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

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IN RE PERSONAL RESTRAINT PETITION OF:

**ZAHID AZIZ KHAN,**

PETITIONER.

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**SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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Jeffrey E. Ellis #17139  
B. Renee Alsept #20400

*Attorneys for Mr. Khan*  
Law Office of Alsept & Ellis  
621 SW Morrison St., Ste 1025  
Portland, OR 97205  
[JeffreyErwinEllis@gmail.com](mailto:JeffreyErwinEllis@gmail.com)  
[ReneeAlsept@gmail.com](mailto:ReneeAlsept@gmail.com)

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## I. INTRODUCTION

Zahid Khan filed a timely non-frivolous PRP, supporting his claims with admissible, competent evidence. The State disputed much of Khan's new evidence with its own sworn declarations. The court rules make it clear what should have happened next: the acting chief judge should have remanded the case for an evidentiary hearing or for a determination on the merits. That did not happen. Instead, a single appellate judge dismissed Khan's entire petition without a hearing, after resolving factual disputes against Khan based on a paper record.

This second<sup>1</sup> supplemental brief argues that Khan's PRP should not have been dismissed. Although this pleading focuses on the contested medical evidence, it has equal application to all of Khan's extra-record evidence.

This Court should simply apply the rules as written and hold that the an evidentiary hearing is required when a Petitioner has made out a prima facie claim of error and when the material facts have been properly disputed by the State. Generally, a judge should not resolve a factual dispute on affidavits, for then he is merely showing a preference for "one piece of paper to another." *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947).

This is particularly so when the judge without holding an evidentiary

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<sup>1</sup> This Court originally granted review limited to the "interpreter" issue. After Khan submitted a supplemental brief on that issue, this Court *sua sponte* expanded the scope of review to include "all issues contained within the motion for discretionary review."

hearing, resolves the disputed facts in favor of the party who has the burden of establishing his right to preliminary relief. See *id.*; 7 Moore, Federal Practice s 65.04(3). This caveat is most compelling “where everything turns on what happened and that is in sharp dispute; in such instances, the inappropriateness of proceeding on affidavits attains its maximum...” *Securities and Exchange Comm'n v. Frank*, 388 F.2d 486, 491 (2d Cir. 1968) (Friendly, C. J.).

This Court should reverse and remand.

## II. FACTS

Zahid Khan was convicted of child rape and molestation. All the charges involved Khan’s stepdaughter, R.H.

According to the evidence, Khan's stepdaughter claimed he began sexually abusing her when she reached puberty and that there were approximately 40 episodes where Khan touched the victim's chest or penetrated her digitally. RP 44, RP 48 and RP 58. For example, in August 2006, after she fell asleep on the loft couch while watching television, she awoke to Khan kneeling next to the couch and moving his finger in and out of her anus. RP 67 - 68. On another occasion, when she was 13 or 14, she was sleeping on her bed in her room when she was awakened by Khan moving his finger in and out of her vagina. RP 71, 73, 74.

The step-daughter was later physically examined. A nurse practitioner testified that the victim's hymen appeared normal and

consistent with her stage of physical development. RP 250. In fact, Nurse Haner did not see any lesions or inflammation and noted not a single injury to the hymen. RP 253. The nurse testified that the lack of any injury was consistent with multiple incidents the digital penetration. RP 245.

In his PRP, Khan contends he was denied effective representation of counsel because counsel did not present expert medical testimony to counter the State's position that the lack of abnormal medical findings was not consistent with her allegations of abuse. In support of his claim, Khan submitted a declaration from a physician who reviewed the testimony and physically examined Khan and stated that because Khan has "very large fingers," damage to a hymen of an eleven year-old girl would be "inevitable" even after a few instances of digital rape. Khan also submitted a declaration from a clinical psychologist who opined that it is "highly unlikely" the victim would not immediately wake up during sexual penetration as described by the victim. *Appendix to PRP*. In addition, he offered the declaration of an attorney who expressed the opinion that counsel's failing to consult a medical expert regarding the victim's lack of injuries fell below objective standards of reasonableness. *Id.*

A Court of Appeals judge dismissed Khan's PRP without an evidentiary hearing. That judge concluded that Khan's medical doctor was not qualified to offer an opinion and failed to adequately explain the basis of his opinion. *Order*, p. 8-9. Rather than treat the attorney declaration for

the purpose for which it was offered (the relevant standard of practice), the lower court concluded that “the attorney was obviously was not qualified to testify about the medical findings and her declaration provides no basis to establish her capability to interpret the medical studies she refers to.”

*Order*, p. 9.

