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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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

Cause # 39485-5-II

STATE OF WASHINGTON, **Respondent,** **V.** **JAMES P. ATKINSON,** **Petitioner,**	**STATEMENT OF ADDITIONAL GROUNDS PURSUANT TO RAP 10.10**

I, James P. Atkinson have received and reviewed the opening brief prepared by my appellate attorney, Catherine E. Glinski. 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. **Mr. Atkinson was denied his 6th Amendment right to counsel by the trial court's refusal to allow him to discharge his privately hired attorney.**

2. **Mr. Atkinson was denied effective assistance of counsel by his attorney's failure to request an intoxication instruction when the evidence was abundantly clear that Mr. Atkinson was highly intoxicated during the relevant events.**

3. **Mr. Atkinson was deprived of his right to the effective assistance of counsel by his attorney's failure to investigate and call expert witnesses who could have given testimony as to the affect of Mr. Atkinson's intoxication on his mental state.**

4. **Mr. Atkinson was denied his 6th Amendment right to be present at all phases of his trial, his 5th and 14th Amendment rights to due process, when the trial court instructed the jury on May 12th and played back the 911 tape to the jury outside of his presence on May 13th.**

5. **Mr. Atkinson was deprived of his right to Due Process guaranteed under the 5th and 14th Amendment by the admission of evidence of prior bad acts that did not fall within the limited exception to ER404(b) and when the trial court failed to conduct the proper analysis on the record.**

6. **The Cumulative Error doctrine requires reversal.**

Argument

1. Mr. Atkinson was denied his 6th Amendment right to counsel by the trial court's refusal to allow him to replace his privately hired attorney.

Mr. Atkinson hired attorney George Brintnall to represent him. On May 7th 2009, prior to trial and before a jury was selected Mr. Atkinson fired his attorney. He then informed the court through counsel that he wanted to discharge his hired attorney. Trial counsel and the court assumed that would mean appointed counsel although the court did not inquire of Mr. Atkinson as to whether he was asking for assigned counsel or whether he would be hiring other counsel. The trial court instructed Mr. Atkinson that he could not replace his hired counsel. "Well it's not his call to just say, whenever he feels like it or when he thinks things ought to be delayed a little more, that he's not satisfied and he wants a new attorney." (Motions hearing May 07, 2009 page 4) Mr. Atkinson was specifically asked if he felt counsel could adequately represent him at trial given the differences of opinion on the case and Mr. Atkinson replied "no." (Motions hearing May 07, 2009 page 5). The trial court responded that it had not heard anything that would justify replacement and informed Mr.

Atkinson that he could not discharge his hired attorney. (Motions hearing May 07, 2009 page 6)

This case is easily distinguishable from the many cases that deal with indigent defendants having conflict with their assigned counsel. This is a case where the defendant was paying for his own attorney and the trial court forced him to continue paying for that attorney despite the fact that he had come to irreconcilable differences with his counsel.

The qualified right to counsel applies exclusively to individuals who have retained counsel at their own expense. *U.S. v. Ray,* 731 F.2d 1361, 1365 (9th Cir. 1984) "This court has recognized that individuals who can afford to retain counsel have a qualified right to obtain counsel of their choice." *Id.* Denial of the qualified right to counsel of choice is reversible regardless of whether prejudice is shown. *Crandell v. Bunnell* 144 F.3d 1213 (9th cir. 1998).

In order to deny a petition to replace counsel, the trial court must conduct a formal inquiry into the circumstances. *In re Personal Restraint of Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983). *Bland v. California Dept of Corrections* 20 F.3d 1469 (9th Cir. 1994), *U.S. v. Robinson*, 913 F.2d 712, 716 (9th Cir. 1990.)

Once Mr. Atkinson informed the court that he wanted to discharge his hired counsel, the court had a duty to inquire as to the reason and whether or not Mr. Atkinson had another attorney in mind that he was going to hire. The trial court made no such inquiry and instead just summarily dismissed Mr. Atkinson's request. The court should have noted that as Mr. Atkinson was paying for Mr. Brintnall and continued to pay him throughout the rest of the trial he certainly could have paid a different attorney who would have given him the representation he was requesting. Furthermore, the court made no inquiry of Mr. Atkinson as to whether or not he wanted to represent himself as he certainly had a right to.

It is further clear from the record that Mr. Brintnall was not prepared to proceed to trial on May 11th. On May 11tt the first day of trial, Mr. Brintnall asked the court for a continuance due to the following circumstances:

- The State filed and amended information increasing charges which was delivered to counsel on the morning of trial. VRP Vol. I pg 7.

- Counsel had been unable to interview key prosecution witnesses despite attempts from the state to set up interviews the weekend before trial. VRP 7-8.
- The state had been unsuccessful in contacting defense counsel to coordinate the interviews. VRP 8.

