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7 **IN THE SUPREME COURT FOR THE STATE OF WASHINGTON**

8 *In re Personal Restraint Petition of*
9 EDWARD MICHAEL GLASMANN,
10 Petitioner.

NO. 84475-5
COA No. 39700-5-II

MOTION FOR
DISCRETIONARY REVIEW

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13 I. IDENTITY OF MOVING PARTY

14 Edward M. Glasmann, Petitioner, seeks the relief designated in Part II.

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16 II. STATEMENT OF RELIEF SOUGHT

17 Petitioner requests that this Court grant discretionary review. RAP 13.5A. On
18 March 25, 2010, the Court of Appeals dismissed Glasmann's *Personal Restraint*
19 *Petition*. A copy of the *Order of Dismissal* is attached as Appendix A.

20
21 III. FACTS

22 For the most part, the facts are set forth in Glasmann's PRP (including the
23 attached appendices) and his reply brief, which he incorporates by reference. However,
24 Glasmann briefly restates the facts relevant to his claim that trial counsel was ineffective
25 in failing to present additional evidence of his degree of intoxication in order to justify
26 an instruction.

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29 At trial, Glasmann testified he was "high" on methamphetamine and ecstasy. 9
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1 RP 367-69. However, trial counsel did not delve into this issue deeper.

2 In his PRP, Mr. Glasmann presented evidence of his long, unfortunate history of
3 drug and alcohol abuse that was not heard by his jury. Due to his excessive and chronic
4 use of substances, Glasmann has repeatedly suffered from blackouts. In addition, he
5 suffers from extreme emotional swings and paranoia, common side effects of substance
6 addiction. *See Declaration of Glasmann* attached to PRP.
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9 During the month leading up to these events, Glasmann was “using between 7
10 and 14 grams of methamphetamine every day.” *Id.* As a result, Glasmann “went
11 without sleep for many days,” became “extremely paranoid and agitated,” had
12 “episodes of broken reality and suicidal thoughts and plans of suicide,” and would often
13 “blackout.” *Id.* As of the day of the crime, Glasmann had been “abusing
14 methamphetamine every day for over 2 months.” He used an astonishing “10 grams of
15 (m)ethamphetamine during the day” of the incidents, then added six to ten drinks and
16 ecstasy on top of that drug use. *Id.* However, that was not the extent of Glasmann’s
17 drug use. After arriving at a hotel with Ms. Benson, Glasmann used “2-3 grams” of
18 methamphetamine, in addition to the aforementioned ecstasy. *Id.*
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24 The effect of this massive ingestion of mind altering substances is evident from
25 evidence both introduced at trial and available to defense counsel, but not introduced
26 for reasons unknown. *See Declaration of Glasmann* (Defense counsel “told me he was
27 going to introduce these facts into trial and that it would be the primary defense,” but
28 “did not discuss any investigation work with me and I am not aware of any
29 investigations conducted). For example, a police officer responding to the scene at the
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1 convenience store “repeatedly stomped” on Glasmann’s head “with his boot while I
2 was being held down,” a fact that Glasmann cannot recall.
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4 Ms. Benson, the victim, likewise could have provided additional support.
5 In her subsequent civil deposition (also attached to the PRP), she noted a “Jekyll and
6 Hyde” transformation that came with Glasmann’s use of methamphetamine, along with
7 at least one incident of prior blackout behavior. Ms. Benson testified that Glasmann
8 ingested methamphetamine. She stated that his driving was so impaired she was afraid
9 of a wreck. She described him as suffering from “road rage.” 3 RP 87-88. She told a
10 defense investigator that Glasmann was “weird that night and not himself.” 3 RP 147.
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14 Mr. Glasmann also presented evidence about the effects of methamphetamine in
15 his PRP. *See* Appendix E – G to PRP. Methamphetamine increases the release and
16 blocks the reuptake of the brain chemical (or neurotransmitter) dopamine, leading to
17 high levels of the chemical in the brain, a common mechanism of action for most drugs
18 of abuse. Dopamine is involved in reward, motivation, the experience of pleasure, and
19 motor function. Methamphetamine’s ability to rapidly release dopamine in reward
20 regions of the brain produces the intense euphoria, or “rush,” that many users feel after
21 snorting, smoking, or injecting the drug. Appendix E. Methamphetamine enters the
22 brain quickly and lingers longer than other similar drugs of abuse. Appendix F. Most
23 importantly, methamphetamine is highly correlated with “severe neurologic and
24 psychiatric adverse events, including the development of psychotic states.” Appendix
25 G.
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Finally, and perhaps most importantly, Glasmann stated in his declaration:

1 As a result of the drugs and my lack of sleep, I was out of my mind, unable to
2 think straight, and out of control.

3 *Declaration of Glasmann, ¶ 16. See also 6 RP 379.*

4
5 IV. ARGUMENT

6 A. GLASMANN WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE
7 ASSISTANCE OF COUNSEL BASED ON COUNSEL'S FAILURE TO INVESTIGATE
8 AND PRESENT EVIDENCE TO JUSTIFY AN INTOXICATION INSTRUCTION.

9 *Introduction*

10 The Acting Chief Judge dismissed this claim (which is clearly not frivolous) after
11 concluding that all of the evidence (both from trial and in the PRP) is insufficient to
12 support an intoxication instruction because Glasmann “does not present evidence that
13 those intoxicants affected his ability to form the requisite mental states for the crimes
14 with which he was charged.” *Order*, p. 2. To the contrary, Glasmann provided more
15 than sufficient evidence to justify an intoxication instruction, including his own
16 statement that he was “out of my mind, unable to think straight, and out of control.”
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20 *Declaration of Glasmann, ¶ 16. See also 6 RP 379.*

21 Further, the *Order* conflicts with another Court of Appeals decision (*State v.*
22 *Kruger*, 116 Wn.2d 685, 67 P.3d 1147 (2003)). Thus, the decision below involves an
23 issue of constitutional importance, as well as a dispute between the divisions of the
24 Courts of Appeals. Review is warranted.

25
26
27 *The Evidence in Glasmann's PRP—Viewed in the Light Most Favorable to*
28 *Glasmann—Was Sufficient to Support an Intoxication Instruction*

29 RCW 9A.16.090 provides: No act committed by a person while in a state of
30 voluntary intoxication shall be deemed less criminal by reason of his condition, but

1 whenever the actual existence of any particular mental state is a necessary element to
2 constitute a particular species or degree of crime, the fact of his intoxication may be
3 taken into consideration in determining such mental state.
4

5 Diminished capacity from intoxication is not a true “defense.” *State v. Coates*,
6 107 Wash.2d 882, 891-92, 735 P.2d 64 (1987). Rather, “[e]vidence of intoxication may
7 bear upon whether the defendant acted with the requisite mental state, but the proper
8 way to deal with the issue is to instruct the jury that it may consider evidence of the
9 defendant's intoxication in deciding whether the defendant acted with the requisite
10 mental state.” *Id.* (citing WPIC 18.10).
11
12

13 A defendant is entitled to a voluntary intoxication instruction when (1) the crime
14 charged includes a mental state, (2) there is substantial evidence of drinking, and (3)
15 there is evidence that the drinking affected the defendant's ability to form the requisite
16 intent or mental state. *State v. Gallegos*, 65 Wash.App. 230, 238, 828 P.2d 37 (1992). In
17 other words, the evidence “must reasonably and logically connect the defendant's
18 intoxication with the asserted inability to form the required level of culpability to
19 commit the crime charged.” *State v. Gabryschak*, 83 Wash.App. 249, 252-53, 921 P.2d
20 549 (1996).
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25 Simply showing that someone has been drinking is not enough. The evidence
26 must show the effects of the alcohol: Intoxication is not an all-or-nothing proposition. A
27 person can be intoxicated and still be able to form the requisite mental state, or he can
28 be so intoxicated as to be unconscious. Somewhere between these two extremes of
29 intoxication is a point on the scale at which a rational trier of fact can conclude that the
30

1 State has failed to meet its burden of proof with respect to the required mental state. *Id.*
2 at 254, 921 P.2d 549 (citation omitted).
3

