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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF:

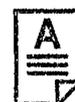
ZAHID AZIZ KHAN,

PETITIONER.

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

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ORIGINAL

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I. INTRODUCTION

The Washington Courts are committed to ensuring equal access to justice for all individuals regardless of their ability to communicate in the spoken English language. Language interpreters play an essential role in ensuring due process and helping court proceedings function efficiently and effectively.

http://www.courts.wa.gov/programs_orgs/pos_interpret/.

Mr. Khan is a foreign born man with limited English proficiency (LEP). The trial court did not inquire about Mr. Khan's ability to speak English or ask whether he wished to waive his right to an interpreter. Despite the fact that Khan explained to his attorney (during their one private meeting) that his English was limited, counsel failed to request an interpreter. As a result, Khan could not understand portions of his own trial. To make matters worse, during Khan's testimony the prosecutor exploited Mr. Khan's limited English proficiency and implied that Khan's failure to clearly answer questions was evidence that Khan was evasive and should not be believed.

All of this could have been easily avoided.

The decision to waive the right to an interpreter belongs to an LEP defendant, not to counsel. Not surprisingly, Khan wanted to understand what was being said at his own trial. If Khan had been given the choice, he would have requested an interpreter. *See Declaration of Khan* attached to PRP.

This Court can protect the right of all individuals charged with a crime to fully understand the proceedings by holding that a waiver of the right to counsel must be evidenced by a defendant's express waiver on the record, not an uninformed defense attorney's silence. This Court should also hold that a prosecutor's attempt to use limited English proficiency as a reason to find a witness incredible is always harmful, just as this Court did with respect to race.

II. FACTS

Zahid Aziz Khan, a permanent resident who emigrated from Pakistan, was charged with multiple counts of sexual abuse of R.H. See *Information and Probable Cause Statement*. The trial court did not provide Mr. Khan with an interpreter. Khan did not waive his right to an interpreter. Defense counsel did not object.

In support of his PRP, Mr. Khan presented several declarations attesting to Khan's limited English proficiency (LEP) at the time of his trial. For example, Mr. Khan's declaration states:

8. When I met with my attorney, who only visited once in jail, I told him that Urdu was my native language and that I did not speak English very well.
9. My attorney told me that he would speak for me and that I should not speak in court. I told him that I would probably not understand everything that was said in court. Once again, my attorney told me that I need not worry because he would be able to understand and respond to everything that was said.

10. Although I told my attorney several times that I was not understanding what was said in court, in response he told me “don’t worry. Everything is good,” and assured me that the case would turn out well.

14. During trial, I understood some things that were said and did not understand other parts of trial.

15. As a result of my inability to understand everything that was being said during trial, I felt unable to consult with and assist my attorney.

16. When I testified, I was confused several times. I did my best to understand and answer, but there were a number of times when I did not understand exactly what was asked or how to accurately express myself in English. I did my best but know that I could have done better with an interpreter.

17. If I had known that I could have asked the court for an interpreter, contrary to my attorney’s advice, I would have done so.

In its *Response*, the State disputed Mr. Khan’s degree of proficiency in English. The Court of Appeals did not remand for an evidentiary hearing.

The trial court never inquired how much Khan understood the testimony of the other witnesses. There are numerous times during his testimony where Khan expressed confusion regarding the question asked. See *e.g.*, RP 342; 343; 344; 349; 355; 357; 365; 366; 368; 370.

During his testimony, Mr. Khan denied having an erection while standing near R.H. shortly after she accused him of sexually abusing her. RP 345 (“No. She is my daughter. I don’t even think this way.”). The

prosecutor then engaged in a lengthy cross-examination of Khan. The prosecutor asked:

- Q. So what about all of this caused you to get the erection?
- A. What do you mean, erection?
- Q. I mean, what caused your penis to get aroused?
- A. When I heard this thing, I'm thinking, how they is using this word? I cannot saying anything in front of my sister or anything, this kind of word. How they using it openly, in front of everybody, and they don't feel one thing, this is how shameful word. I not imagine.
- Q. So they should be too ashamed to say that?
- A. No, ashamed to say I can do this thing, this kind of thing, this kind of feeling, like I have something like that.
- Q. You don't every get erections?
- A. No. No.

RP 358. Later, the prosecutor asked Khan if R.H. was worried that Khan intended to:

- Q. ...do the same thing to M. that you have been doing to her?"
- A. What I'm doing with her?
- Q. The sexual things.
- A. How you know I'm doing sexual things?
- Q. Well, I've been sitting here for three days.

RP 361. During closing, the prosecutor attacked Khan's credibility based on these exchanges. "But you will remember what he [Khan] said: This is

ridiculous. I don't get erections. That's what he said the first time. Later, he said – and I asked him again, You don't get erections. No, I don't get erections. That wasn't natural and credible....His testimony in general was not credible...and he was caught not telling the truth a couple of times, or being confused.” RP 482.