The crux of the contention between Mr. Atkinson and his hired counsel was the fact that Mr. Atkinson wanted to proceed to trial and Mr. Brintnall wanted him to accept a plea agreement. It is clear that Mr. Brintnall was not preparing for nor intending to go to trial on this matter. This conflict led to Mr. Atkinson informing Mr. Brintnall and the court that he wanted to discharge Mr. Brintnall. Mr. Atkinson notified the court in the most timely manner possible.

The U.S. Supreme Court noted in *Brecht v. Abrahamson* 113 S. Ct. 1710, 1717 (1993) that the deprivation of counsel is a structural defect requiring automatic reversal.

The trial court did not make the proper inquiry and the refusal to allow Mr. Atkinson to discharge his hired attorney was a structural error requiring reversal.

2. Mr. Atkinson was denied effective assistance of counsel by his attorney's failure to request an intoxication instruction when the evidence was abundantly clear that Mr. Atkinson was highly intoxicated during the relevant events.

The record is replete with testimony that Mr. Atkinson was highly intoxicated at the time of the incident in question. A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). In other words, the evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

In the present case there is ample evidence to support all three necessary conditions. First degree burglary requires the mental state of intent to commit a crime. There are numerous references to the fact that Mr. Atkinson had consumed large amounts of alcohol and Officer Taylor specifically testified that Mr. Atkinson was exhibiting signs of being intoxicated at his arrest. VRP Volume II page 254. Furthermore, Mr. Atkinson himself testified that he was highly intoxicated and that his actions were greatly impacted by the alcohol.

Clearly the evidence supports an intoxication instruction and there is no legitimate tactical reason for counsel to not request one.

Both the Sixth Amendment to the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson,* 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) at 687-88. Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78 (citing *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 c).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all of the circumstances. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) at 689-90. To provide constitutionally adequate assistance,

"counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (citing *Strickland*, 466 U.S. at 691). Ineffective assistance of counsel is a mixed question of law and fact. *Strickland*, 466 U.S. at 698.

As the level of intoxication was clearly established, there is no legitimate tactical reason to not ask for an instruction informing the jury of the applicable law regarding intoxication. Counsel's performance was clearly deficient.

3. Mr. Atkinson was deprived of his right to the effective assistance of counsel by his attorney's failure to investigate and call expert witnesses who could have given testimony as to the affect of Mr. Atkinson's intoxication on his mental state.

There is no question that state of mind is the most important issue in this case. Mr. Atkinson took the stand and admitted to much of the actions that the state alleged. The key question is what his mental state was at the time and whether he had the required intent to elevate the charge to 1st degree burglary. His level of intoxication is critical to that inquiry. Inexplicably, counsel sought no expert

testimony to explain to the jury what effect the alcohol had on Mr. Atkinson.

Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how to best represent his client. *Seidel v. Merkle* 146 F. 3d 750, 755 (9th Cir. 1998)(Citing *Sanders v. Ratelle,* 21 F.3d 1446 (9th Cir. 1994)). See also In re Personal Restraint of Brett, 142 Wn. 2d 868, 873 16 P.3d 601 (2001).

When a specific intent or knowledge is an element of the crime charged, a defendant is entitled to present evidence showing an inability to form that intent or knowledge at the time of the crime. *State v. Greene*, 92 Wn. App. 8 (1998) (Citing *State v. Edmon,* 28 Wn. App. 98, 102-104, 621 P.2d 1310. *State v. Martin,* 14 Wn. App. 74.538 P.2d 873 (1975)) Acceptable bases for arguing a lack of capacity include voluntary intoxication, RCW 9A.16.090, and mental disorder, *State v. Ferrick,* 81 Wn.2d 942, 506 P.2d 860, (1973). The right to present evidence includes the use of expert testimony. *Greene* at 80.

A case particularly on point with the present case is *Miller v. Terhune*, 510 F. Supp.2d 486 (E.D. Cal. 2007). The central issue

before the Court was whether trial counsel rendered ineffective assistance when they failed to investigate and present evidence as to how Miller's level of intoxication likely affected his perceptions, intentions and actions on the night in question. *Id.* at 497.The Court concluded "the record reflects that counsel failed to investigate the effects of intoxication on petitioner. Accordingly, counsel was in no position to make a reasoned or strategic decision regarding the use of intoxication evidence." *Id.* at 499. The Court took great issue with counsel's failure to fully investigate the effect of a highly elevated blood alcohol level and was unwilling to defer to a strategic decision because the decision could not be strategic if it was not based upon an adequate investigation. *Id.* at 500.

In *Jennings v. Woodford* 290 F. 3d 1006(9th Cir. 2002) the 9th Circuit ruled counsel ineffective for failing to investigate Jennings use of methamphetamine and alcohol on the night of the crime despite the fact that Jennings was insistent on his innocence and wanted an alibi defense. The Court concluded that the decision to pursue an alibi defense was not reasonable and informed because counsel did not investigate the matter. *Id.* at 1014.