4 Division III reached the opposite conclusion of the court in this case (and on
5 much less evidence than presented here) in *State v. Kruger*, 116 Wash.App. 685, 67 P.3d
6 1147 (2003). In that case, the Court of Appeals noted that the record reflects ample
7 evidence of his level of intoxication on both his mind and body because he “black[ed]
8 out,” vomited at the police station, had slurred speech, and was imperviousness to
9 pepper spray. Despite the lack of direct evidence on Kruger’s ability to inform the
10 requisite intent, the Court reasoned that inferences from the above cited facts were such
11 that Kruger was entitled to the instruction.
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15 The evidence in this case is much stronger than in *Kruger, supra*. Like Kruger,
16 Glasmann was largely impervious to pepper spray and a taser. Unlike Kruger,
17 Glasmann ingested not only alcohol, but also methamphetamine—a substance known to
18 cause psychotic states. This evidence alone justifies the instruction. However,
19 Glasmann provided additional evidence in his PRP. He indicated both the number and
20 amount of mind altering substances he had consumed and he described the effect of
21 those substances on his state-of-mind.
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25 The lower court was required to view both the direct and circumstantial evidence
26 in the light most favorable to Glasmann in deciding whether he was prejudiced by the
27 failure to produce evidence that would have supported an instruction. *See generally State*
28 *v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).
29
30

It appears that the court below failed to do so. The *Order* fails to cite much of

1 Glasmann's evidence (especially his own statements about his state of mind), but instead
2 quotes from his former counsel's somewhat contradicting declaration. At best, this
3 declaration supports remand for an evidentiary hearing. RAP 16.11. However, it should
4 not have defeated Glasmann's claim.
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7 This Court should accept review.

8 B. MR. GLASMANN WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO
9 EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO
10 INVESTIGATE AND CALL AN EXPERT WITNESS WHO COULD HAVE GIVEN
11 TESTIMONY CONNECTING GLASMANN'S EXTREME INTOXICATION WITH HIS
12 CORRESPONDING ABILITY, OR LACK OF ABILITY, TO FORM THE CRIMINAL
13 INTENT REQUIRED FOR CONVICTION.

14 Although some of the details were disputed, Mr. Glasmann did not dispute the
15 essential characterization of the facts that lead to his arrest and eventual convictions.
16 The dispute was over the degree of crimes committed. Counsel sought and Glasmann's
17 jury was instructed on lesser included offenses. In fact, counsel affirmatively argued
18 that the jury find Glasmann guilty of the lesser offenses. In short, Glasmann's state of
19 mind at the time of the crime was critical to the defense theory—in fact, it was the only
20 issue.
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23 The charge that carried the greatest penalty, kidnapping in the first degree is a
24 specific intent crime. Defense counsel asked jurors to find Glasmann guilty of the lesser
25 crime of unlawful imprisonment. 8 RP 494.
26

27
28 Given this backdrop, counsel's failure to consult with an expert is astonishing,
29 and cannot be justified by counsel's personally held opinion that Glasmann had an intact
30 memory of events. For one, current memory and a previously impaired capacity are not

1 necessarily mutually exclusive. In addition, counsel presented some evidence of
2 Glasmann's intoxication. Nothing could have been more critical to the case than for the
3 jury to have also been presented with information about the affect of Glasmann's drug
4 ingestion on his state of mind at the time of the crime.
5

6
7 There was ample evidence available to counsel to establish Glasmann's high level
8 of intoxication, appoint discussed in the previous claim of error. Counsel elicited
9 testimony from Glasmann that he was "out of my head" on drugs. 6 RP 379. Glasmann
10 was impervious to the pepper spray. He was acting erratically. He spoke nonsense.
11

12 Counsel even began closing argument with references to the drug use. However,
13 inexplicably, counsel failed to conduct a competent investigation and failed to call an
14 expert witness to testify about Glasmann's impaired state of mind.
15

