v. Lynaugh, 835 F.2d 126, 127 (5th Cir. 1988) (holding that "[i]n a noncapital murder case, the failure to give an instruction on a lesser-included offense does not raise a federal constitutional issue"); Bagby v. Sowders, 894 F.2d 792, 796 (6th Cir. 1990) (citing *Beck*, 447 U.S. at 638) (finding it unnecessary to extend *Beck* to noncapital offenses because the analysis in *Beck* seemed to be based on Eighth Amendment grounds); Nichols v. Gagnon, 710 F.2d 1267, 1271 (7th Cir. 1983) (finding it unnecessary to extend *Beck* because the United States Supreme Court itself emphasized the capital nature of the greater offense in *Beck* and expressly reserved the applicability of the holding to noncapital offenses); Trujillo v. Sullivan, 815 F.2d 597, 603 (10th Cir. 1987) (choosing not to extend *Beck* to noncapital offense cases); Perry v. Smith, 810 F.2d 1078, 1080 (11th Cir. 1987) (holding that in a noncapital case the Constitution's Due Process Clause does not require a state court to instruct the jury on lesser-included offenses). *But see* Vujosevic v. Rafferty, 844 F.2d 1023 (3rd Cir. 1988) (holding that a defendant in a noncapital case is entitled to *all* available lesser-included offense instructions).

58. *See* Tinsley v. Million, 399 F.3d 796, 808 (6th Cir. 2005) ("[I]t was a permissible exercise of trial strategy not to request [lesser-included-offense instructions] given that [the defendant's] primary line of defense was that [the defendant] was not the shooter."); Scott v. Elo, 302 F.3d 598, 607 (6th Cir. 2002) (holding counsel's failure to request an involuntary manslaughter instruction did not constitute deficient performance under the *Strickland* test where counsel made a strategic decision to advance other defense theories); Lewis v. Russell, 42 F. App'x 809, 810–11 (6th Cir. 2002) (holding trial counsel's failure to request a jury instruction on the lesser-included offense of voluntary manslaughter in a murder trial constituted a reasonable strategic decision where the strategy was consistent with defendant's effort to seek full acquittal on the basis of self-defense); Edwards v. Mack, 4 F. App'x 215, 217–18 (6th Cir. 2001) (holding counsel's omission of jury instructions on lesser-included offenses constituted effective assistance, even if the all-or-nothing strategy was pursued without the defendant's permission, because it constituted a proper exercise of counsel's judgment).

59. *See* Adams v. Bertrand, 453 F.3d 428, 430, 435–36 (7th Cir. 2006) (recognizing that the trial strategy "could have led to a complete acquittal had the jury agreed that proof of force was lacking" and holding that because of the possibility of an acquittal, "[c]ounsel's decision here dwells in the region of tactics and strategy"); United States v. Boyles, No. 92-3886, slip op. at 32–33 (7th Cir. June 8, 1995); Barnett v. Godinez, 61 F.3d 905, 1995 WL 399030, at *4 (7th Cir. 1995) ("Presenting the jury with an all-or-nothing choice is generally a reasonable trial strategy because, although it involves a risk, it increases the chances of an acquittal."); Sarwacinski v. McBride, 51

Eighth,[60] and Ninth Circuits[61]—have each applied *Strickland*'s highly deferential standard, granting great deference to trial attorneys in determining which trial strategies to use. The United States Army Board of Review has similarly found all-or-nothing strategies reasonable in court-martial proceedings.[62] In sum, federal courts have consistently declined to extend *Beck*'s reasoning, instead employing a highly deferential standard in reviewing all-or-nothing strategies in noncapital cases.

II. WASHINGTON COURTS APPLY *STRICKLAND* AND GRANT GREAT DEFERENCE TO TRIAL LAWYERS' STRATEGIC CHOICES

Like the United States Constitution, the Washington State Constitution also guarantees the right to assistance of counsel.[63] The

---

F.3d 276, 1995 WL 123120, at *3 (7th Cir. 1995) (holding that the attorney's "decision not to submit a voluntary manslaughter charge, which he made with the express approval of his client, does not constitute ineffective assistance under the performance prong of *Strickland*"); United States v. Windsor, 981 F.2d 943, 947 (7th Cir. 1991); Kubat v. Thieret, 867 F.2d 351, 365 (7th Cir. 1989) (noting that there is a "general proposition that it is reasonable to forego a lesser included offense instruction where a defendant has presented an alibi defense").

60. Riley v. Lockhart, 726 F.2d 421, 422–23 (8th Cir. 1984) (noting that "a petitioner shoulders a heavy burden in proving ineffective assistance" and holding that "hindsight, though a superior view, does not form the basis for finding a constitutional deprivation in strategic or tactical decisions"); Knott v. Mabry, 671 F.2d 1208, 1212 (8th Cir. 1982) ("Trial of law suits is peculiarly susceptible to hindsight appraisal of another lawyer's endeavors. When trial counsel exercise their judgment in making strategic decisions, third party post-trial construction of strategic alternatives cannot be the sole basis for finding constitutional deficiency.").

61. Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir. 1984) ("With the benefit of hindsight we know that this [all-or-nothing] strategy was incorrect; however, it did not constitute ineffective assistance of counsel" because "reasoned tactical decisions are not faulted, even if in retrospect better tactics were available.").

62. United States v. Craighead, 22 C.M.R. 523, 524–25, 1956 WL 4822 (1956) ("The entire theory of the defense at the trial was in direct contradiction of the commission of any offense of lesser included offenses. The theory of the defense was designed to secure an acquittal and was based on an 'all or nothing' strategy. . . . Such trial tactics specifically rejected any possible lesser included offenses" and thereby make the decision not to propose such instructions manifestly reasonable.).

