

No. 84475-5

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

EDWARD M. GLASMANN,

PETITIONER.

SUPPLEMENTAL BRIEF

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STATE OF WASHINGTON
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A. INTRODUCTION

During closing argument, the prosecutor displayed several PowerPoint slides that consisted of a booking photo showing Mr. Glasmann dressed in jail garb, his face bearing multiple bruises as the result of the force used during his arrest, accompanied by captions stating: “WHY SHOULD YOU BELIEVE HIM?,” and “WHY SHOULD YOU BELIEVE ANYTHING HE SAYS?”. Later during argument, the prosecutor displayed a slide with the word “GUILTY” superimposed three times over Glasmann’s booking photo.

Read and viewed as a whole, the prosecutor’s argument misstated the burden of proof by arguing that jurors could acquit Mr. Glasmann only if they believed him—not if they had reasonable doubts based on all of the evidence or lack of evidence. However, this error was compounded by the prosecutor’s use the booking photo as a means of arguing Glasmann was not only unbelievable, but was “GUILTY, GUILTY, GUILTY.”

Putting the prosecutor’s words together with the picture of Glasmann in jail clothes was highly prejudicial. The prosecutor’s presentation sought to strip Glasmann of his presumption of innocence and to use his jail clothes to brand him with the mark of guilt. It was an error that could not have been cured with a limiting instruction and which undermines confidence in this verdict.

As a result, this Court should reverse and remand for a new trial.

B. FACTS

The Court of Appeals described the facts on direct appeal as follows:

Edward Michael Glasmann and Angel Benson were romantically involved and engaged to be married. On the night of October 22, 2005, Glasmann and Benson went to dinner in Tacoma and rented a motel room in Lakewood to celebrate Glasmann's birthday. Both Glasmann and Benson ingested methamphetamine, ecstasy, and alcohol over the course of the evening. In addition, Glasmann and Benson had been arguing throughout that day and evening.

Around midnight, their argument escalated. Glasmann hit Benson, who curled up into the fetal position to protect herself from his blows. Glasmann eventually told Benson that he wanted to go for a ride. They both left the motel room.

Outside the room, another hotel guest, Erika Rusk, witnessed Glasmann (1) pin Benson against the wall with one hand around her neck and repeatedly punch her with his other hand; (2) release Benson and kick her twice in the stomach; (3) drag her to the passenger side of his Corvette and got into the driver's seat; (4) reach over to the open passenger door and attempt to pull Benson into the car by her hair; (5) pull forward from the parking stall while Benson was not fully in the car; and (6) run over Benson's leg with his car.

Once in the car, Benson put the car into park, grabbed the keys, and ran into a mini-mart adjacent to the motel. Inside the mini-mart, she hid on the floor behind the counter. As Rusk watched, she was calling 911 and reporting these events to dispatch.

Lakewood Police Officers Timothy Borchardt and David Butts arrived to find Glasmann's Corvette parked in the roadway. As they approached, they observed Glasmann exit his Corvette, run over to the mini-mart, and climb into three separate cars, apparently hoping to steal one and escape.

Their guns drawn, Officers Borchardt and Butts ordered Glasmann to show his hands. Glasmann refused to comply, and told the officers that he had a gun. When Glasmann pushed a man aside in order to access the third car, Officer Butts approached the open driver's side window and sprayed pepper spray into Glasmann's eyes. Glasmann then exited the vehicle through the passenger door and ran into the

mini-market, pursued by a group of officers.

Glasmann continued to yell, “[S]hoot me, I have got a gun. Go ahead and shoot me.” 4 Report of Proceedings (RP) at 116. As if it were a weapon, he pointed a black object at the officers. Eventually, Glasmann ran behind the counter, grabbed Benson, put his arm around her neck in a choke hold, and pulled her body in front of his, threatening to kill her. Glasmann then dropped to the floor, holding Benson between him and the officers.