16
17 As indicated earlier, there is no shortage of documentation available to establish
18 the drastic effect of methamphetamine on the brain. The drug, even in low to moderate
19 amounts, causes anxiety, confusion, and mood disturbances and can lead to violent
20 behavior. With chronic use and/or the consumption of larger doses, methamphetamine
21 causes psychotic features, including paranoia, visual and auditory hallucinations.
22

23
24 All of these disturbing consequences were on display on the night of these crimes.
25 As a result, it was deficient for trial counsel not to consult with an expert. Indeed, that
26 expert would not necessarily need to assess Mr. Glasmann. It would have been
27 sufficient, although not preferable, to discuss the impact of the amount of drugs ingested
28 on the human central nervous system.
29

30 Counsel must, at a minimum, conduct a reasonable investigation enabling him to

1 make an informed decision about how best to represent his client. *In re Pers. Restraint*
2 *of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001); *Seidel v. Merkel*, 146 F.3d 750, 755
3 (9th Cir. 1998).

5 If investigated, the evidence would have been admissible. Kidnapping is a
6 specific intent crime. Thus, evidence of an inability to form the requisite intent is
7 admissible. *State v. Martin*, 14 Wn. App. 74, 538 P.2d 873 (1975). Intoxication is an
8 accepted basis for arguing lack of ability to form the requisite intent. RCW 9A.16.090.
9
10 The right to present evidence includes the right to expert testimony.

12 A case particularly on point is *Miller v. Terhune*, 510 F. Supp.2d 486 (E.D. Cal.
13 2007). The central issue before the court in that case was whether petitioner's trial
14 counsel rendered ineffective assistance when they failed to investigate and present
15 evidence as to how petitioner's level of intoxication likely affected his perceptions,
16 intentions and actions on the night of the shooting.
17
18

19 After finding that counsel failed to conduct a minimally competent investigation
20 (counsel did consult with mental health professionals, unlike this case), the Court held:
21

22 In sum, the record reflects that counsel failed to investigate the effects of
23 intoxication on petitioner. Accordingly, counsel was in no position to make a
24 reasoned or strategic decision regarding the use of intoxication evidence. It is
25 well settled that under *Strickland*, "attorneys have considerable latitude to make
26 strategic decisions about what investigations to conduct once they have gathered
27 sufficient evidence upon which to base their tactical choices." *Jennings v.*
28 *Woodford*, 290 F.3d 1006, 1014 (9th Cir.2002). In the instant case, there is simply
29 no indication that defense counsel gathered any evidence upon which to base their
30 decision to not investigate or present evidence of intoxication. *See Williams*, 529
U.S. at 369, 120 S.Ct. 1495(counsel must conduct a "thorough investigation"
before decision can be considered strategic under *Strickland*); *Sanders*, 21 F.3d at
1457 (citing *United States v. Gray*, 878 F.2d 702, 711 (3rd Cir.1989)) (finding
that "... [c]ounsel can hardly be said to have made strategic choice when he has

1 not obtained the facts on which a decision could be made.”).

2
3 The ABA Standards for Criminal Justice provide guidance as to the obligations of
4 criminal defense attorneys in conducting an investigation. *Rompilla v. Beard*, 545
5 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Williams*, 529 U.S. at 396,
6 120 S.Ct. 1495. The standards in effect at the time of petitioner's trial clearly
7 described the defense lawyer's duty to investigate:

8 (a) Defense counsel should conduct a prompt investigation of the
9 circumstances of the case and explore all avenues leading to facts relevant
10 to the merits of the case and the penalty in the event of conviction. The
11 investigation should include efforts to secure information in the possession
12 of the prosecution and law enforcement authorities. The duty to investigate
13 exists regardless of the accused's admissions or statements to defense
14 counsel of facts constituting guilt or the accused's stated desire to plead
15 guilty.

