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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

**Cause # 34997-3-II**

**EDWARD M. GLASMANN,  
Petitioner,**

**v.**

**STATE OF WASHINGTON,  
Respondent.**

**STATEMENT OF  
ADDITIONAL GROUNDS  
PURSUANT TO  
RAP 10.10**

**A. STATEMENT**

I, Edward M. Glasmann, have received and reviewed the opening brief prepared by my appellate attorney, Stephanie C. Cunningham. Summarized below are the additional grounds that my appellate attorney did not address in her opening brief on my behalf. Appellant believes that the following issues have merit and should be addressed by this Honorable Court.

Appellant understands that the Court will review this Statement of Additional Grounds for Review prepared by me when my appeal is considered on its merits.

## **B. ISSUES PRESENTED FOR REVIEW**

**(1) WERE MR. GLASMANN'S CONSTITUTIONAL RIGHTS UNDER THE WASHINGTON STATE AND FEDERAL CONSTITUTIONS VIOLATED WHEN APPELLANT WAS SEEN NUMEROUS TIMES BY MEMBERS OF HIS JURY WHILE HE WAS WEARING RESTRIANTS?**

**(2) DID THE COURT ERROR WHEN IT FAILED TO GIVE THE JURY A VOLUNTARY INTOXICATION INSTRUCTION?**

## **C. FACTS AND ARGUMENT**

**(1) Were Mr. Glasmann's constitutional rights under the Washington State and Federal Constitutions violated when appellant was seen numerous times by members of his jury while he was wearing restraints?**

On April 24, 2006, appellant was being escorted through a group of people in a hallway of the Pierce County Courthouse by County Corrections Officer Day who was attempting to escort appellant into the courtroom where appellant's trial was being held. See VRP Vol. 2 at 15.

Appellant's trial was the only trial in session in the courthouse at the time, and a majority of his jurors watched

appellant being taken into the courtroom in handcuffs. See VRP at 21.

Again on April 26, 2006, Officer Day was again escorting appellant to that same courtroom where his trial was being held and juror number one (1) from appellant's jury was sitting on a bench reading a book and as appellant was being escorted by, the juror looked up from his book, noticed appellant, and nodded a greeting. See VRP Vol. 5 at 190.

Finally, on April 27, 2006, at the end of the trial day, appellant was seen and recognized by juror number 3 while being escorted to the elevator. Appellant was within 10 feet of juror number 3 while he was standing by the elevator with his hands cuffed behind him with his back towards juror number 3. Appellant had not gone five feet more when juror number 13 came out of the bathroom and nearly collided with appellant, also recognizing him. See VRP Vol. 5 at 186 and 189-90.

After jurors 3 and 13 saw and recognized appellant in handcuffs, defense counsel motioned the court, VRP 180,

for a mistrial citing grounds that so many jurors had seen appellant in shackles that his Constitutional Due Process Rights under the Fifth and Fourteenth Amendments had been violated and that a mistrial should be called. This motion was denied by the court. See VRP Vol. 5 at 192-93.

At VRP 186, the state asked juror 13 the following question:

MR. HILLMAN: If the judge gave you an instruction not to consider anything that you saw outside of the courtroom when you deliberate and return a verdict on this case, would you follow that instruction and decide the case solely based on evidence you heard here in court?

The judge never did give that or any instruction of any kind to any of the jurors who saw appellant in shackles, curative or otherwise. When the state was allowed to ask the question on VRP 186 to juror 13, it was then more likely than not and nearly impossible for the juror to disregard what the state had asked. It is impossible to un-ring a bell once it has been rung, especially in a courtroom setting. See VRP Vol. 5 at 187.

At VRP 188, the trial judge asked juror number 3 the following question:

THE COURT: If I were to give you an instruction telling you that you are not to consider the fact that you saw them at that time, would you be able to follow that instruction?

Again, the court did not at any time give any curative or any other instruction to juror number 3 or as before to juror number 13. There is no way to know what went through the minds of the three jurors from that point on throughout the remainder of the trial.

