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SUPREME COURT
STATE OF WASHINGTON
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NO. 97953-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ZAHID AZIZ KHAN,

Petitioner.

CORRECTED ANSWER TO
PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied. If review is nonetheless granted, the State asks the court to review the issue designated in part II.

II. ISSUE CONDITIONALLY RAISED BY RESPONDENT

In its previous opinion in this case, this court said if the defendant required an interpreter, his counsel was deficient for failing to obtain one. This determination was based on the assumption that the defendant may have required an interpreter because he lacked the ability to *understand* many of the questions asked of him.

On remand, however, the court found that the defendant *could* understand the questions. The court determined that the defendant nonetheless had a statutory right to an interpreter because he spoke in broken English and sometimes strained to find the right words to express himself. If this court grants review, should it reconsider its decision that counsel's failure to obtain an interpreter constituted deficient performance?

III. STATEMENT OF THE CASE

The facts are accurately set out in the Court of Appeals opinion.

IV. ARGUMENT

A. IN LIGHT OF THE REMAND COURT'S FINDING THAT THE DEFENDANT UNDERSTOOD THE TRIAL PROCEEDINGS, THE ISSUE OF WHETHER HE SUFFERED PREJUDICE FROM HIS "BROKEN ENGLISH" DOES NOT WARRANT REVIEW.

In his personal restraint petition, the defendant's¹ primary claim was that he needed an interpreter because he did not understand the questions he was asked. P.R.P. at 6-9. This court determined that the defendant's need for an interpreter could not be determined from the record. In re Khan, 184 Wn.2d 679, 689-90 ¶¶ 13, 363 P.3d 577 (2015). The court also noted that the defendant had failed to show "how the lack of an interpreter caused him prejudice by demonstrating what specifically he would have done differently had he understood the proceedings or questions." Id. at 692 ¶¶ 17. Nonetheless, "[g]enerously construing his arguments and based on our own review of the record," the court found sufficient grounds to warrant a reference hearing on prejudice. Id. ¶¶ 18.

On remand, the defendant did almost nothing to remedy these problems. He did not himself testify to any lack of

¹ In the course of these proceedings, Zahid Khan has had several different designations. He was defendant at the original trial, petitioner in the personal restraint proceedings, appellant in the appeal following the remand, and now again petitioner in this court. For simplicity, he will be referred to in this Answer as "defendant."

understanding. Nor did he call any witness who was present at his trial. Instead, he called two witnesses who based their conclusions on the trial transcript. 1 RP 80, 126. His only other witness acknowledged that she knew nothing about the defendant's proficiency in *spoken* English. 1 RP 58-59.

In contrast, the State introduced the testimony of three witnesses who had been present at the defendant's trial: defense counsel, the judge, and the prosecutor. Defense counsel had also met with the defendant in jail five times and had 18 or more telephone conversations with him. 2 RP 198-99. He testified that based on the defendant's interactions with him, it appeared that he was understanding 100 percent. 2 RP 225-26. Both the judge and the prosecutor testified that they did not observe anything that caused them concern about the defendant's ability to understand what was happening. 2 RP 243-44, 292-93.

The remand court found that "the defendant was able to readily comprehend the questions that were asked of him and make himself understood while testifying." CP 15, Finding no. 1. The court also found that although the defendant spoke in "broken English," he was "nonetheless able to clearly express his defense." *Id.*, finding no. 3. The court concluded that the defendant had no

constitutional right to an interpreter. *Id.*, conclusion no. 1. Because of his “broken English,” he had a *statutory* right to an interpreter. CP 16, conclusion no. 2. The defendant had, however, failed to establish any “reasonable probability that the result of the trial would have been different if the defendant had been provided an interpreter.” CP 15, finding no. 5.