The lower court did not make a frivolousness finding when it dismissed the petition. To the contrary, the *Order* reflects that Khan raised several issues of at least debatable merit.

### III. ARGUMENT

#### A. Introduction

This case is about the failure to follow procedure. A judge reviewing a PRP determines whether an evidentiary hearing should be held; but does not adjudicate the facts based on a paper record.

The rules are clear. RAP 16.11 sets forth the procedure for consideration of a PRP. First, “(t)he Chief Judge determines at the *initial consideration* if the petition will be retained by the appellate court for determination on the merits or transferred to a superior court for determination on the merits or for a reference hearing.” RAP 16.11(a).

#### B. Khan’s Petition is Not Frivolous

If the Chief Judge determines that the issues presented are “frivolous, the Chief Judge will dismiss the petition.” RAP 16.11(b). An appeal is frivolous “if there are no debatable issues upon which reasonable

minds might differ and it is so devoid of merit that there [is] no reasonable possibility of reversal.” *State v. Chapman*, 140 Wash.2d 436, 454, 998 P.2d 282 (2000) (quoting *State ex rel. Quick-Ruben v. Verharen*, 136 Wash.2d 888, 905, 969 P.2d 64 (1998)). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *In re Marriage of Wagner v. Wheatley*, 111 Wash.App. 9, 18, 44 P.3d 860 (2002). The same standard should apply to a PRP.

Khan’s PRP is not frivolous and the State has never suggested otherwise.

C. An Evidentiary Hearing Was Required to Resolve the Disputed Facts

Appellate courts are not fact-finding courts.

The Acting Chief Judge’s *Order* is contrary to RAP 16.11 (b)’s directive that contested material facts must be found by a trial court after an evidentiary hearing. There is no court rule or statute that allows an appellate judge to sort through the facts, ignoring some, viewing others in a light unfavorable to a Petitioner, and adjudicating others finding the State’s evidence more persuasive.

Instead, “(i)f the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing” RAP 16.11(b).

An evidentiary hearing is not required for every PRP. A PRP that raises only legal issues based on the trial record does not require a hearing. An evidentiary hearing also is not required for claims based on conclusory allegations, or for claims refuted by or can be resolved by reference to the state record. An evidentiary hearing will be ordered only if the petitioner demonstrates he or she has competent, admissible evidence establishing facts which would require relief and where the State disputes those facts with its own competent, admissible evidence. *In re Personal Restraint of Rice*, 118 Wash.2d 876, 886, 828 P.2d 1086 (1992).

A petition cannot be determined solely on the record when the material facts are in dispute. When making such a determination without an evidentiary hearing, the court must consider the pleadings and affidavits in a light most favorable to the plaintiff.

D. The Federal Constitution Demands a Fair Process

The Constitution also requires reasonable process. A well-pleaded claim of a federal constitutional violation cannot be summarily dismissed. *See Coleman v. Alabama*, 377 U.S. 129 (1964); *Herman v. Claudy*, 350 U.S. 166 (1956); *Palmer v. Ashe*, 342 U.S. 134 (1952). A well-pleaded federal claim is one whose allegations are “plainly and reasonably made,” *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *Angel v. Bullington*, 33 U.S. 183, 188 (1947), and are “not patently frivolous or false on a consideration of the whole record.” *Pennsylvania ex. rel. Herman v. Claudy*, 350 U.S.

116, 119 (1956); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 298 (1949) (“Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.”); *Davis*, 263 U.S. at 24 (“Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.”).

In *Herman*, the Supreme Court reversed the summary dismissal of a habeas petition containing properly pleaded claims that petitioner’s Federal Due Process rights were violated because his confession was coerced and he did not make a valid waiver of his right to counsel. *Herman*, 350 U.S. at 118. In remanding for a hearing, the Court stated:

Our prior decisions have established that . . . where a denial of these constitutional protections is alleged in an appropriate proceeding by factual allegations not patently frivolous or false on a consideration of the whole record, the proceeding should not be summarily dismissed merely because a state prosecuting officer files an answer denying some or all of the allegations.

*Id.* at 118-19.

Implicit in each of these principles is the requirement that the allegations in a well-pleaded complaint be taken as true for purposes of determining how to proceed. *See Smith v. O’Grady*, 312 U.S. 329, 331 (1941) (“[I]n denying the writ the Nebraska court necessarily held that petitioner’s allegations – even if proven in their entirety – would not entitle

him to habeas corpus, even if the petition showed a deprivation of federally protected rights.”); *Ex parte Hawk*, 321 U.S. 114, 116 (1944) (“From our examination of the papers presented to us we cannot say that [petitioner] is not entitled to a hearing on these contentions.”).