III. ARGUMENT

A. Introduction

The right of a criminal defendant to an interpreter is based on the fundamental notion that no person should be subjected to a Kafkaesque trial which may result in the loss of freedom and liberty. Language is the principal means of communication in any legal proceeding. The ability to understand what is being said animates a defendant's trial rights: the right to be present, to assist counsel, to confront witnesses, and to testify. A person's facility with the language used is critical to the proceeding's fairness, reliability, and integrity.

There are plenty of examples, both in and out of court, where the failure to accurately translate a document or interpret a statement has resulted in a harm or injury. Accuracy is required to protect the integrity of the proceedings as well as the defendant's rights. Where a defendant cannot understand testimony or argument, the increased risk of error is significant. *See* Steven M. Kahaner, *The Administration of Justice in a*

Judicature 220, 224-225 (April-May 2009).

B. LEP Defendants Must Personally Waive the Right to an Interpreter on the Record.

RCW 2.43.010 provides that it is state policy:

... to secure the rights, *constitutional or otherwise*, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be *fully protected* in legal proceedings unless qualified interpreters are available to assist them. It is the intent of the legislature in the passage of this chapter to provide for the use and procedure for the appointment of such interpreters.

(emphasis added). In enacting RCW 2.43, the Legislature placed the right to complete, competent interpretation on par with constitutional rights meriting the highest protection.

The Legislature also ensured that RCW 2.43's protections not be unwittingly forfeited, by restricting waiver of the right to an interpreter to those cases in which the appointing authority determines "on the record" that the defendant (rather than counsel) has waived such right "knowingly, voluntarily, and intelligently." RCW 2.43.060(1)(b). This strict requirement for knowing and voluntary waiver is nearly identical to waiver requirements for fundamental constitutionally protected rights, which are personal to the defendant. See *Faretta v. California*, 422 U.S. 806, 835 (1975); *State v. Tetzlaff*, 75 Wn.2d 649, 652, 453 P.2d 638, 640 (1969)(right to counsel); *Adams v. United States ex rel. McCann*, 317 U.S.

269, 278 (1942); *State v. Bugai*, 30 Wn. App. 156, 157, 632 P.2d 917, 918 (1981)(right to jury trial); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (right to plead guilty); *Fay v. Noia*, 372 U.S. 391, 439 (1963) (right to appeal).

In this case, Mr. Khan did not waive his statutory or constitutional right to an interpreter. No colloquy whatsoever took place.

The State may argue that Khan did not identify himself to the court as a “non-English speaking person” in need of an interpreter. But, the law does not place the burden on Khan to demand an interpreter. And, it does not place the decision in his counsel’s control. Instead, it creates a presumption in favor of an interpreter unless the LEP defendant expressly and personally waives the right.

The State’s probable cause statement identified Khan as someone who was born in a non-English speaking country. All it would have taken to identify Mr. Khan as an LEP defendant is one or two simple questions. When a defendant who was not born in the United States or whose native language is a language other than English; and who comes from an environment where a language other than English is dominant, the statute requires the judge appoint an interpreter or secure a waiver. Indeed, the law allows a waiver to be set aside (by the judge or defendant) at any time in the proceedings. RCW 2.43.060(2).

The State may argue that Mr. Khan does not fit within the statutory definition of defendants who are entitled to interpreters. RCW 2.43.020(4) ("Non-English-speaking person" means any person involved in a legal proceeding who cannot readily speak or understand the English language). Understandably, the trial record is not conclusive because no inquiry took place. While Khan was able to make himself understood during his testimony, it was also clear that he misunderstood several questions and sometimes struggled with his answers. What the trial record does not disclose is how much of trial Khan did not understand. Khan's declaration states that understood "some things that were said and did not understand other parts of trial."

In any event, to the extent that this claim requires this Court to ascertain the extent of Khan's proficiency in English at the time of his trial, an evidentiary hearing is required. RAP 16.11.

C. Trial Counsel's Failure to Inquire of Khan and to Take Adequate Steps to Determine Khan's English Proficiency was Deficient.

Trial counsel failed to protect Mr. Khan's statutory and constitutional right to an interpreter (and the attendant rights that accompany the ability to fully understand the proceedings).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration

of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wash.2d 222, 225–26, 743 P.2d 816 (1987) (applying the 2–prong test in *Strickland v. Washington*, 466 U.S. 668, 687(1984)).

The first prong of the *Strickland* test “requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances.” *State v. Thomas*, 109 Wash.2d 222, 226, 743 P.2d 816 (1987). To provide constitutionally adequate assistance, “counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client.” *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994)(citing *Strickland*, 466 U.S. at 691).