63. WASH. CONST. art. I, § 22 ("In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . . . In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."); *see* State v. Sardinia, 42 Wash. App. 533, 538, 713 P.2d 122 (1986) ("The Washington State and United States Constitutions guarantee a criminal defendant the right to

Washington State Supreme Court has held that the State's guaranteed right to assistance of counsel is equivalent to the protection guaranteed by the Sixth Amendment[64] and, accordingly, has followed federal precedent.[65] As such, the Washington State Supreme Court has adopted the United States Supreme Court's analysis of effective assistance of counsel[66] and has consistently applied the *Strickland* test when reviewing ineffective assistance of counsel claims.[67] This Part reviews Washington's highly deferential approach before and after *Strickland* and demonstrates that state courts have given similarly high deference to ineffective assistance of counsel claims based on all-or-nothing trial strategies.

A. Before and After Strickland, *Washington Courts Employed a Highly Deferential Standard of Review for Ineffective Assistance of Counsel Claims*

The Washington State Supreme Court explicitly adopted the *Strickland* test for determining ineffectiveness of counsel in 1986.[68] But even before then, Washington courts employed a highly deferential standard of review for ineffective assistance of counsel claims.[69] For

---

effective assistance of counsel.").

64. *See In re* Davis, 152 Wash. 2d 647, 672, 101 P.3d 1, 16 (2004) ("Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings.").

65. *See* State v. Heddrick, 166 Wash. 2d 898, 910, 215 P.3d 201, 207 (2009) (citing United States v. Cronic, 466 U.S. 648, 658–59, 659 n.25 (1984), for holding that a "complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal"); State v. Benn, 120 Wash. 2d 631, 663, 845 P.2d 289, 307 (1993) (citing Burger v. Kemp, 483 U.S. 776, 788–89 (1987), which applied the *Strickland* standard to death penalty proceedings).

66. The Supreme Court of Washington specifically adopted the *Strickland* test in *State v. Jeffries*. 105 Wash. 2d 398, 418, 717 P.2d 722, 733–34, *cert. denied*, 479 U.S. 922 (1986).

67. *See In re* Davis, 152 Wash. 2d at 672, 101 P.3d at 1; *In re* Brett, 142 Wash. 2d 868, 873, 16 P.3d 601, 603–04 (2001) (citing *Strickland*'s two-part test); State v. Hendrickson, 129 Wash. 2d 61, 77, 917 P.2d 563, 571 (1996) (citing and applying *Strickland*'s two-part test); State v. McFarland, 127 Wash. 2d 322, 334–35, 899 P.2d 1251, 1256–57 (1995) (citing and applying *Strickland*'s two-part test).

68. *See supra* note 66 and accompanying text.

69. *See* State v. Adams, 91 Wash. 2d 86, 91, 586 P.2d 1168, 1171 (1978) ("Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate."); Fleetwood v. Rhay, 7 Wash. App. 225, 228, 498 P.2d 891, 893 (1972) ("Hindsight is a recognized educator; it should not be a substitute for appreciating the difficult decisions required of trial and appellate counsel . . . . While different counsel might have made different decisions, we do not believe the trial was reduced to a farce so as to impugn the dictates of due process."); State v. Gibson, 79 Wash. 2d 856, 862, 490 P.2d 874, 877 (1971) ("It is only when the incompetence or neglect of a

example, in 1978—five years before the United States Supreme Court decided *Strickland*—the Washington State Supreme Court acknowledged that, "[a]s a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction."[70]

In the years following *Strickland*, Washington courts have repeatedly affirmed their highly deferential approach for reviewing ineffective assistance of counsel claims and have incorporated the *Strickland* two-part test.[71] Additionally, to overturn a conviction, a state court must find that there were *no* legitimate tactical reasons for the strategy employed,[72] placing an even heavier burden on defendants to prove their claim. The Washington State Supreme Court has defended this burden as a necessary result of high deference: "We will not find ineffective assistance of counsel if the actions [a defendant] complains about go to the theory of the case or trial tactics."[73] Moreover, Washington courts employ a strong presumption of effective assistance of counsel,[74] which defendants may only overcome with a clear showing of incompetence.[75] Specifically, a defendant "must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by his counsel's errors such that 'but for counsel's errors that outcome of the proceedings would have been different.'"[76] In other words, the defense counsel's performance must have been so

---

lawyer . . . results in the violation of a constitutional right by reducing the trial to a farce that a new trial will be granted." (quoting State v. Mode, 57 Wash. 2d 829, 833, 360 P.2d 159, 161 (1961)).

70. *Adams*, 91 Wash. 2d at 91, 586 P.2d at 1171.

71. *See* State v. Donaldson, 141 Wash. App. 1002, 2007 WL 2909650, at *7 (2007) ("To show deficient performance, [a defendant] has the heavy burden of showing that his attorneys made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (internal quotations and citations omitted)); State v. Hayes, 81 Wash. App. 425, 442, 914 P.2d 788, 798, *review denied*, 130 Wash. 2d 1013, 928 P.2d 413 (1996); State v. White, 84 Wash. App. 1015, 1996 WL 219648, at *7 (1996) (holding "defendant has the 'heavy burden' of showing that counsel's performance was deficient in light of all surrounding circumstances"); State v. Sherwood, 71 Wash. App. 481, 483, 860 P.2d 407, 409 (1993) ("The defendant has the heavy burden of showing, after a review of the entire record, that counsel's performance fell below the objective standard of reasonableness after considering all surrounding circumstances." (internal citations omitted)).

72. State v. Rainey, 107 Wash. App. 129, 135–36, 28 P.3d 10, 14 (2001) ("The defendant bears the burden of showing there were no 'legitimate strategic or tactical reasons' behind defense counsel's decision.").