If this court will examine VRP Vol. 6 at 282, lines 11-17, it will see where the trial judge all but admits that if juror 13 is put on the panel the Court of Appeals may well reverse and the state will be forced to re-try appellant. But yet the court denied the defense Motion for a Mistrial See VRP Vol. 5 at 192-93.

“The state must prove beyond a reasonable doubt that the shackling did not contribute to the verdict obtained.”

*Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824

As early as 1897, this state's Supreme Court recognized the "ancient right of one accused of a crime ... to appear in court unfettered." *State v. Rodriguez*, 146 Wn 2d 260, 45 P.3d 535 (2002), (citing *State v. Williams*, 18 Wash 47, 50 P. 580 (1897)). In recent years the concept of a fair trial has been expanded to include the prohibition against physical restraint of both defendants and their witnesses. Appellant in this case was both defendant and witness because he did testify on his own behalf after the jurors witnessed him in handcuffs. While it is difficult to measure the prejudicial affect of shackling on a jury, it is possible to imagine the potential. *Rodriguez*, 146 Wn 2d @ 268.

The presumption of innocence guarantees every criminal defendant all "the physical indicia of innocence," including that of being "brought before the court with the appearance, dignity, and self respect of a free and innocent man." *State v. Finch*, 137 Wn 2d 792, 844, 975 P.2d 967 (1999).

"We have previously held that the appearance of shackles or other restraints may reverse the presumption of innocence by causing jury prejudice and thus denying Due Process."

*State v. Gonzales*, 129 Wn. App. 895, 901, 120 P. 2d 645 (2005). (citing *State V. Hutchinson*, 135 Wn 2d 863, 887, 959 P.2d 1061 (1998)).

“The courts duty to shield the jury from routine security measures is a constitutional mandate.” *Hutchinson*, 135 Wn 2d at 887-88.

“However strong the government’s case, the fundamental right to a fair trial demands minimum standards of Due Process.” *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

“When a trial right as fundamental as the presumption of innocence is abridged, however, reversal is required.” *State v. Gonzales*, 12 Wn. App. 895 at 905.

“... we now conclude that those statements identify a basic element of Due Process of law protected by the federal constitution, thus the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination that they are justified by a state interest specific to a particular trial.” *Deck v. Missouri*,

\_\_\_ U.S. \_\_\_, 125 S. Ct. 2007, 2012, \_\_\_, L. Ed 2 \_\_\_.  
(2005).

“... A view rooted in this Court’s belief that the practice (of using visible restraints) will often have negative effects that cannot be shown from a trial transcript.” *Riggins v. Nevada*, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed 2d 479 (citing *Deck v. Missouri* at 2009). Emphasis added.

“The state must prove beyond a reasonable doubt that the (shackling) did not contribute to the verdict obtained.”  
*Chapman Id.*

Appellant’s Constitutional Rights under the Washington State Constitution Article I § 3, 21, and 22 and his Rights under the United States Constitution, Amendments V, VI, and XIV were violated when his jury was allowed to see him in shackles during his trial. This court should overturn this conviction and remand for a new trial.

**(2) Did the court error when it failed to give the jury a voluntary intoxication instruction?**

**(a) Was it ineffective assistance of counsel for appellant’s trial attorney not to ask for an intoxication instruction?**

The record in the instant case clearly reflects the level of appellant's intoxication. E. g., his shaking and kicking during and after being tazered by the police, and the testimony of witnesses. VRP Vol. 3 at 80-81 and VRP Vol. 6 at 360, 361-63.

Before trial appellant's defense attorney assured appellant that he would bring the intoxication issue up to the court as well as the jury. Defense attorney failed to do anything of the kind.

In the victim's interview with Ms. Durkee, Ms. Benson, the victim, stated that "He was weird and not himself that night." See VRP 147. Ms. Benson also told police that "Mr. Glasmann was out of his head on drugs." At sentencing, the trial judge also recognizes that the entire group of charges revolves around drugs. See Sentencing Vol. at 15.

RCW 9A.16.090 states: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of

his intoxication may be taken into consideration in such mental state.”

