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SUPREME COURT
STATE OF WASHINGTON
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re Personal Restraint
Petition of

ZAHID A. KHAN,

Petitioner.

ANSWER TO MOTION FOR
DISCRETIONARY REVIEW

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 ORIGINAL

TABLE OF CONTENTS

I. IDENTITY OF RESPONDENT 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 1

 A. UNDER ESTABLISHED LAW, THE COURT OF APPEALS SHOULD DISMISS A PETITION THAT LACKS EVIDENTIARY SUPPORT.....2

 B. THE COURT OF APPEALS CORRECTLY HELD THAT THE ABSENCE OF AN INTERPRETER AT TRIAL DOES NOT WARRANT RELIEF..... 3

 1. When A Defendant Makes A Tactical Decision Not To Request An Interpreter, He Cannot Later Complain That No Interpreter Was Appointed. 4

 2. Defense Counsel’s Tactical Decision Not To Request An Interpreter Should Not Be Second-Guessed On Collateral Review. 6

 3. The Court of Appeals Correctly Held That An Ineffectiveness Claim Based On Failure To Object To Alleged “Prosecutorial Misconduct” Cannot Be Raised, Since It Involves A Ground For Relief That Was Rejected On Direct Appeal And All Relevant Evidence Was In The Appellate Record..... 8

 C. THE COURT OF APPEALS CORRECTLY REJECTED AN “EXPERT” OPINION THAT HAS NO DISCERNIBLE SCIENTIFIC BASIS.....9

IV. CONCLUSION..... 11

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Benn</u> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	7
<u>In re Griffith</u> , 102 Wn.2d 100, 683 P.2d 194 (1984).....	5
<u>In re Lord</u> , 123 Wn.2d 296, 868 P.2d 835 (1994).....	6
<u>In re Rice</u> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	2, 10
<u>In re Taylor</u> , 105 Wn.2d 683, 717 P.2d 755 (1986).....	6
<u>In re Thompson</u> , 141 Wn.2d 712, 10 P.3d 380 (2000).....	5
<u>State v. Gore</u> , 143 Wn.2d 288, 21 P.2d 262 (2001).....	9
<u>State v. Johnston</u> , 143 Wn. App. 1, 177 P.3d 1127 (2007).....	8
<u>State v. Rusos</u> , 127 Wash. 65, 219 P. 843, 844 (1923).....	5
<u>State v. Trevino</u> , 10 Wn. App. 89, 516 P.2d 779 (1973).....	4

FEDERAL CASES

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	7
<u>Valladares v. United States</u> , 871 F.2d 1564 (11 th Cir. 1989).....	4, 5

U.S. CONSTITUTIONAL PROVISIONS

Fourth Amendment.....	5
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COURT RULES

RAP 13.4(b).....	1
RAP 13.4(b)(3).....	1
RAP 13.5A.....	1

I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that discretionary review be denied.

II. STATEMENT OF THE CASE

The facts are set out in the State's Response to Personal Restraint Petition.

III. ARGUMENT

The standards for discretionary review of the dismissal of a personal restraint petition are set out in RAP 13.5A. Under that rule, this court will apply the same considerations that govern petitions for review under RAP 13.4(b). The motion for discretionary review does not specifically address these considerations. It does claim that this case raises constitutional questions. Motion for Discretionary Review at 6 (“the process used to decide Mr. Kahn’s case departs from both the court rule and the Constitution”); Id. at 16 (case presents “important constitutional issue”); Id. at 21 (Court of Appeals decision is “an unreasonable application of the constitutional law governing claims of ineffective assistance of counsel”). A significant question of constitutional law could warrant review under RAP 13.4(b)(3). This case does not, however, present any such question.

A. UNDER ESTABLISHED LAW, THE COURT OF APPEALS SHOULD DISMISS A PETITION THAT LACKS EVIDENTIARY SUPPORT.

The petitioner first claims that, in ruling on a personal restraint petition, "the allegations in a well-pleaded complaint [must] be taken as true." Motion for Discretionary Review at 4. Settled law is to the contrary. A petitioner is not entitled to a reference hearing simply because he sets out allegations that are not meritless on their face. Rather, the petition must state "the evidence available to support the factual allegations." In re Rice, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992).