73. State v. Varga, 151 Wash. 2d 179, 199, 86 P.3d 139, 149 (2004).

74. State v. McFarland, 127 Wash. 2d 322, 335, 899 P.2d 1251, 1257 (1995).

75. *Varga*, 151 Wash. 2d at 199, 86 P.3d at 149.

76. *Id.* at 198, 86 P.3d at 149 (citing State v. Brett, 126 Wash. 2d 136, 199, 892 P.2d 29, 62 (1995)).

deficient that it was manifestly unreasonable.

B. Washington Courts Have Traditionally Employed a Highly Deferential Standard When Reviewing Ineffective Assistance of Counsel Claims Based on All-or-Nothing Strategies

Few courts in Washington have considered the specific question of whether pursuing an all-or-nothing strategy constitutes ineffective assistance of counsel.[77] However, the Washington State Supreme Court and the Washington State Court of Appeals, Division II, have each found that such trial tactics should receive great deference on appeal.[78] Additionally, the Court of Appeals, Division I, held that presiding judges must provide lesser-included-offense instructions only if a defendant requests them.[79] Division II has interpreted this rule as meaning attorneys are not ineffective when they fail to propose lesser-included instructions.[80]

In line with that interpretation, in 1979, Division II affirmed a defendant's conviction where the defendant was charged with second-degree assault after a brawl outside of a bar.[81] Rather than asking the court to provide an instruction on a lesser-included offense, the defendant's attorney chose to "attempt to persuade the jurors that the affray was not as violent as some witnesses suggested and that the injuries sustained did not produce pain and suffering of a sufficient magnitude to qualify as grievous bodily harm."[82] The court held that the attorney was not ineffective because "[i]t was an all-or-nothing tactic that well could have resulted in an outright acquittal."[83]

---

77. Only two Washington cases raised the issue before 2004: State v. Hoffman, 116 Wash. 2d 51, 804 P.2d 577 (1991) (holding that a choice to pursue an all-or-nothing tactic could well result in an outright acquittal); State v. King, 24 Wash. App. 495, 601 P.2d 982 (1979) (holding that an attorney did not provide ineffective representation for choosing to pursue an all-or-nothing strategy). For a detailed description of the lesser-included-offense doctrine in Washington State, see Kyron Huigens, *The Doctrine of Lesser Included Offenses*, 16 U. PUGET SOUND L. REV. 185 (1992).

78. *See supra* note 77.

79. *See* State v. Walker, 13 Wash. App. 545, 550, 536 P.2d 657, 662 (1975) ("The defense did not propose an instruction on the lesser included offense of manslaughter, and, in fact, rejected the possibility when it was raised. . . . When the evidence would support a finding of guilty on a lesser included offense and an instruction on the lesser included offense is proposed, then the instruction must be given, but not otherwise.").

80. *King*, 24 Wash. App. at 501, 601 P.2d at 986 (citing *Walker*, 13 Wash. App. at 550, 536 P.2d at 662).

81. *Id.*

82. *Id.*

83. *Id.*

Subsequently, in *State v. Hoffman*,[84] the Washington State Supreme Court utilized a highly deferential standard of review when it considered the reasonableness of an all-or-nothing strategy that had failed.[85] In *Hoffman*, the Court concluded that, "[h]ad the jury decided (as the defendants strenuously argued) that the evidence did not prove the charges of murder in the first degree and assault in the second degree beyond a reasonable doubt, then under the instructions given, the defendants would have been acquitted."[86] Ultimately, the Court recognized that the decision to withhold the lesser-included-offense instruction was a tactic employed to get the jury to acquit the defendant.[87] The failure of that tactic did not make its use unreasonable: "The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off. Defendants' decision to not have included offense instructions given was clearly a calculated defense trial tactic."[88] In an effort to prevent defendants from retrying their cases when initial strategies fail,[89] Washington courts have continued to utilize deferential review when considering decisions regarding trial strategy, including all-or-nothing tactics.[90]

III. WASHINGTON'S COURT OF APPEALS, DIVISION I, ADOPTED A "PUNISHMENT-BASED" STANDARD OF REVIEW IN 2004, BUT ABANDONED IT IN 2009

Prior to 2009, the Court of Appeals, Division I, had considered all-or-nothing strategies only twice.[91] In both cases, the court attempted to establish a method for determining the reasonableness of trial tactics.[92] The court's approach required close examination of each case's facts to determine whether the choice to withhold lesser-included-offense instructions was manifestly unreasonable. To determine reasonableness, the court considered the discrepancy between the punishment for the crime charged and the punishment for the lesser-included offense. The

84. 116 Wash. 2d 51, 804 P.2d 577 (1991).

85. *Id.* at 111–12, 804 P.2d at 608–09.

86. *Id.* at 112, 804 P.2d at 609.

87. *Id.* at 111–13, 804 P.2d at 609.

88. *Id.* at 112, 804 P.2d at 609.

89. *Id.*

90. *See supra* note 71 and accompanying text.

91. *See* State v. Ward and State v. Pittman, discussed *infra* Part III.A and III.B.

92. *See* State v. Ward and State v. Pittman, discussed *infra* Part III.A and III.B.

court announced this "punishment-based" standard in *State v. Ward*[93] and subsequently utilized it in *State v. Pittman*.[94] However, two years later, in *State v. Hassan*,[95] the court abandoned this approach and reverted to a more deferential standard of review.