16 ABA Standards for Criminal Justice, Defense Functions, Standard 4-4.1
17 (3d Ed.).

18 When trial counsel is on notice that his client may have a particular mental
19 impairment relevant to the case, the Ninth Circuit has repeatedly held that failure
20 to investigate the mental state constitutes deficient performance under *Strickland*.
21 See, e.g., *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir.2003) (citing *Bean*
22 *v. Calderon*, 163 F.3d 1073, 1078 (9th Cir.1998) (holding that “[t]rial counsel has
23 a duty to investigate a defendant's mental state if there is evidence to suggest that
24 the defendant is impaired.”); see also *Caro v. Woodford*, 280 F.3d 1247, 1254
25 (9th Cir.2002); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir.1995)). In
26 such circumstances, counsel must undertake at least “a minimal investigation in
27 order to make an informed decision regarding the possibility of a defense based
28 on mental health.” *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir.1998).

29 *Id.* at 499. In *Jennings*, the 9th Circuit concluded that defense counsel was ineffective
30 when counsel failed to investigate Jennings use of methamphetamine and alcohol on the
night of the crime, despite the fact that Jennings was insistent on an alibi defense. The
Court concluded that the decision to pursue the alibi defense was unformed and
therefore unreasonable. *Id.* at 1014.

1 Had defense counsel in this case simply looked to the relevant caselaw, he would
2 have discovered *State v. Kruger, supra*, a case with remarkably similar facts. *Id.* at 692.
3 (“The record reflects substantial evidence of Mr. Kruger’s drinking and level of
4 intoxication. And there is ample evidence of his level of intoxication on both his mind
5 and body, e.g., his “blackout,” vomiting at the station, slurred speech, and
6 imperviousness to pepper spray. He was entitled to the instruction.”).

7
8
9 Had counsel conducted a simple search of the caselaw for “methamphetamine”
10 and “mental state,” he would have found a plethora of cases discussing, with approval,
11 the use of an expert to opine about the interaction of drugs on the brain. *See e.g., State*
12 *v. Ferrick*, 81 Wn.2d 942, 944, 506 P.2d 860 (1973); *State v. Coates*, 107 Wn.2d 882,
13 735 P.2d 64 (1987); *State v. Griffin*, 100 Wn.2d 417, 419, 670 P.2d 265 (1983); *State v.*
14 *Hansen*, 46 Wn. App. 292, 730 P.2d 706 (1987); *State v. Thomas*, 109 Wn.2d 222, 743
15 P.2d 816 (1987); *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001).

16
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18 Thus, Glasmann has presented at least a *prima facie* claim of error. As with the
19 previous argument, he was entitled to an evidentiary hearing—not dismissal of his PRP.
20

21
22 C. MR. GLASMANN WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO A
23 FAIR TRIAL WHEN THE PROSECUTOR USE HIGHLY INFLAMMATORY
24 ILLUSTRATIONS AND INJECTED PERSONAL OPINIONS DURING CLOSING
25 ARGUMENT.

26 During closing argument, the prosecutor presented a PowerPoint slide show to the
27 jury. The slides show photos of Glasmann’s bruised “mug shot” face (as a result of
28 being stomped by a police officer’s boot), accompanied by the headings: “Do You
29 Believe Him;” “Why Should You Believe Anything He Says About the Assault?;” and
30

1 the word “GUILTY” superimposed on his face (repeated in three slides).

2 In response, the State argued that those slides had not been shown to Glasmann’s
3 jury—creating a dispute of facts that should have been resolved with an evidentiary
4 hearing. However, the *Order* below simply concludes that the argument was not
5 improper. However, the *Order* below simply concludes that the argument was not
6 improper.
7

8 Not only were the booking photos unfair, the prosecutor repeatedly expressed his
9 personal opinion about the credibility of witnesses—a decision that must be left in the
10 exclusive hands and minds of jurors.
11