[This] prerequisite ... enabl[es] courts to avoid the time and expense of a reference hearing when the petition, though facially adequate, has no apparent basis in provable fact. In other words, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. Thus, a mere statement of evidence that the petitioner believes will prove his factual allegations is not sufficient. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his

factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

Id. at 886.

Although the petitioner in this case made numerous allegations, he failed to present admissible evidence to support them. Absent adequate factual support, the Court of Appeals properly dismissed the petition. This procedure did not violate due process requirements. The court's application of established law does not warrant review.

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE ABSENCE OF AN INTERPRETER AT TRIAL DOES NOT WARRANT RELIEF.

The petitioner next claims that constitutional error resulted from the trial court's failure to appoint a translator. The petitioner's argument under this heading intermingles three distinct legal theories: (1) the due process requirement to appoint an interpreter; (2) ineffective assistance of counsel in failing to seek an interpreter, and (3) ineffectiveness of counsel in failing to object to "prosecutorial misconduct" in purportedly exploiting the petitioner's language difficulties. None of these theories warrant review.

1. When A Defendant Makes A Tactical Decision Not To Request An Interpreter, He Cannot Later Complain That No Interpreter Was Appointed.

The petitioner's declaration makes it clear that his attorney made a tactical decision not to request appointment of an interpreter. See App. B to P.R.P. ¶ 18 (“[my attorney] told me that using an interpreter would make me look bad”). It is also clear that the petitioner acquiesced in this decision. Although he claims that he told his attorney that he was unable to understand some of the proceedings, he never brought this issue to the attention of the court until sentencing.

“As a constitutional matter, the appointment of interpreters is within the [trial] court’s discretion.” Valladares v. United States, 871 F.2d 1564, 1566 (11th Cir. 1989); see State v. Trevino, 10 Wn. App. 89, 94-95, 516 P.2d 779 (1973). If a defendant is having difficulty understanding the proceedings, the court cannot read his mind to find this out. The court can only know that an interpreter is necessary if that issue is raised by the defendant or his counsel:

[The defendant] and his counsel knew, if any one did, of his lack of fluency in the English tongue, how comprehensible and intelligible his language was, and what, if any, difficulties a stranger might have in grasping his meaning. Hence it was their duty to call the attention of the court to the necessity for an interpreter, if there was such necessity. Nor having

done so is an admission that they believed no interpreter necessary...

State v. Rusos, 127 Wash. 65, 66, 219 P. 843, 844 (1923). Absent any request for an interpreter, the court does not abuse its discretion in failing to appoint one.

If there was any error, it is not grounds for relief via personal restraint petition. "The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal." In re Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). This doctrine applies equally to personal restraint petitions. In re Griffith, 102 Wn.2d 100, 102, 683 P.2d 194 (1984). Similarly, a defendant waives his constitutional rights when he elects not to take advantage of the mechanism provided for vindicating those rights. State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983) (defendant who affirmatively withdrew suppression motion waived Fourth Amendment rights).

Here, the defendant and his attorney deliberately chose not to ask for an interpreter. In so doing, they set up any error that may have occurred in not appointing an interpreter. Under these circumstances, the absence of an interpreter does not provide a

basis for challenging the conviction. The Court of Appeals' rejection of this claim does not warrant review.

2. Defense Counsel's Tactical Decision Not To Request An Interpreter Should Not Be Second-Guessed On Collateral Review.

In a second variation on this claim, the defendant argues that his attorney was ineffective for failing to seek an interpreter. This issue should not be considered. On direct appeal, the defendant raised ineffective assistance claims, which the court rejected on the merits. When a ground for relief has been rejected on direct appeal, it cannot be considered on a personal restraint petition, unless doing so would serve the ends of justice. In re Taylor, 105 Wn.2d 683, 687-88, 717 P.2d 755 (1986). "[A] petitioner may not create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching his argument in different language." In re Lord, 123 Wn.2d 296, 329, 868 P.2d 835 (1994).

The Court of Appeals believed that *some* of the petitioner's ineffectiveness claim fell within the "ends of justice" exception. The court applied this exception to those claims that "rely on matters outside the trial court record and could not be raised on direct appeal." Slip op. at 7. This is incorrect analysis. To obtain

reconsideration of an issue rejected on appeal, it is not enough to offer evidence outside the appellate record. Rather, “the defendant must show the evidence could not have been discovered in time to be included in the record on appeal.” In re Benn, 134 Wn.2d 868, 886, 952 P.2d 116 (1998). Information about the petitioner’s alleged language difficulties could have been discovered in time to be included in the appellate record. Consequently, even if inadequate information on this subject was contained in the record, that does not establish a basis for reconsidering a ground for relief rejected on direct appeal.