A. Ward *Set Forth a "Punishment-Based" Analysis of Ineffective Assistance of Counsel Claims Regarding All-or-Nothing Strategies and* Pittman *Further Clarified that Standard*

In 2004, Division I decided *State v. Ward*, in which the defendant faced eighty-nine months in prison for assault convictions.[96] The lesser-included offense of unlawful display of a weapon would have warranted a maximum sentence of one year in prison,[97] but defense counsel chose not to propose it, hoping for an acquittal instead.[98] The Court of Appeals focused on the difference in possible punishments between the crime charged and the lesser-included offense and found a difference of seventy-seven months.[99] The court, highlighting the fact that the choice to pursue a claim of self-defense was risky because it depended entirely on the credibility of the defendant, found the difference in punishments significant.[100] Thus, it concluded that the decision to pursue an all-or-nothing strategy was objectively unreasonable.[101]

In determining whether the defendant had been provided with effective assistance of counsel, the court relied on a United States Supreme Court case cited in *Beck*. The case, *Keeble v. United States*,[102] noted that it is not acceptable for the court to refuse a request for a lesser-included-offense instruction simply because a defendant might be better off without it.[103] Citing *Keeble*'s reasoning, Division I created a new standard that looked entirely to the discrepancy in possible punishments to determine reasonability.[104] Utilizing this "punishment-

93. 125 Wash. App. 243, 249, 104 P.3d 670, 673 (2004).

94. 134 Wash. App. 376, 388–89, 166 P.3d 720, 725 (2006).

95. 151 Wash. App. 209, 211 P.3d 441 (2009).

96. *Ward*, 125 Wash. App. at 249, 104 P.3d at 673.

97. *Id.*.

98. *Id.*

99. *Id.* at 247, 104 P.3d at 671.

100. *Id.* at 250, 104 P.3d at 673.

101. *Id.*

102. 412 U.S. 205 (1973).

103. *Ward*, 125 Wash. App. at 250–51, 104 P.3d at 673 (citing *Keeble*, 412 U.S. at 212–13).

104. *Id.* at 249, 104 P.3d at 672–73.

based" standard, the court reversed the conviction, finding that no reasonable person would choose to risk an additional punishment of seventy-seven months for the chance of acquittal when a lesser-included offense might have resulted in a mere twelve-month sentence.[105]

Two years later, Division I considered a similar issue in *State v. Pittman*, in which the defendant faced a standard-range sentence of nine to ten-and-a-half months for attempted residential burglary.[106] The lesser-included offense of criminal trespass, for which the defense attorney chose not to propose instructions, carried a maximum penalty of only ninety days.[107] The court, employing *Ward*'s standard, found that the difference was significant and concluded that the choice to pursue the all-or-nothing tactic was manifestly unreasonable.[108] In making its determination, the court again relied on *Keeble* as well as its own reasoning from *Ward*.[109]

B. Division I Retreated from the "Punishment-Based" Standard in State v. Hassan

Two years after creating its "punishment-based" approach, Division I questioned the standard's legitimacy when it reverted to the traditional highly deferential standard in deciding *State v. Hassan*.[110]

On August 14, 2007, police arrested Rashid Ali Hassan after watching him perform three separate drug transactions.[111] The arresting officer claimed that, during each transaction, he watched an individual approach Hassan and hand him money.[112] Hassan deposited the money into a backpack from which he retrieved a small plastic bag.[113] The State charged Hassan with one count of possession of marijuana with intent to deliver.[114]

At trial, Hassan admitted that he had purchased two bags of marijuana that day but denied ownership of the backpack, claiming that its owner

---

105. *Id.* at 250, 104 P.3d at 673.

106. 134 Wash. App. 376, 389, 166 P.3d 720, 725 (2006).

107. *Id.*

108. *Id.* at 387–90, 166 P.3d at 725–26.

109. *Id.* at 387–88, 166 P.3d at 725 (citing Keeble v. United States, 412 U.S. 205, 212–13 (1973), and *Ward*, 125 Wash. App. at 250, 104 P.3d at 673).

110. 151 Wash. App. 209, 211 P.3d 441 (2009).

111. *Id.* at 212, 211 P.3d at 442–43.

112. *Id.*

113. *Id.*

114. *Id.*

had gone to the restroom when the officer arrived.[115] Two defense witnesses corroborated Hassan's claims.[116] Hassan's counsel did not propose jury instructions on the lesser-included offense of possession of marijuana.[117] In closing, the defense argued that the State had not met its burden of proving beyond a reasonable doubt that Hassan possessed the marijuana with the intent to deliver[118] and asserted that Hassan's testimony was more credible than the State's evidence because only Hassan's version of the events had been corroborated.[119]

The jury found Hassan guilty and the court sentenced him to nine months in the King County Work Education Release Program.[120] Hassan appealed his conviction, arguing that he had received ineffective assistance of counsel because his attorney failed to propose jury instructions regarding possession, a lesser-included offense of the crime charged.[121] The Court of Appeals, Division I, found the decision to withhold a lesser-included-offense instruction a legitimate trial strategy and affirmed the conviction and sentencing.[122] The court held that because the only chance the defendant had for acquittal was to withhold the lesser-included-offense instruction, "the decision to pursue an all or nothing strategy was not objectively unreasonable."[123] The court reasoned that because Hassan admitted he committed the lesser offense and the only dispute was whether the backpack belonged to him, the defense attorney's attempt at an acquittal was a legitimate tactic.[124]

Division I spent little time discussing the difference between sentences available for the crime charged and for the lesser-included offense, a difference of three to fifteen months.[125] Instead, the court used a more deferential standard of review based on *Strickland* and affirmed Hassan's conviction.[126] Specifically, the court quoted *Strickland* in

---

115. *Id.* at 213, 211 P.3d at 443.

116. *Id.*

117. *Id.* at 214, 211 P.3d at 444.

118. *Id.*

119. *Id.* at 214–15, 211 P.3d at 444.