“A defendant is entitled to have his or her theory of the case submitted to the jury under appropriate instructions when that theory is supported by substantial evidence.” *State v. Locati*, 111 Wn. App. 222, 43 P.3d 1288 (2002) (citing *State v. Finley*, 97 Wn. App. 129, 134, 982 P.2d 681 (1999)).

In *State v. Kruger*, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003), the court stated the following: “... e.g., his “blackout” vomiting at the station, slurred speech, and imperviousness to pepper spray. He was entitled to this instruction. As in the instant case, Mr. Glasmann demonstrated the same evidence of intoxication and imperviousness to pepper spray and should definitely have been accorded this jury instruction. See VRP Vol. 4 at 63 and 75.

**(2)(a) Was it ineffective assistance of counsel for appellant’s trial attorney not to ask for an intoxication instruction?**

The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to

which they are entitled. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(citing *Adams v. United States Ex Rel McCann*, 317 U.S. 269, 275, 276, 63 S. Ct. 236, 240).

The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. *Strickland*, 104 S. Ct. at 2063.

For that reason the court has recognized that the "right of counsel is the right to effective assistance of counsel." *Strickland*, 104 S. Ct. at 2063 (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90S. Ct. 1441, 1449 n.14.

Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance." *Strickland* Id. (citing *Cuyler v. Sullivan*, 446 U.S. at 344.)

## **STANDRD OF REVIEW**

**Ineffective assistance is to fail to ask for instruction.**

A defendant has the right to effective assistance by the lawyer acting on the defendant's behalf. *State v. Adams*, 91 Wn.2d 86, 89-90, 586 P.2d 1168 (1978). *Strickland* requires a showing of deficient performance and prejudice 466 U.S. at 687.

**Deficient Performance.**

The first prong is the question of whether a reasonable attorney should propose an intoxication instruction under these facts. See *State v. Glenn*, 86 Wn. App. 40, 44, 935 P.2d 679 (1997). (counsel's performance is deficient if it falls below "a minimum objective standard of reasonable attorney conduct").

**Prejudice.**

The second *Strickland* prong requires proof that "defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *In re Personal Restraint Petition of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002)(quoting *McFarland*, 127 Wn.2d at 334-35).

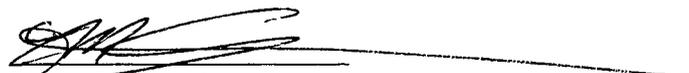
The instant case is a mirror image of the *Kruger* case. In the case at bar, defense counsel did not even attempt to bring up the possibility of an intoxication instruction and failing to do this has broken both of the *Strickland* prongs. Defense counsel was deficient and this prejudiced appellant's trial beyond repair. Appellant has shown that both of the Strickland prongs have been met and all else necessary for this Honorable Court to reverse the Trial Court and remand this case for a new trial.

Finally, appellant asks this Honorable Court to order appellant's appellate attorney, Stephanie C. Cunningham, to additionally brief for this court the issues in this Statement of Additional Grounds because appellant believes that he has shown that there is merit in the issues he has presented.

#### **D. CONCLUSION**

For the reasons set forth above, Mr. Glasmann asks this Honorable Court to reverse his conviction and remand for a new trial.

Dated this 5<sup>th</sup> day of March, 2007

  
Edward M. Glasmann  
Appellant, pro se

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**Edward M. Glasmann,**  
**Petitioner,**  
**v.**  
**State of Washington,**  
**Respondent.**

**DECLARATION OF MAILING**

I, Edward M. Glasmann, appearing pro se, do hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

That on the 5th day of March, 2007, I did process through the Washington State Reformatory, in accordance with institutional mail policy, postage prepaid, United States Mail addressed to the following:

**Clerk of the Court  
Washington State Court of Appeals  
Division II  
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Tacoma, WA 98402-3194**

**Attorney for Appellant  
Stephanie C. Cunningham  
Attorney t Law  
4616 25<sup>th</sup> Avenue N.E. # 552  
Seattle, WA 98105**

ONE ORIGINAL TO EACH OF: **Statement of Additional Grounds pursuant to RAP 10.10**

DATED this 5th day of March, 2007 at Monroe, WA.

Respectfully Submitted,

[Signature]  
Edward M. Glasmann  
Appellant, pro se