12 In order to establish prosecutorial misconduct, a defendant must prove that the
13 prosecutor's conduct was improper and that it prejudiced his right to a fair trial. *State v.*
14 *Carver*, 122 Wash.App. 300, 306, 93 P.3d 947 (2004) (citing *State v. Dhaliwal*, 150
15 Wash.2d 559, 578, 79 P.3d 432 (2003)). A defendant can establish prejudice only if
16 there is a substantial likelihood that the misconduct affected the jury's verdict. *Carver*,
17 122 Wash.App. at 306, 93 P.3d 947 (quoting *Dhaliwal*, 150 Wash.2d at 578, 79 P.3d
18 432). Courts review a prosecutor's comments during closing argument in the context of
19 the total argument, the issues in the case, the evidence addressed in the argument, and
20 the jury instructions. *Carver*, 122 Wash.App. at 306, 93 P.3d 947 (citing *Dhaliwal*, 150
21 Wash.2d at 578, 79 P.3d 432). If defense counsel fails to object to the prosecutor's
22 statements, then reversal is required only if the misconduct was so flagrant and ill-
23 intentioned that no instruction could have cured the resulting prejudice. *State v.*
24 *Belgarde*, 110 Wash.2d 504, 508, 755 P.2d 174 (1988).
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It is improper for a prosecutor to personally vouch for a witness's credibility. *See*

1 *State v. Brett*, 126 Wash.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121,
2 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). Prosecutors may, however, argue an inference
3 from the evidence and this court will not find prejudicial error “unless it is ‘clear and
4 unmistakable’ that counsel is expressing a personal opinion.” *Brett*, 126 Wash.2d at 175,
5 892 P.2d 29 (quoting *State v. Sargent*, 40 Wash.App. 340, 344, 698 P.2d 598 (1985)).
6
7

8 In this case, read in context, and especially considering the visual display
9 accompanying the prosecutor’s words, the argument was both inflammatory and unfair.
10 The prosecutor’s use of a booking photo accompanied by the superimposed word
11 “GUILTY,” was beyond the pale. Given the increasing amount of use of digital
12 technology during a trial, this Court should accept review and condemn such unfair
13 argument.
14
15

16 D. MR. GLASMANN WAS DENIED HIS SIXTH AMENDMENT RIGHT TO
17 EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL INEXPLICABLY
18 OPENED THE DOOR TO THE ENTIRETY OF GLASMANN’S CRIMINAL
19 HISTORY.

20 Prior to trial, the court granted an *in limine* motion limiting the impeachment of
21 Glasmann to a conviction for unlawful issuance of a bank check and a second-degree
22 robbery. 1 RP 5-6.
23

24 When Glasmann was on the stand, counsel asked him if he had ‘ever been
25 convicted of a crime before’ to which Glasmann responded by admitting to the
26 convictions earlier allowed by the court. 6 RP 387-88.
27
28

29 In response, the State argued and the court agreed the door had been opened by
30 the phrasing of counsel’s question. Thus, the State was able to elicit numerous other

1 crimes—making Glasmann out to be both a career criminal and a liar.

2 This is a very straightforward case of attorney incompetence. It was obviously
3 not tactical—counsel argued that he did not open the door. Thus, the deficient
4 performance prong is easily satisfied.
5

6 Prejudice, which is defined as undermining confidence in the verdict, is also
7 established. Washington caselaw is clear that “prior conviction evidence is inherently
8 prejudicial when the defendant is the witnesses because it tends to shift the jury focus
9 form the merits of the charge to the defendant’s general propensity for criminality.”
10 *State v. Jones*, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), *overruled on other grounds*
11 *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).
12
13

14 However, this Court must add to the “inherent” prejudice, the State’s exploitation
15 of this error. During closing argument, the State attacked Glasmann’s honesty. Thus,
16 this serious misstep by counsel inflicted a great blow on the jury’s assessment of
17 Glasmann. If he was willing to lie by minimizing his criminal history, he was also likely
18 not honest in describing his own involvement in the events at issue. In the end,
19 counsel’s blunder injured Glasmann’s credibility more than any cross-examination
20 could.
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25 Because the *Order* below fails to fairly evaluate the prejudice to Glasmann from
26 counsel’s error, it reaches an incorrect conclusion. This Court should accept review.
27

28 E. MR. GLASMANN IS ENTITLED TO A NEW TRIAL BASED ON THE
29 CUMULATIVE PREJUDICE FROM MULTIPLE ERRORS, ESPECIALLY THE
30 MULTIPLE FAILURES OF DEFENSE COUNSEL.