When Benson was able to “wiggle her way down from [Glasmann's] body,” Officer Ryan Hamilton applied a stun gun to Glasmann. 4 RP at 125-26. The officers then removed Benson. They took Glasmann into custody, determined he was not armed, and realized he had brandished a stereo remote control as a weapon.

Additionally, during closing argument the prosecutor argued that jurors should not believe the testimony of Glasmann. The prosecutor told jurors that the law required them to compare Glasmann’s testimony to the State’s witnesses. RP 458. “The defendant got up and he testified in this case, and the question to you is do you believe him?” Shortly thereafter, the prosecutor told jurors that in order to reach a verdict they must determine: “Did the defendant tell the truth when he testified?” *Id.* One of the slides features Glasmann’s booking photo along with the words: DO YOU BELIEVE HIM?

A short time later, the prosecutor argued that Glasmann’s testimony about a certain incident conflicted with the videotape depiction. He then asked jurors: “...why should you believe a word that came out of his mouth about the assault that occurred in the Budget Inn parking lot?” RP 460. Another slide contains the words: WHY SHOULD YOU BELIEVE

ANYTHING HE SAYS ABOUT THE ASSAULT? That slide also features Glasmann's booking photo.

Finally, in summation the prosecutor argued that Glasmann was guilty of each charged counts. The final slide once again featured Glasmann's photo in jail garb with the word GUILTY superimposed on Glasmann's face three times.

The PowerPoint¹ presentation was not entered into evidence. Mr. Glasmann obtained a copy after trial through a public disclosure request. In its response to Glasmann's PRP, the State disputed that the last challenged slide was used.

C. ARGUMENT

MR. GLASMANN WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR USED A HIGHLY INFLAMMATORY PHOTOGRAPH AND SWITCHED THE BURDEN OF PROOF DURING CLOSING ARGUMENT

❖ A prosecutor's duty to do justice on behalf of the public transcends mere

¹ "PowerPoint" is a registered trademark of the Microsoft Corporation for its graphics presentation software program. The initial release was called "Presenter." In 1987, it was renamed "PowerPoint." PowerPoint presentations consist of a number of individual pages or "slides." The "slide" analogy is a reference to the slide projector, a device that became obsolete with the widespread use of PowerPoint and other presentation software. Slides may contain text, graphics, movies, and other objects, which may be arranged freely. The presentation can be printed, displayed live on a computer, or navigated through at the command of the presenter. The computer display is often projected using a digital projector. Many large companies and branches of the government use PowerPoint as a way to brief employees on important issues that they must make decisions about. Opponents of PowerPoint argue that reducing complex issues to bulleted points is detrimental to the decision making process; in other words, because the amount of information in a presentation must be condensed, viewing a PowerPoint presentation does not give one enough detailed information to make a truly informed decision. A frequently cited example is Edward Tufte's analysis of PowerPoint slides prepared for briefing NASA officials concerning possible damage to the Space Shuttle Columbia during its final launch. Tufte argues that the slides, prepared by the Boeing Corporation, had the effect of oversimplifying the situation, and provided false assurance that the ultimately fatal damage to the shuttle was only minimal.

advocacy of the State's case. See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 Fordham L.Rev. 1695, 1715 (April, 2000).

❖ The duty of the prosecution is to seek justice, to exercise the highest good faith in the interest of the public and to avoid even the appearance of unfair advantage over the accused. *State v. Quelnan*, 70 Haw. 194, 198, 767 P.2d 243, 246 (1989).

During closing argument in this case, the prosecutor presented a PowerPoint slide show to the jury. Three black and white copies of the slides are attached. The slides show photos of Glasmann's bruised "mug shot" face (as a result of being stomped by a police officer's boot), accompanied by the headings: "DO YOU BELIEVE HIM?;" "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?;" and the word "GUILTY" superimposed three times over his face.

The use of PowerPoint slides adds a new element to argument—the ability to combine pictures, audio, and video with words chosen by an attorney which can serve to explain, as well as to distort, and inflame.