120. *Id.* at 216, 211 P.3d at 445.

121. *Id.*

122. *Id.*

123. *Id.* at 221, 211 P.3d at 447.

124. *Id.* at 220–21, 211 P.3d at 447.

125. *Id.* at 219–20, 211 P.3d at 447 ("[T]he sentence for possession of marijuana with intent to deliver is 6+ to 18 months, while the sentence for the lesser included misdemeanor of possession of less than 40 grams of marijuana is 3 months.").

126. *Id.* at 217, 221, 211 P.3d at 445, 447.

support of the strong presumption of defense counsel's effectiveness: "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[127] Hassan, the court concluded, had not overcome this strong presumption of effectiveness.[128]

While the *Hassan* court declined to address whether *Ward* and *Pittman* were correctly decided, it did clarify that the reasoning in those cases did not "properly take into consideration the strong presumption of effective assistance in determining whether the decision to seek acquittal was a legitimate trial strategy."[129] Further, Division I noted that those cases relied on out-of-context dicta from *Keeble*, a case the *Hassan* court found irrelevant because it "did not address ineffective assistance of counsel or the strategic decision to pursue an all or nothing strategy in consultation with the client."[130] While it is still unclear how Division I will approach future ineffective assistance of counsel claims stemming from all-or-nothing strategies, *Hassan* indicates that it has retreated from the so-called "punishment-based" standard created in *Ward*.

IV. IN *STATE V. GRIER*, DIVISION II ADOPTED DIVISION I'S "PUNISHMENT-BASED" STANDARD

In June 2009, just as Division I began to distance itself from its earlier decisions in *Ward* and *Pittman*, Division II embraced those cases as guiding precedent and, in *State v. Grier*,[131] adopted the "punishment-based" standard.[132] *Grier* involved the shooting death of Gregory Scott Owen while he attended a party at Kristina Grier's house.[133] Grier was charged with second-degree murder while armed with a deadly weapon.[134] Counsel for the defendant initially requested instructions on the lesser-included offenses of first- and second-degree manslaughter,

127. *Id.* at 217, 211 P.3d at 445–46 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

128. *Id.* at 221, 211 P.3d at 447.

129. *Id.* at 221 n.6, 211 P.3d at 447 n.6.

130. *Id.*

131. 150 Wash. App. 619, 208 P.3d 1221 (2009).

132. *Id.* at 640–46, 208 P.3d at 1232–35.

133. *Id.* at 623–29, 208 P.3d at 1224–27.

134. *Id.* at 629, 208 P.3d at 1227.

but later withdrew that request without explanation.[135] The trial court, in addition to providing the instruction for second-degree murder, provided the requested instructions on self-defense and the defense of others.[136]

After a three-week trial, the jury convicted Grier of second-degree murder[137] and sentenced her to 220 months in prison.[138] However, on the special verdict form, the jury found that Grier had not been armed with a firearm at the time of the murder.[139] Grier appealed her conviction[140] and claimed that her attorney never explained the option of offering jury instructions on lesser-included offenses.[141]

Division II reversed the second-degree murder conviction on the basis of ineffective assistance of counsel.[142] Highlighting the strange facts of the case[143] and relying on *Ward* and *Pittman*,[144] the court found that Grier had been denied effective assistance of counsel because the choice to pursue an all-or-nothing strategy in this case was unreasonable.[145] In line with those cases, Division II employed the "punishment-based" standard and calculated the difference in possible punishments between the crime of which Grier was convicted and the potential lesser-included offenses.[146] The court calculated the difference at 193 months, which it noted was even greater than the discrepancy that existed in both *Ward* and *Pittman*.[147]

Division II's decision muddled Washington State's approach to ineffective assistance of counsel claims based on all-or-nothing strategies. In January 2010, the Washington State Supreme Court granted certiorari to consider *Grier*.[148]

---

135. *Id.* at 630, 208 P.3d at 1228.

136. *Id.*

137. *Id.* at 631, 208 P.3d at 1228.

138. *Id.* at 631–32, 208 P.3d at 1228.

139. *Id.*

140. *Id.* at 632, 208 P.3d at 1228.

141. *Id.*

142. *Id.* at 645–46, 208 P.3d at 1235.

143. *Id.* at 638–39, 208 P.3d at 1231–32 (noting that the victim had likely stolen the guns earlier that evening, it was unclear whether Grier had possessed any weapon at the time of the killing, no one had seen the fatal shot, the murder weapon was never recovered, and Grier may have reasonably believed she was acting in defense of herself or her son).

144. *Id.* at 640–41, 208 P.3d at 1233.

145. *Id.* at 644, 208 P.3d at 1234.

146. *Id.* at 641–42, 208 P.3d at 1233.

147. *Id.* at 642, 208 P.3d at 1233.

148. 167 Wash. 2d 1017, 224 P.3d 773 (2010).

V. WASHINGTON SHOULD REVERSE *STATE V. GRIER*, STRENGTHEN ITS RELIANCE ON *STRICKLAND*, AND REAFFIRM *HOFFMAN*

Grier and *Hassan* have left Washington courts without a clear standard of review for ineffective assistance of counsel claims based on all-or-nothing strategies. In *Hassan*, Division I retreated from its "punishment-based" standard and reaffirmed its reliance on *Strickland*. In contrast, Division II adopted the "punishment-based" standard in *Grier*, thereby abandoning Washington's traditional deference to defense counsel on matters of trial and strategy. When the Washington State Supreme Court decides *State v. Grier*, it should reverse Division II's judgment because the "punishment-based" standard conflicts with Washington precedent, ignores federal guidance, and fails to accord defense attorneys the deference necessary to enable a true adversarial process. The Washington State Supreme Court should reaffirm *State v. Hoffman*'s highly deferential standard to accord with *Strickland* and align with the stance federal circuit courts have taken when addressing all-or-nothing trial strategies.