Where the cumulative effect of multiple errors so infected the proceedings with

1 unfairness a resulting conviction or death sentence is invalid. *See Kyles v. Whitley*, 514
2 U.S. 419, 434-35, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995). As the Ninth Circuit
3 pointed out in *Thomas v. Hubbard*, 273 F.3d 1164 (9th Cir.2001), “[i]n analyzing
4 prejudice in a case in which it is questionable whether any single trial error examined in
5 isolation is sufficiently prejudicial to warrant reversal, this court has recognized the
6 importance of considering the cumulative effect of multiple errors and not simply
7 conducting a balkanized, issue-by-issue harmless error review.” *Id.* at 1178 (internal
8 quotations omitted) (citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th
9 Cir.1996)); *see also Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir.1984) (“Errors that
10 might not be so prejudicial as to amount to a deprivation of due process when considered
11 alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

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17 Glasmann asserts that each of the errors described previously merits relief.
18 However, considered cumulatively, they certainly resulted in sufficient prejudice to
19 merit a new trial. Trial counsel’s errors, measured cumulatively, were devastating to
20 Glasmann. Counsel failed to investigate and present compelling evidence of the extent
21 of Glasmann’s intoxication, failed to obtain an instruction, opened the door to
22 devastating evidence (making his client into a perjurer in the meantime), and failed to
23 object and put an end to prosecutorial misconduct.
24
25

26
27 This Court should accept review of all of the issues presented in this PRP, so that
28 it can also fairly review Glasmann’s claim of cumulative error.
29
30

1 V. CONCLUSION

2 Based on the above, this Court should accept review.
3

4 DATED this 21st day of April, 2010.
5

6
7 /s/ Jeffrey E. Ellis
8 Jeffrey E. Ellis, WSBA #17139
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON
BY DEPUTY

In re the
Personal Restraint Petition of

EDWARD MICHAEL GLASMANN,

Petitioner.

No. 39700-5-II

ORDER DISMISSING PETITION

Edward Glasmann seeks relief from personal restraint imposed after his 2006 convictions for first degree kidnapping, second degree assault, attempted second degree robbery and obstructing.¹ He argues that he received ineffective assistance of trial counsel and that the prosecutor engaged in misconduct.

In his direct appeal, this court rejected Glasmann’s argument that he received ineffective assistance of counsel for failure to request a voluntary intoxication instruction, noting:

the record does not contain ample evidence that his level of intoxication affected his ability or lack thereof to form the mental state required to establish the crimes charged. At best, the evidence merely showed that Glasmann had ingested unspecified amounts of methamphetamine, ecstasy, and alcohol the night of the incident. As such, Glasmann was not entitled to a [voluntary] intoxication instruction.

No. 34997-3-II, slip op. at 10.

Glasmann now presents a declaration recounting the details of his drug and alcohol consumption in the months prior to his crimes. He avers that on the day of his

crimes, he had consumed 12-13 grams of methamphetamine, six to ten drinks and one tablet of ecstasy. However, even with this information, Glasmann does not show that he would have been entitled to a voluntary intoxication instruction had his trial counsel requested one. To obtain such instruction, the defendant must show evidence both of ingesting intoxicants and the effects of the intoxicants on his ability to form the requisite mental state. *State v. Kruger*, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003). While Glasmann shows evidence of ingesting intoxicants, he does not present evidence that those intoxicants affected his ability to form the requisite mental states for the crimes with which he was charged. He asserts that he would “often blackout” after heavy methamphetamine use. And there was evidence that it took considerable force for the police to bring him under control after the crimes. However, he does not present any evidence of the effect of the intoxicants on his ability to form the requisite intent to commit the crimes. And the declaration from his trial counsel recounts that Glasmann had considerable recall of the events of that night. To establish ineffective assistance of counsel, Glasmann must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of his case probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Because Glasmann has not demonstrated a reasonable probability that the trial court would have given a voluntary intoxication instruction had his counsel requested one, he has not demonstrated a probability that the result of his trial

¹ This court issued its mandate of Glasmann’s direct appeal on September 11, 2008, making his August 25, 2009 petition timely. RCW 10.73.090(3)(b).

would have been different had his counsel requested the instruction. Glasmann therefore fails to demonstrate ineffective assistance of counsel.