A state appellate court is not permitted to simply dismiss a petitioner’s well-pleaded federal constitutional claim by arbitrarily resolving disputed factual questions against him, without holding a hearing or affording the petitioner an opportunity to collect and present evidence in support of his claim for the court’s review. Rather, the state court must engage in a *reasoned* decision-making process. This means that the state court must recognize the existence of factual disputes, resolve them according to the settled norms and use the results of that process to inform its application of the relevant constitutional test. A failure to do so amounts to arbitrary decision-making, and a decision made in that manner is – by definition – objectively unreasonable.

E. Khan Claimed a Violation of His Sixth Amendment Right to Effective Assistance of Counsel and Adequately Supported that Claim.

Mr. Khan met the pleading standard.

His proffered evidence (the opinions of two doctors and an attorney’s opinion regarding the standard of practice) made out at least a prima facie claim of error. The fact that the State presented a competing

declaration did not signal that an appellate court should decide which declarations are most persuasive. Instead, it signaled the need for a hearing.

American courts routinely admit the testimony of physicians regarding observed injuries that, in the opinion of the doctor, are consistent with rape. The State would be shocked and courts would waste valuable time if every time such testimony was offered a *Frye* hearing was required.

This Court has never held that a trial court must undergo the substantial burden of holding a *Frye* hearing every time medical or scientific evidence is sought to be admitted at trial, every time a defendant raises an objection to such evidence, or even if a particular person or persons in the scientific community may have a differing opinion. To the contrary, “[o]nce a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier or fact.” *State v. Gregory*, 158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006). And when an appellate court has previously determined that the *Frye* standard has been met as to a specific scientific theory, a trial court may rely upon the prior ruling to govern admissibility of the same theory in subsequent cases. *State v. Cauthron*, 120 Wn.2d 879, 888 n.3, 846 P.2d 502 (1993); *State v. Ortiz*, 190 Wn.2d 294, 831 P.2d 1060 (1992)). It is only when a party produces new evidence” which “seriously questions” the

continued general acceptance or lack of acceptance as to the theory within the relevant scientific community that a court must conduct a *Frye* hearing. *Id.*

In any event, the Court of Appeals could have remanded with directions to conduct a *Frye* hearing, if it concluded that Khan sought to rely on novel scientific evidence.<sup>2</sup> It should not have dismissed Khan's PRP.

R.H. testified that Khan penetrated her anally, vaginally, as well as molesting her at least 20 times in Bellevue and 20 or 30 times in Snohomish. She gave graphic details. She remembered his fingers moving in and out and it felt really bad; she would wake up and his finger was in her vagina and moving in and out and it felt really bad; he would go inside my anus and it felt really uncomfortable and hurt; he would put his fingers between my butt cheeks, moving in and out. RP 48 – 102. In addition, the State's expert witness testified that R.H. told her that she was digitally penetrated 20 – 30 times and it was painful every time. RP 236 – 256.

In light of that testimony, Dr. William Rollins declaration is hardly remarkable and consistent with the medical literature. Dr. Rollins opined that some "damage" or injury would likely be apparent during a medical

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<sup>2</sup> With regard to the lower court's determination that Petitioner's expert did not fully explain the basis for his opinion, his opinion was arguably more informed than the State's opinion given that he was able to examine Petitioner's fingers. However, the basis for the doctor's opinion is an issue that could be explored at a hearing.

examination and that it was unlikely an eleven or thirteen year old would not immediately wake up if she were repeatedly penetrated on up to fifty occasions when she was asleep.

It was error for the Court of Appeals' judge to dismiss Khan's claim of constitutional error because it was not frivolous and because it depended on the resolution of facts by a trial judge presiding at an evidentiary hearing.

#### **IV. CONCLUSION**

This Court should reverse and remand for an evidentiary hearing.

DATED this 16<sup>th</sup> day of December, 2014.

s/Jeffrey Ellis  
Jeffrey E. Ellis #17139  
B. Renee Alsept # 20400  
*Attorneys for Mr. Khan*

Law Office of Alsept & Ellis  
621 SW Morrison St., Ste 1025  
Portland, OR 97205  
JeffreyErwinEllis@gmail.com  
ReneeAlsept@gmail.com

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Attached for filing please find Mr. Khan's second supplemental brief, which has been served on opposing counsel through this email.

Jeff Ellis  
Attorney at Law  
Oregon Capital Resource Counsel  
621 SW Morrison Street, Ste 1025  
Portland, OR 97205  
503/222-9830 (o)  
206/218-7076 (c)