A. The "Punishment-Based" Standard Conflicts with Washington Precedent and Runs Counter to Federal Court Decisions

The "punishment-based" standard conflicts with Washington State Supreme Court precedent established in *State v. Hoffman* and runs counter to the United States Supreme Court's highly deferential approach, which the Washington State Supreme Court has adopted as its own.[149] Additionally, the "punishment-based" standard disregards the persuasive analysis provided by the Sixth, Seventh, Eighth, and Ninth Circuits regarding the reasonableness of all-or-nothing tactics in terms of ineffective assistance of counsel complaints.[150]

In *Hoffman*, the state supreme court emphasized the need for a highly deferential standard so that defendants complaining of all-or-nothing tactics would not receive a second trial simply because their original strategy failed.[151] *Ward*, *Pittman*, and *Grier* cannot be reconciled with *Hoffman* because they fail to apply *Hoffman*'s highly deferential standard and fail to presume that counsel is effective. Because the defendant in *Hoffman* chose to challenge the court's failure to provide

149. *See supra* notes 65–67.

150. *See supra* notes 58–61.

151. State v. Hoffman, 116 Wash. 2d 51, 112, 804 P.2d 577, 609 (1991).

lesser-included jury instructions *sua sponte* rather than challenging the effectiveness of his attorney in selecting the all-or-nothing strategy,[152] the Washington State Supreme Court did not rely on *Strickland* in resolving the case. However, the Court did give great deference to trial strategies employed by an attorney, as evidenced by the reluctance of the Court to allow the defendant a second trial.[153] *Hoffman* acknowledged that all-or-nothing strategies involve a gamble, but also recognized the potential benefits of such strategies.[154] Even though *Hoffman* provides the Washington State Supreme Court's only relevant guidance as to the reasonability of all-or-nothing tactics, *Ward*, *Pittman*, and *Grier* fail to cite it.[155]

Additionally, when it decided *Grier*, the Court of Appeals, Division II, completely overlooked its own precedent. Twenty years earlier, Division II had found all-or-nothing strategies to be legitimate trial tactics that "well could have resulted in outright acquittal."[156] The court reached its conclusion without considering the difference in possible punishments between the crime charged and the lesser-included offense.[157] Instead, it reasoned that a lesser-included-offense instruction would have almost ensured a conviction of at least a misdemeanor, while the all-or-nothing strategy might have resulted in an acquittal.[158]

The "punishment-based" standard also runs counter to *Strickland*, which established a highly deferential standard of review for ineffective assistance of counsel claims.[159] The Washington State Supreme Court specifically adopted that approach.[160] When state courts apply a "punishment-based" standard, they ignore *Strickland*'s highly deferential preference and disregard overwhelmingly consistent circuit court analysis.

Under Washington State precedent, when addressing ineffective assistance of counsel claims, courts must utilize *Strickland* to determine whether a defendant has shown that the defense attorney's performance

---

152. *Id.* at 111–12, 804 P.2d at 609.

153. *Id.* at 112, 804 P.2d at 609.

154. *Id.*

155. *See* State v. Ward, 125 Wash. App. 243, 104 P.3d 670 (2004); State v. Pittman, 134 Wash. App. 376, 166 P.3d 720 (2006); State v. Grier, 150 Wash. App. 619, 208 P.3d 1221 (2009).

156. State v. King, 24 Wash. App. 495, 501, 601 P.2d 982, 986 (1979).

157. *Id.*

158. *Id.*

159. Strickland v. Washington, 466 U.S. 668, 689 (1984); *see supra* Part I.

160. *See supra* notes 65–67.

fell below an objective level of reasonableness.[161] *Ward*, *Pittman*, and *Grier* ignore *Strickland*'s presumption of effective counsel and instead scrutinize sentencing ranges for the applicable crimes in an effort to determine whether a choice to pursue an all-or-nothing tactic would be manifestly unreasonable.[162] Such scrutiny does not accord with *Strickland* because it allows hindsight to distort the court's view of counsel's tactics.

In support of the "punishment-based" standard, *Ward*, *Pittman* and *Grier* rely heavily on the United States Supreme Court case of *Keeble v. United States*, a case *Beck* similarly relied upon when considering all-or-nothing strategies in the capital context. *Keeble* addressed the Major Crimes Act of 1885 and held that where a defendant requests a lesser-included instruction, the court errs in refusing to provide such an instruction.[163] Even though *Keeble* is distinguishable from cases where the defense attorney has chosen to pursue an all-or-nothing strategy,[164] Washington courts have said *Keeble* supports their conclusion that a defendant is entitled to lesser-included-offense instructions.[165] *Beck* is similarly inapplicable because it applies only to capital cases[166] and federal courts have consistently declined to extend its reasoning to noncapital cases.[167] Because the entire line of state cases culminating in *Grier* and *Hassan* addresses the reasonableness of strategically choosing to forgo lesser-included-offense instructions as opposed to the defendant's right to receive them, these cases fall outside the scope of both *Keeble* and *Beck*. Recognizing it had incorrectly relied on dicta in *Keeble*, Division I questioned its reliance on the "punishment-based" standard with *Hassan* and acknowledged its prior error.[168]

Even if the reasoning in *Beck* and *Keeble* were applicable to ineffective assistance of counsel claims based on a failure to request lesser-included-offense instructions in noncapital cases, that reasoning would not apply to *Grier* because the facts there are distinguishable. In

---

161. *See supra* notes 65–67.