The Dangers that Sometimes Accompany Technology

"The unsupervised use of pedagogical aids during closing argument greatly heightens the risk of reversible error." *Miller v. Mullin*, 354 F.3d 1288, 1295 (10th Cir.2004). "An inherent risk in the use of pedagogical devices is that they may 'unfairly emphasize part of the proponent's proof or create the impression that disputed facts have been conclusively

established or that inferences have been directly proved.’ ” *Id.* (quoting *United States v. Drougas*, 748 F.2d 8, 25 (1st Cir. 1984) (citing J. Weinstein and M. Berger, *Weinstein's Evidence*, 1006 [07] (1983))).

In *United States v. Crockett*, 49 F.3d 1357 (8th Cir. 1995), the trial court permitted the use of overhead transparencies that summarized the testimony presented. The transparencies were later challenged on the grounds that they provided argumentative characterizations of defense testimony. In rejecting this challenge, the trial court concluded that the visual devices contained only statements that would be considered fair closing arguments. *Id.* at 1361-62. Although the Eighth Circuit ruled that the use of transparencies in closing argument was not reversible error, the Court warned:

We do not encourage the use of such devices [transparencies] in the future. . . . Moreover, in a criminal case, the prosecution runs a tangible risk of creating reversible error when it seeks to augment the impact of its oral argument with pedagogic devices. . . . ***Because the very purpose of a visual aid of this type is to heighten the persuasive impact of oral argument, we will necessarily be more inclined to reverse in a close case if the testimony has been unfairly summarized or the summary comes wrapped in improper argument.***

Id. at 1362 (emphasis added).

Other courts have also condemned and/or disallowed the use of pedagogic devices in closing arguments. See *State v. Stringer*, 500 So.2d 928, 935 (Miss. 1987) (held, use of color slides of body of another victim,

projected on a screen during closing argument, was error because it was an unnecessary dramatic effect that can only be intended to inflame and prejudice the jury); *People v. Williams*, 641 N.E.2d 296, 325 (Ill. 1994) (“an exhibit which merely summarized clearly understandable testimony and thereby serves only to memorialize particular evidence should be disallowed”); *Ellis v. State*, 651 P.2d 1057, 1063 (Okla. 1982) (condemned prosecutor's recreation of the image of deceased through the use of decedent's trousers and shoes, noting the “illustration used by the prosecutor served no useful or explanatory purpose but rather only served to inflame the jury's emotions”); *State v. Escobedo*, 573 N.W.2d 271, 278 (Iowa 1997) (warned, prosecutor's overlay on overhead projector, which read “Innocent People Don't Lie,” ran perilously close to crossing the line between permissible and impermissible argument, and could have been impermissible under different circumstances; overlay was inadvertently exposed to jury for only a couple of seconds and was not accompanied by argument).

Nevertheless, Glasmann acknowledges that the decision to allow the use of visual aids, including pedagogical devices, rests squarely with the trial court. *Collins v. State*, 561 P.2d 1373, 1380 (Okla.1977) (“ ‘Argument by means of illustration, such as exhibiting to the jury models, tools, weapons, implements, etc., is a matter of every day practice [D]iscretion

is vested in the trial court to prevent an abuse of the use of such illustrations, and unless there has been such an abuse, this court will not interfere.’ ”) (quoting *Peoples v. Commonwealth*, 147 Va. 692, 137 S.E. 603, 607 (1927)). “Reversible error is committed when counsel's closing argument to the jury introduces extraneous matter which has a reasonable probability of influencing the verdict.”). However, as was the case here, often these presentations are not shared with opposing counsel and the court before argument so that objections cannot be made and are not made part of the record so that a reviewing court can be fully informed about the conduct of the trial.

Prosecutorial Misconduct During Closing

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. *State v. Carver*, 122 Wash.App. 300, 306, 93 P.3d 947 (2004) (citing *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003)). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Carver*, 122 Wash.App. at 306, 93 P.3d 947 (quoting *Dhaliwal*, 150 Wash.2d at 578, 79 P.3d 432). If defense counsel fails to object, reversal is still required where the misconduct was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. *State v. Belgarde*, 110 Wash.2d 504, 508, 755 P.2d 174 (1988).