Had counsel done a simple search of the relevant case law he would have found that calling an expert witness to discuss whether a defendant's level of intoxication could have prevented him from forming the requisite state of mind to commit the crime charged is a common practice. Washington case law is replete with examples. See *State v. Ferrick*, 81 Wn.2d 942, 944, 506 P.2d 860, (1973), *State v. Edmon*, 28 Wn. App. 98, 103-04, 621 P.2d 1310, *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987), *State v. Griffin*, 100 Wn.2d 417, 419, 670 P.2d 265 (1983), *State v. Hansen*, 46 Wn. App. 292, 730 P.2d 706, 737 P.2d 670 (1987), *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), *State v. Cienfuegos* 144 Wn. 2d 222 , 25 P.3d 1011 (2001). As is shown, there are numerous avenues that could have led counsel to use of an intoxication instruction and expert testimony had he done even the most minimal of investigations. Counsel's failure to investigate the most critical factor of this case fell well below any reasonable standard and is certainly sufficient to undermine confidence in the outcome.

4. **Mr. Atkinson was denied his 6th Amendment right to be present at all phases of his trial as well as his 5th and 14th Amendment rights to due process, when the trial court instructed the jury on May 12th, and played back the 911 tape to the jury outside of his presence on May 13th.**

Ms. Sigsbee. The state was allowed to admit pictures of Ms Sigsbee's bruised arm over the objection of counsel. VRP pg 118.

The record is absolutely devoid of any reference as to how the pictures themselves were probative of Ms. Sigsbee's state of mind. Furthermore, the pictures were admitted prior to any testimony from Deputy Waddell as to how or when he took the pictures or there authenticity.

It is well settled that pictures can be highly inflammatory and prejudicial. In the present case Mr. Atkinson was essentially faced with the accusation that he had beaten his wife prior to the incident for which he was charged without any opportunity to defend himself against that accusation and without the proper analysis for entering the evidence. The state never even attempted to explain how the pictures were relevant to Ms. Sigsbee's state of mind and the extreme prejudice was never weighed against any probative value.

The pictures of bruising to Ms. Sigsbee's arm and nose were highly prejudicial.

6. **The Cumulative Error doctrine requires reversal.**

It is the contention of this defendant that the accumulation of numerous errors by the trial court deprived him of a fair trial. This

Court has the authority under RAP 2.5(a)(3) to review error claims whether they be properly preserved or not, if the cumulative effect of all errors denies the defendant the constitutional right to a fair trial.. *State v. Alexander* 64 Wn. App 147, 150-151, 822 P.2d 1019 (1992)

Although it is Mr. Atkinson's contention that many of the errors listed warrant reversal on their own merit, this appellant would ask this court to also view all of the errors in light of, "the total effect of a series of incidents creating a trial atmosphere which threatens to deprive the accused of the fundamentals of due process." *State. v. Swenson* 62 Wn. 2d 259, 382 P.2d 614 (1963) "The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors materially affects the outcome of a trial." *State v. Newbern* 95 Wn. App. 277, 297, 975 P.2d 721 (1999).

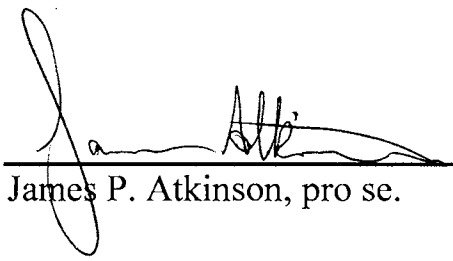
Where the cumulative error of multiple errors so infected the proceedings with unfairness a resulting conviction or death sentence is invalid. See *Kyles v Whitley*, 514 US 419, 434-35, 115 S.Ct. 1555, 131 L.Ed.2d 490(1995). As the Ninth Circuit pointed out in *Thomas v Hubbard,* 273 F.3d 1164(9th Cir. 2001), "[i]n analyzing prejudice in a case in which it is questionable whether any single error examined in isolation is sufficiently prejudicial to warrant reversal, this Court has

recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review." Id. At 1178. (Internal quotations omitted) (Citing *US v Fredrick*, 78 F.3d 1370, 1381(9th Cir. 1996)); see also *Matlock v Rose*, 731 F.2d 1236, 1244(6th Cir. 1984) ("Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.").

Conclusion

As Mr. Atkinson did not receive a fair trial and several constitutional violations occurred this Court should reverse his conviction and remand.

Respectfully submitted this 18th day of January, 2010.



James P. Atkinson, pro se.

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STATE OF WASHINGTON, **Respondent.,** **v.** **JAMES P. ATKINSON,** **Petitioner**	**DECLARATION OF MAILING**

I, James P. Atkinson, 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 18th day of January, 2010, I did process through the Washington State Reformatory, in accordance with institutional mail policy, postage prepaid, United States Mail addressed to the following:

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ONE ORIGINAL TO EACH ADDRESSEE OF:
Statement of Additional Grounds RAP 10.10

DATED this 18th day of January, 2010 at Monroe, WA.

Respectfully Submitted,

_____
James P. Atkinson
Petitioner, pro se