The Petition for Review largely ignores the remand court’s findings. Instead, it relies on “misunderstandings and miscommunications” that the remand court rejected. PRV at 11. As the Court of Appeals held, the remand court’s findings are supported by the record. The Petition does not explain why that holding is wrong — or why the correctness of a case-specific factual determination warrants review by this court.

The Petition complains about his supposed misunderstanding of the word “erection.” PRV at 15. His trial testimony showed that he knew exactly what this word means: “when I sleep with [my wife], without erection I cannot do my – make my kids.” Ex. 14 at 394. In its memorandum decision, the remand court said that any confusion over this word “appeared to stem from defendant’s persistent denial that he had been in the presence of the children while in an erect state rather than any

misunderstanding of the word.” CP 20. There is no reason to believe that use of an interpreter would have solved that problem.

In light of the findings made on remand, this case presents a narrow, case-specific issue: whether there is a reasonable probability that the defendant’s “broken English” affected the outcome of the proceedings. The court found that notwithstanding his broken English, the defendant was “able to clearly express his defense.” CP 15, finding no. 3. In light of this finding, both the remand court and the Court of Appeals determined that there was no reasonable probability that an interpreter would have changed the result of the trial. CP 15, finding no. 5; slip op. at 16. This fact-specific determination does not warrant review by this court.

B. IF THIS COURT GRANTS REVIEW, IT SHOULD RECONSIDER ITS DECISION THAT COUNSEL’S PERFORMANCE WAS DEFICIENT, SINCE THAT DECISION WAS BASED ON THE ERRONEOUS PREMISE THAT THE DEFENDANT DID NOT UNDERSTAND THE PROCEEDINGS.

If this court nonetheless grants review, it should take the opportunity to reconsider one of its prior conclusions in light of the new findings. In its previous opinion, this court held that “[i]f in fact Khan’s English language skills were such that he required an interpreter, his counsel was deficient for failing to obtain one.” Khan, 184 Wn.2d at 690 ¶ 13. That holding was, however, based

on the premise that the lack of an interpreter “deprived Khan of the ability to understand many of the questions he was asked on the stand and likely deprived him of the ability to understand many other aspects of the trial.” Id. at 690-91 ¶ 14. As discussed above, the findings entered on remand show that this premise is incorrect. CP 15, findings nos. 1-2.

In light of these findings, the issue of deficient performance raises a substantially different question than the one that this court previously answered. The question is not, “Can a reasonable defense attorney allow his client to testify, when language difficulties prevent that client from understanding the questions?” Rather, the question is, “Can a reasonable defense attorney allow his client to testify *in his own words*, when those words contain ‘broken English’ but nonetheless clearly express the client’s defense?”

This question presents very different tactical considerations than the question that this court previously answered. The defendant’s constitutional right to testify includes his “right to present his own version of events in his own words.” Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). As this court has recognized in a different context, another person


may not be able to speak for the defendant as persuasively “as the defendant might, with halting eloquence, speak for himself.” State v. Canfield, 154 Wn.2d 698, 703 ¶ 5, 116 P.3d 391 (2005) (discussing common law right of allocution). Under the circumstances of this case, use of a translator would have traded a constitutional right for a statutory one. The defendant would have given up the constitutional right to testify in his own words, in exchange for the statutory right to assistance in communicating in the English language. See CP 16, conclusion no. 2. Although there may be benefits in such an exchange, this court has no basis for saying that a reasonable attorney must *always* advise his client to do so. If this court decides to grant review of the defendant’s issue, it should consider whether such a tactical decision is necessarily deficient performance.

V. CONCLUSION

The petition for review should be denied.

Respectfully submitted on January 6, 2020.

ADAM CORNELL
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By: 

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

ZAHID AZIZ KHAN,

Petitioner.

No. 97953-7

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The undersigned certifies that on the 6th day of January, 2020, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

CORRECTED 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 Petitioner; Nielsen, Broman & Koch; Sloanej@nwattorney.net; SweigertJ@nwattorney.net;

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 6th day of January, 2020, 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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