Where the prosecutor's comments "so infected the trial with unfairness" it constitutes a "denial of due process" under the federal constitution. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citations omitted); *Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir.2005) (stating, "under *Darden*, the first issue is whether the prosecutor's remarks were improper and, if so, whether they infected the trial with unfairness.").

Burden Shifting

A prosecutor commits misconduct by misstating the law regarding the burden of proof. *State v. Fleming*, 83 Wash.App. 209, 213-14, 921 P.2d 1076 (1996). Furthermore, a prosecutor's expressions of personal opinion about the defendant's guilt or the witnesses' credibility are improper. *State v. Dhaliwal*, 150 Wash.2d at 577-78.

In 1996, Division One of this court disapproved of the prosecutor's remarks to the jury when the prosecutor stated in closing argument, "for you to find the defendants ... not guilty of the crime ..., you would have to find either that [the victim] has lied about what occurred ... or that she was confused." *Fleming*, 83 Wash.App. at 213 (emphasis omitted). The court held that the prosecutor "misstated the law and misrepresented both the role of the jury and the burden of proof." *Fleming*, 83 Wash.App. at 213. Division One made clear that under the presumption of innocence, a jury need not find that the victim or witness was mistaken or lying in order to acquit; instead, it is *required* to acquit *unless* it is convinced beyond a

reasonable doubt of the defendant's guilt. *Fleming*, 83 Wash.App. at 213.

Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt. *Fleming*, 83 Wash.App. at 213. It is improper to suggest to the jury that it need do anything to find the defendant not guilty. Jurors are required on their oath to find the defendant not guilty unless they have individually been convinced of the defendant's guilt beyond a reasonable doubt. Importantly, *Fleming* was not the first case to emphasize that it is improper to present an argument of the “in order to find the defendant not guilty” form. The *Fleming* court stated, “We note that this improper argument was made over two years after the opinion in [*State v.*] *Casteneda-Perez*, [61 Wash.App. 354, 362-63, 810 P.2d 74 (questioning witnesses as to whether another witness is lying is improper and contrary to a prosecutor's duty to seek convictions based only on probative evidence and sound reason), *review denied*, 118 Wash.2d 1007, 822 P.2d 287 (1991)]. We therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.” 83 Wash.App. at 214.

Two decades have passed since *Casteneda-Perez* and more than a dozen years since *Fleming*.

Nevertheless, in this case the prosecutor used a similar argument by telling jurors that in order to acquit they needed to find Glasmann credible.

Jail Garb and the Presumption of Innocence

Making matters much worse, the prosecutor then compounded this “burden-shifting” error by making it while simultaneously projecting a picture of Glasmann in jail garb.

One of the essential due process safeguards that attends the accused at his trial is the benefit of the presumption of innocence “that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’ ” *In re Winship*, 397 U.S. 358, 363 (1970), quoting *Coffin v. United States*, 156 U.S. 432, 453, (1895). See also, *e. g.*, *Deutch v. United States*, 367 U.S. 456, 471 (1961).

The prime instrument for reducing the risk of convictions resting on factual error is the reasonable-doubt standard. For that reason, it has long been held that when an accused is tried in identifiable prison garb, the dangers of denial of a fair trial and the possibility of a verdict not based on the evidence are obvious. See *Estelle v. Williams*, 425 U.S. 501, 504 (1976); *State v. Hartzog*, 96 Wash.2d 383, 635 P.2d 694 (1981)

Identifiable jail garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt. The prejudice may only be subtle and jurors may not even be conscious of its impact, but in a system in which every person is presumed innocent until proved guilty

beyond a reasonable doubt, the Due Process Clause forbids toleration of the risk. *Estelle*, 425 U.S. at 505. Jurors required by the presumption of innocence to accept the accused as a peer, an individual like themselves who is innocent until proved guilty, may well see in an accused garbed in jail attire an obviously guilty person to be recommitted by them to the place where his clothes clearly show he belongs. *Id.* Cases condemning trials where a defendant is dressed in identifiable prison garb have also held that it is reasonable to be concerned whether jurors will be less likely to credit the testimony of an individual whose garb brands him a criminal. *Estelle*, *supra*.