In a related vein, Glasmann argues that he received ineffective assistance of counsel because his trial counsel failed to obtain and call an expert witness regarding his level of intoxication and its effect on his ability to form the requisite mental states for the crimes with which he was charged. However, as noted above, his trial counsel noted that Glasmann had considerable recall of the events of that evening, leading him to not pursue a voluntary intoxication defense and thus not to obtain and call an expert witness on that issue.² Glasmann does not show that this decision fell below an objective standard of reasonableness and therefore does not demonstrate ineffective assistance of counsel.

Glasmann also argues that he received ineffective assistance of counsel when his trial counsel asked him whether he had "ever been convicted of a crime before." The trial court had earlier granted a motion in limine to restrict evidence of prior convictions to impeachment with convictions for unlawful issuance of a bank check and second degree robbery. However, the State argued, and the court agreed, that Glasmann's counsel had opened the door to questioning that elicited Glasmann's admissions of having committed additional crimes. He contends that the evidence of prior convictions was inherently prejudicial. *State v. Jones*, 101 Wn.2d 113, 120, 677 P.2d 131(1984), *overruled on other grounds in State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). Thus, he argues that opening the door to such evidence was ineffective assistance of

² Glasmann and his trial counsel have different recollections about their discussions about whether voluntary intoxication would be their primary defense. Glasmann says they agreed it would be and his trial counsel said they agreed it would not be. However, that dispute does not require an evidentiary hearing to resolve because it is not material to the reasonableness of his trial counsel's actions.

counsel. However, he fails to show a reasonable probability that absent the opening the door to such evidence, the result of his trial would have been different. The State's cross-examination was limited to having Glasmann admit that "those aren't the only convictions you have, correct?" The State did not further pursue Glasmann's prior convictions. To the extent it was error for Glasmann's counsel to have asked the question he did, Glasmann does not show that it constitutes ineffective assistance of counsel.

Next, Glasmann argues that the prosecutor committed misconduct by using a PowerPoint display during closing argument. That PowerPoint used an unflattering booking photograph of Glasmann and then repeatedly overlaid the word "guilty" over that photograph. While the PowerPoint may have been melodramatic, it was not improper closing argument and so was not prosecutorial misconduct.

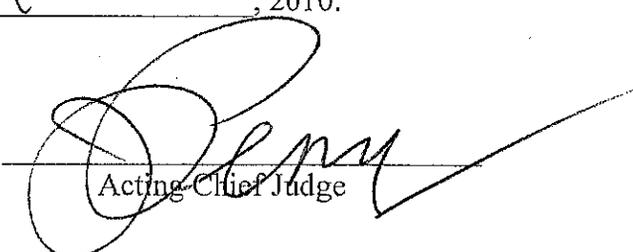
Finally, Glasmann argues cumulative error entitles him to relief. However, as addressed above, he has not shown any accumulation of errors.

Glasmann fails to demonstrate grounds for relief from restraint. Accordingly, it is

ORDERED that Glasmann's petition is dismissed as frivolous under RAP

16.11(b).

DATED this 25th day of March, 2010.


Acting Chief Judge

cc: Jeffery E. Ellis
Thomas C. Roberts
Pierce County Clerk
County Cause No. 04-1-04983-2

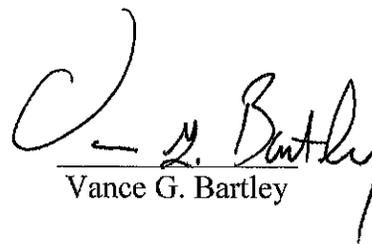
CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on April 21, 2010 I served the parties listed below with a copy of *Motion For Discretionary Review* as follows:

Thomas C. Roberts
Deputy Prosecuting Attorney
930 Tacoma Ave S Rm. 946
Tacoma, WA 98402-2171

Edward Glassman
DOC No. 905293
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PO BOX 777
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4-21-10 Sea, WA
Date and Place


Vance G. Bartley