162. *See* State v. Ward, 125 Wash. App. 243, 249, 104 P.3d 670, 672–73 (2004); State v. Pittman, 134 Wash. App. 376, 388–89, 166 P.3d 720, 725–26 (2006); State v. Grier, 150 Wash. App. 619, 642, 208 P.3d 1221, 1233 (2009).

163. Keeble v. United States, 412 U.S. 205, 212–13 (1973); *see supra* note 48 and accompanying text.

164. *See supra* Part III.B; State v. Hassan, 151 Wash. App. 209, 221 n.6, 211 P.3d 441, 447 n.6 (2009).

165. *See supra* Part III.A.

166. Beck v. Alabama, 447 U.S. 625, 637 (1980); *see also supra* Part I.B.

167. *See* Hall, *supra* note 56 and accompanying text.

168. *Hassan*, 151 Wash. App. at 221 n.6, 211 P.3d at 447 n.6.

Beck and *Keeble*, the defendants were clearly guilty of some offense; the only dispute was whether it was the offense charged or the lesser-included offense.[169] Grier, however, was not clearly guilty of any offense.[170] The disparity of the verdict forms—where the jury found Grier guilty of second-degree murder but did not find that she was in possession of a deadly weapon at the time of the murder—demonstrates the lack of clarity at the trial.[171] Because *Grier* is distinguishable, the Washington State Supreme Court should not rely on the reasoning employed in *Beck* or *Keeble* when reviewing Grier's ineffective assistance of counsel claim.

Finally, the "punishment-based" standard adopted in *Grier* also runs counter to the majority of federal circuit court decisions.[172] Federal circuit courts that have addressed all-or-nothing strategies in the context of ineffective assistance of counsel claims have extended *Strickland*'s highly deferential standard of review to those claims.[173] While this practice is not binding on Washington courts, it should be highly persuasive given that Washington has adopted *Strickland* as its own standard.[174]

B. Reversing Grier *Would Provide Better Guidance for Attorneys, Allow for a True Adversarial Process, and Encourage Attorneys to Be Zealous Advocates for Their Clients*

While the all-or-nothing strategy has been criticized as being "problematic,"[175] providing parties an opportunity to make their own strategic decisions and to utilize the inherent uncertainty of the judicial process is necessary in our adversarial system.[176] The repercussions of applying ex post facto scrutiny to trial tactics far outweigh the benefits because preventing attorneys from utilizing legitimate trial strategies will ultimately make attorneys less effective.[177]

---

169. *See Beck*, 447 U.S. at 634; Keeble v. United States, 412 U.S. 205, 212–13 (1973).

170. State v. Grier, 150 Wash. App. 619, 208 P.3d 1221 (2009).

171. *Id.* at 645–46, 208 P.3d at 1235.

172. *See supra* notes 58–61.

173. *See supra* notes 58–61.

174. *See supra* note 66.

175. *See* Pflaum, *supra* note 14, at 291.

176. *See id.* at 304.

177. Judge, *supra* note 12, at 209 (noting that "scrutiny of defense counsel's choice of trial tactics . . . may, in actuality, decrease defense counsel's effectiveness").

Courts need to maintain a highly deferential level of review for ineffective counsel claims because doing so allows attorneys to serve as zealous advocates for their clients. A specific set of rules determining the effectiveness of counsel would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."[178] If a defense attorney knows that the appeals court will be highly deferential to the attorney's trial decisions, that attorney can more easily make legitimate strategic decisions. Conversely, if a presumption of effectiveness is not in place, then an attorney's "performance and even willingness to serve could be adversely affected."[179] Such restrictions on defense counsels' actions could "decrease defense counsel's potential effectiveness" by interfering with their preparation and conduct.[180] Furthermore, the fear of being deemed ineffective could "dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."[181] With a highly deferential standard of review in place, defense attorneys may have more confidence in their chosen trial strategies, and prosecuting attorneys need not fear that a conviction will be overturned should the defense attorney choose to withhold lesser-included-offense instructions.

Additionally, overturning convictions based on close scrutiny of trial tactics would likely result in more appeals stemming from ineffective assistance of counsel claims.[182] The proliferation of such claims would likely flood courts because anyone dissatisfied with a trial outcome could appeal a verdict in the hope of securing a chance to re-try the case with another strategy.[183] Such an approach would discredit the judicial process because the presumption of jury verdict finality would be severely weakened.

Critics of all-or-nothing strategies argue that all possible instructions should be submitted to the jury because lawyers cannot predict how a

---

178. *See* Judge, *supra* note 12, at 224 (citing Strickland v. Washington, 466 U.S. 668, 690 (1984)).

179. *Strickland*, 466 U.S. at 690.

180. *See* Judge, *supra* note 12, at 224.

181. *Strickland*, 466 U.S. at 690.

182. *Id.* ("The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.").

183. Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 78 (1991) ("[A]dherence to strict rules defining effective assistance could infringe on tactical decisions by defense counsel and discourage representation of criminal defendants. Such stringent standards could potentially lead to a flood of appellate challenges based on ineffective assistance of counsel.").

jury will think.[184] While jurors ostensibly must acquit if the prosecution did not prove all elements of a crime beyond a reasonable doubt,[185] they might not comply with that standard if given a choice between only the most severe sentence and acquittal.[186] Critics argue that given such a limited choice, jurors might err on the side of conviction merely so the defendant does not walk free.[187] However, jurors' unpredictability cuts both ways. If lesser-included-offense instructions are provided where a defendant presents a theory of self-defense, the jury might "evade its responsibility to conduct rigorous fact-finding on all elements of the charged offense and, instead, compromise the verdict by convicting of the lesser offense" because of the uncertainties raised by the defense.[188] Courts and counsel cannot determine how a jury will rule in any given case,[189] and fear of how a jury *might* react should not determine the level of review applied to an appeal.