It is true that Glasmann did not wear jail garb during his trial or testimony. However, the prosecutor repeatedly showed Glasmann in jail garb (and with visible bruises) when discussing Glasmann's testimony and while arguing that jurors should find him unbelievable and convict him. Thus, the prosecutor's PowerPoint presentation linked the assessment of Glasmann's credibility and ultimately his guilt with a picture of him in jail garb. In other words, the prosecution's oral and visual argument took the photograph far beyond its evidentiary value. .

Standard of Review Meriting Reversal

In *State v. Sucharew*, 205 Ariz. 16, 66 P.3d 59, 64 (Ariz.Ct.App.2003), a second-degree murder case, the defendant argued that the trial court abused its discretion by allowing the prosecution to use a

PowerPoint presentation because the presentation involved a “computer-generated exhibit.” That court addressed the propriety of the use of the presentation as follows:

Although a computer was used in the presentation, the actual presentation did not include any computer simulation or other similar evidence; rather, it was essentially a slide show of photographic exhibits. The photographs included in the presentation were the same ones disclosed to defendant during pretrial discovery and later admitted into evidence at trial. Moreover, even though the photographs included superimposed descriptive words and labels, the words and labels simply tracked the subject matter of the prosecutor's opening statement to the jury, and defendant made no objection to any of the content or substance of the actual opening statement. We conclude, therefore, that there was no abuse of discretion by the trial court in permitting the State's use of the [PowerPoint] presentation.

Id. In contrast, where a prosecutor's slide takes a item of evidence “far beyond [its] evidentiary value” (*State v. Stringer*, 500 So.2d 928, 935 (Miss.1986)), such use of the evidence by the prosecution misleads the jury and magnifies the “significant persuasive force,” of that evidence. *State v. Rogan*, 91 Hawaii 405, 413, 984 P.2d 1231, 1239 (1999).

In this case, the prosecutor repeatedly linked Glasmann's credibility and ultimately his guilt or innocence with a picture of him in jail clothes. This Court recently condemned the conduct of criminal trials in jail courtrooms reasoning that the location of the trial unreasonably interfered with the presumption of innocence *even where* juror were told that the location was simply the result of scheduling and administrative needs. *State v. Jaime*, 168 Wash.2d 857, 233 P.3d 554 (2010). This Court

reversed because it was nevertheless concerned about the risk of “impermissible factors” coming into play. *Id.* at 862. In Glasmann’s case, the prosecutor’s oral and visual argument repeatedly and unmistakably urged that those same impermissible factors be used by jurors in deciding Glasmann’s case. So, while there were efforts taken to minimize the prejudice in *Jaime*, the prosecutor in Glasmann’s case repeatedly reminded jurors of the booking photo. This served only to maximize the prejudicial impact. If the curative instruction in *Jaime* was insufficient, no curative instruction would have worked in this case.

Reversal is required because the argument was flagrant and could not have been cured by an objection.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should either remand this case to Pierce County Superior Court for an evidentiary hearing or for a new trial.

DATED this 7th day of March, 2011.