In any event, this claim does not warrant review. As the Court of Appeals pointed out, having the petitioner testify in broken English supported his theory of the case. Slip op. at 5. “[S]trategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). It makes no difference that some other attorney would have made a different choice. “Even the best criminal defense attorneys would not defend a particular client in the same way.” Id. at 689. The trial court’s application of the well-established standards for ineffectiveness does not warrant review.

3. The Court of Appeals Correctly Held That An Ineffectiveness Claim Based On Failure To Object To Alleged "Prosecutorial Misconduct" Cannot Be Raised, Since It Involves A Ground For Relief That Was Rejected On Direct Appeal And All Relevant Evidence Was In The Appellate Record.

In his third variation on this claim, the petitioner claims that his attorney was ineffective for failing to object to the prosecutor's "misconduct" in cross-examining the defendant. As the Court of Appeals pointed out, claims of both ineffective assistance of counsel and prosecutorial misconduct were rejected on direct appeal. All of the facts relevant to this ineffectiveness claim are contained in the appellate record. Consequently, the interests of justice do not require reconsideration of this claim. Slip op. at 7. The petitioner has given no explanation of why this analysis was wrong.

Even if this claim could be raised, it would properly be rejected. "Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions." State v. Johnston, 143 Wn. App. 1, 19 ¶ 54, 177 P.3d 1127 (2007). If the petitioner's language difficulties were apparent to the jury, the prosecutor's attempt to exploit those difficulties would reflect badly on the prosecutor, not the petitioner. Defense

counsel could reasonable decide not to object to the prosecutor harming his own credibility. This tactical decision does not establish ineffective assistance.

C. THE COURT OF APPEALS CORRECTLY REJECTED AN “EXPERT” OPINION THAT HAS NO DISCERNIBLE SCIENTIFIC BASIS.

Finally, the petitioner claims that trial counsel was ineffective for failing to obtain an expert on the effects of digital penetration. In support of this claim, he submitted a declaration from a physician at Stafford Creek Corrections Center. According to this “expert,” “Damage to the hymen of an eleven year old girl after even a few instances of digital rape by the fingers Mr. Kahn has would be inevitable.” This “expert” provides no information about any experience with pediatric child abuse. Nor does he explain any basis for his conclusion. App. E to PRP.

When an expert opinion is based on a scientific theory, the theory must be generally accepted in the relevant scientific community. Otherwise the opinion is inadmissible. State v. Gore, 143 Wn.2d 288, 302, 21 P.2d 262 (2001). Here, there is no showing of any accepted scientific theory that supports the “expert’s” conclusion.

This deficiency is particularly glaring in light of the declaration submitted by a State's expert. This expert has the experience that the petitioner's "expert" lacks – she is certified in Child Abuse Pediatrics and has published and spoken on that field. She explains in detail the basis for her conclusion that digital penetration of pubescent girls often leaves no visible signs. Resp. to P.R.P., ex. 13. In response to this declaration, the petitioner presented *no* further evidence.

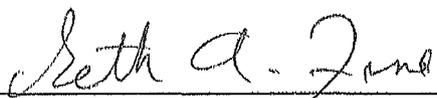
Contrary to the petitioner's arguments, this does not present a dispute between qualified experts. The State's expert was highly qualified and presented an opinion based on extensive observations and studies. The petitioner's "expert" demonstrated no qualifications in the relevant area of medicine and presented an opinion with no discernible basis. The petitioner has failed to demonstrate that he has any *admissible* evidence to support his claims. Absent such a showing, he is not entitled to a reference hearing. Rice, 118 Wn.2d at 886. The Court of Appeals rejection of the petitioner's claims does not warrant review by this court.

IV. CONCLUSION

The motion for discretionary review should be denied.

Respectfully submitted on January 10, 2014.

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Good Afternoon...

RE: In RE PRP of Zahid Khan
Supreme Court No. 89657-7

Please accept for filing the following attached pleading: State's Answer to Motion for Discretionary Review

Let me know if there is a problem opening the attachment.

Thanks.

Diane.

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