The "punishment-based" standard adopted in *Grier* does not resolve the primary concerns critics raise regarding all-or-nothing strategies. Instead, it creates new quandaries. For example, how should courts decide how much of a discrepancy in punishments is required before a decision to pursue an all-or-nothing strategy becomes unreasonable? Is the difference in punishment affected by the relation of that difference to the standard sentencing ranges? In *State v. Pittman*,[190] for example, would the court have found that the difference of six to seven months was manifestly unreasonable if the two punishments had been eighteen versus twenty-five months? Or was the fact that the lesser offense carried only a ninety-day sentence the reason why a disparity of six months was deemed manifestly unreasonable? In creating the "punishment-based" standard, the state courts of appeals failed to clarify their reasoning and have consequently promulgated a nebulous rule that produces inconsistent and disordered results.

---

184. *See* Pflaum, *supra* note 14, at 327–28.

185. Laura Ann Cooper, Comment, *Should Juries Be Able to Agree to Disagree?* People v. Boettcher *and the 'Unanimous Acquittal First' Instruction*, 54 BROOK. L. REV. 1027, 1043 (1988). For other criticisms of the all-or-nothing strategy, see *supra* notes 12, 14, 56; and Tracy L. Hamrick, *Looking at Lesser Included Offenses on an "All or Nothing" Basis:* State v. Bullard *and the Supporting Sporting Approach to Criminal Justice*, 69 N.C. L. REV. 1470, 1470 (1991).

186. *See* Pflaum, *supra* note 14, at 327–28, 291.

187. *See id.* at 291.

188. *See id.* at 327–29; Michael H. Hoffheimer, *Lesser Included Offenses in Mississippi*, 74 MISS. L.J. 135, 146 (2004).

189. J. Mark Cooney, *Benching the Monday-Morning Quarterback: The "Attorney Judgment" Defense to Legal-Malpractice Claims*, 52 WAYNE L. REV. 1051, 1055 (2006).

190. State v. Pittman, 134 Wash. App. 376, 388–89, 166 P.3d 720, 725–26 (2006).

Consequently, the Washington State Supreme Court should reverse *State v. Grier*, affirm Grier's conviction, and establish a clear approach for considering effective representation in the context of all-or-nothing trial strategies. Such an approach would realign Washington State with its own precedent and the precedent of the United States Supreme Court.

CONCLUSION

The conflicting decisions in *Grier* and *Hassan* demonstrate the strong need for the Washington State Supreme Court to establish a clear policy for reviewing ineffective assistance of counsel claims based on all-or-nothing strategies. While the courts of appeals might have been making a good-faith effort to define reasonableness in cases of all-or-nothing trial strategies, their efforts have actually created confusion and tightened Washington's standard of review beyond what Washington precedent allows. While courts struggle with this confusing state of affairs, they also risk receiving a significant increase in appeals based on all-or-nothing strategies.[191]

While there may be room for a more balanced approach to determining whether a defendant received effective assistance of counsel, analyzing all-or-nothing strategies based on differences in punishments is not the answer. In determining a standard, the Washington State Supreme Court should embrace *Strickland* and create precedent where appeals courts grant great deference when dealing with complaints about trial strategies. A defendant should not be able to

191. As of June 2010, eighteen appeals in Washington based on ineffective assistance of counsel claims for all-or-nothing trial tactics have relied on *Ward*. *See* State v. Baker, 2010 WL 1756728 (Wash. Ct. App. May 3, 2010); State v. Breitung, 2010 WL 1553572 (Wash. Ct. App. Apr. 20, 2010); *In re* Crace, 154 Wash. App. 1016, 2010 WL 179151 (Wash. Ct. App. Jan. 20, 2010); State v. White, 152 Wash. App. 1046, 2009 WL 3360194 (Wash. Ct. App. Oct. 20, 2009); State v. Grier, 150 Wash. App. 619, 208 P.3d 1221 (2009); State v. Hassan, 151 Wash. App. 209, 211 P.3d 441 (2009); O'Connell v. Uttech, 2009 WL 927493 (Wash. Ct. App. Apr. 3, 2009); State v. Holloway, 148 Wash. App. 1005, 2009 WL 58919 (Wash. Ct. App. Jan. 12, 2009); State v. Warren, 144 Wash. App. 1050, 2008 WL 2261451 (Wash. Ct. App. Jun. 3, 2008); State v. Chau, 142 Wash. App. 1036, 2008 WL 176374 (Wash. Ct. App. Jan. 22, 2008); State v. O'Connell, 137 Wash. App. 81, 152 P.3d 349 (2007); State v. Miller, 128 Wash. App. 1057, 2007 WL 1575223 (Wash. Ct. App. May 31, 2007); *In re* Relfe, 138 Wash. App. 1032, 2007 WL 1314547 (Wash. Ct. App. May 7, 2007); State v. Bostwick, 137 Wash. App. 1027, 2007 WL 615144 (Wash. Ct. App. Mar. 1, 2007); State v. Raber, 134 Wash. App. 1027, 2006 WL 2246195 (Wash. Ct. App. Aug. 7, 2006); State v. Stevens, 134 Wash. App. 1014, 2006 WL 2130370 (Wash. Ct. App. Jul. 31, 2006); State v. Hassan, 133 Wash. App. 1010, 2006 WL 1462741 (Wash. Ct. App. May 30, 2006); State v. Hayes, 131 Wash. App. 1056, 2006 WL 533398 (Wash. Ct. App. Mar. 6, 2006). Prior to the decision in *Ward*, there were only two such appeals. *See supra* note 77.

pursue one strategy at trial and then, if it fails, appeal for the chance to pursue an alternative strategy.