Respectfully Submitted:

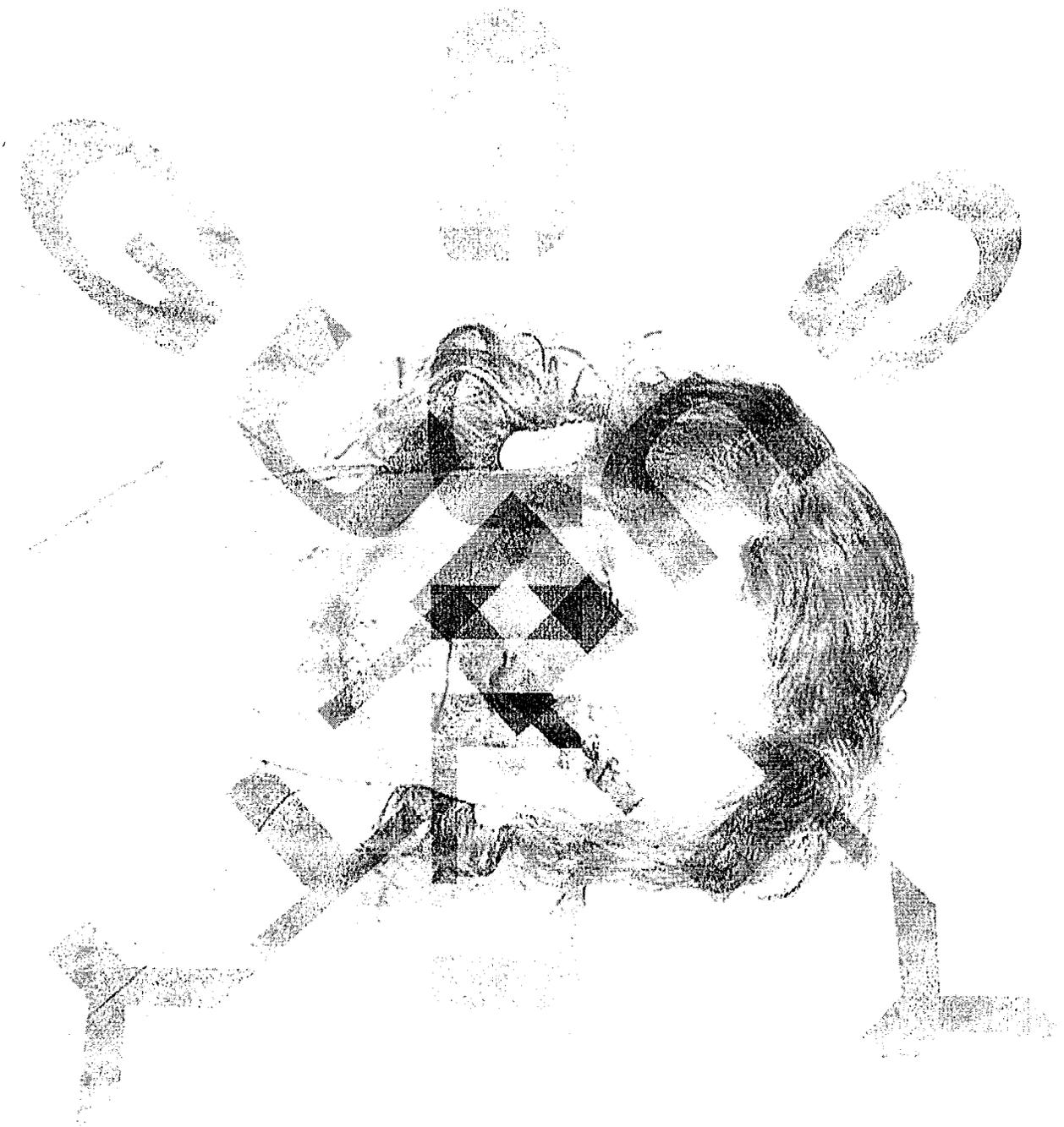
/s/ Jeffrey E. Ellis

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#10



#1



DO YOU BELIEVE HIM?

Handwritten marks and scribbles in the top left corner, possibly including a signature or initials.

#2

WHY SHOULD YOU BELIEVE
ANYTHING HE SAYS ABOUT THE
ASSAULT?



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Attached please find Mr. Glasmann's supplemental brief for filing. I have served opposing counsel by simultaneously sending this email and its attachment to counsel for Respondent. Please let me know if I can provide additional information.

--

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