NO. 96638-9

IN THE SUPREM COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HECTOR HUGO TALAVERA,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

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

II. STATEMENT OF THE CASE

The facts are set out in the Brief of Respondent.

III. ARGUMENT

APPLICATION OF THE WELL-ESTABLISHED INEFFECTIVENESS STANDARD DOES NOT WARRANT REVIEW BY THIS COURT.

In determining whether the performance of defense counsel is constitutionally deficient, the United States Supreme Court has made it clear that there can be no set of detailed rules for counsel's conduct. "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984). Yet the petitioner asks this court to create such a rule: "the court should grant review of [this] case to outline counsel's duty to prepare for cross examination and impeachment by acquiring transcripts of key witnesses' prior testimony." P.R.V. at 7. Because any such blanket rule would be improper, the court should *not* grant review.

The petitioner fails to recognize that a transcript is a double-edged sword. If a transcript is available for the defense, it is also available for the prosecution. If it could be used to impeach, it could also be used to refresh. See People v. Sanders, 221 Cal. App. 3d 350, 370-71, 271 Cal. Rptr. 534 (1990); Richardson v. State, 666 S.W.2d 336, 340 (Tex. App. 1984). In this case, the danger of a transcript was particularly great. A young woman was testifying about events that occurred seven or more years before. There was a strong possibility that she might forget important details — or claim to forget to avoid testifying about embarrassing events. Without a transcript, the prosecutor would have little recourse. If a transcript existed, however, the prosecutor could if necessary use it as former testimony, which is admissible as substantive evidence. ER 804(b)(1).

The course adopted by defense counsel gained her the advantages of potential impeachment, while avoiding the risks. Since defense counsel handled both trials, she knew what answers the witnesses had previously given. She could cross-examine them about any inconsistencies. If the witnesses denied the inconsistency, she could then obtain a transcript of the relevant portions of the testimony. As defense counsel told the court, "If you

want me to have the transcript made, I can do that." 7 RP 492. At the same time, there was no transcript that the prosecution could use to prove its case if the witness failed to testify as anticipated.

The events at trial showed the value of this strategy. Defense counsel did cross-examine the victim's sister about the "sleepover." She got the witness to testify that she didn't "remember ever having a sleepover." 7 RP 495; see slip op. at 8-9. At the first trial, the witness had testified that there "probably could have been a time" that she spent the night in the defendant's room, but she didn't remember. 2 RP 163-64; see slip op. at 6. The impeachment was thus more effective without a transcript than it would have been with one.

Counsel likewise cross-examined the victim effectively about how many times she had been abused in the defendant's car. The cross-examination showed that she did not remember how often this occurred. It also showed that she could not remember *any* details of *any* incident. 6 RP 419. Counsel could reasonably decide that it would not be helpful for the jury to know that the victim had previously testified to a *larger* number of incidents. From such evidence, jurors might well conclude that the victim's fading

memory had caused her to *minimize* the extent of the abuse, not exaggerate it.

In short, there is no reason for this court to accept review to establish broad rules for the conduct of defense counsel. Such rules are inappropriate, both in general and under the facts of this case. This case presents a routine application of the well-established standard for ineffective assistance. There is neither any significant question of constitutional law nor issue of substantial public interest that would warrant review under RAP 13.4(b)(3) or (4).

IV. CONCLUSION

The petition for review should be denied.

Respectfully submitted on January 28, 2019.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Petitioner, HECTOR HUGO TALAVERA, Respondent.	No. 96638-9 DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:
The undersigned certifies that on the 28th day of January, 2019, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the respondent; Peter Mazzone; James Wayne Herr; peterm@mazzonelaw.com; jamesh@mazzonelaw.com

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of January, 2019, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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