The right of an LEP defendant to be tried with an interpreter is similar to the right of a defendant to be tried only if competent. Competence, like language fluency, requires an understanding of the proceedings and an ability to assist counsel. This Court held in *PRP of Fleming*, 142 Wash.2d 853, 16 P.3d 610 (2001), that counsel was ineffective in burglary case for failing to advise the court at time of defendant's *Alford* plea that the defendant had been found incompetent by a defense expert authorized by the court for purposes of a diminished

capacity defense. This Court found deficient performance because one must be competent to stand trial or enter plea and competence cannot be waived (and certainly cannot be unilaterally waived by counsel). This Court also found prejudice even though defendant was medicated prior to plea, no irrational behavior was apparent from the record, and there was no other indication to show that defendant did not understand the proceedings because the defendant “might have been found incompetent and should have had a competency hearing before entering a plea of guilty.” *Id.* at 863. See also *Newman v. Harrington*, 726 F.3d 921 (7th Cir. 2013) (affirming *United States ex rel. Newman v. Rednour*, 917 F. Supp. 2d 765 (N.D. Ill. 2012)) (counsel was ineffective in murder case for failing to investigate the intellectually disabled defendant’s competence and failing to seek a competence hearing).

Khan has stated facts which demonstrate his trial attorney’s deficient performance. As Khan’s declaration states, his attorney met with Khan privately only one time and only briefly; did take steps to determine Khan’s proficiency in English; did not ask whether Khan wanted to use an interpreter at trial; did not urge the trial court to inquire of Khan; but instead simply told Khan that only counsel not Khan, needed to understand everything that was said during Khan’s trial.

As *Fleming* establishes, reasonably competent counsel would not make a decision to conduct a trial without ensuring that his client

understands the proceedings. See also *Declaration of Jay Stansell* attached to PRP Reply. No one would defend an attorney's failure to insure a sign language interpreter for a hearing impaired defendant or suggest that as long as the defendant could lip read his rights were fully protected.

Further, any suggestion that counsel made a tactical choice to deny Khan the ability to fully understand his trial in order to portray Khan as an unsophisticated immigrant taken advantage of by his Americanized step-daughter fails to take into account that the choice to be assisted by an interpreter belongs to the defendant, not counsel. In any event, there is absolutely no evidence that counsel employed such a strategy—a strategy that would have been supported by the use of an interpreter and undermined by proceeding without an interpreter.

Ultimately, counsel could not have made such a tactical decision because he did not spend enough time with Khan and did not investigate sufficiently to learn that Khan was not proficient in English. Compare *State v Woo Won Choi*, 55 Wash App 895, 781 P.2d 505 (1989), where the judge had inquired of defense counsel whether there was a language problem and counsel replied that he had had “many, many meetings” with the defendant, a Korean immigrant; that he was confident that the defendant could understand and answer questions; and that counsel would advise the judge if any problems occurred.

D. Mr. Khan Was Prejudiced by His Attorney's Failure to Request an Interpreter.

When this Court finds error for failing to provide an interpreter for trial, this Court should establish a bright-line rule mandating reversal. Such a rule is needed to ensure compliance with RCW 2.43 and best serves judicial efficiency. Requiring an LEP party to establish what he understood and what he would have understood if he had been provided an interpreter and why that would have led to a different outcome would render RCW 2.43's protections essentially unenforceable in many cases. Further, it would require hindsight review of the entire trial.

An automatic reversal rule also recognizes that the improper denial of an interpreter interferes with numerous trial rights which otherwise require automatic reversal. For example, even a temporary denial of the right to assist and consult with counsel mandates reversal. See *State v. Hartwig*, 36 Wash.2d 598, 601, 219 P.2d 564 (1950); *State v. Cory*, 62 Wash.2d 371, 376, 382 P.2d 1019 (1963). Likewise, an automatic reversal rule recognizes that this claim was not cognizable on direct appeal precisely because the court and defense counsel failed in their duties to Khan.

In addition, when considering whether Khan was prejudiced, this Court should recognize that failure to provide full interpretation harms a defendant's right to be free from discrimination based on national origin,

which is a substantial right. Such discrimination violates Title VI of the Civil Rights Act of 1964, 42 U.S.C.A § 2000(d)(1994).

E. The Prosecutor's Flagrant Misconduct

Prosecutorial misconduct is grounds for reversal if “the prosecuting attorney’s conduct was both improper and prejudicial.” *State v. Fisher*, 165 Wash.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wash.2d 759, 858, 147 P.3d 1201 (2006)). Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *Id.* at 71. Thus, a prosecutor must function within boundaries while zealously seeking justice. *Id.*

A prosecutor gravely violates a defendant's Washington State Constitution article I, section 22 right to an impartial jury when the prosecutor resorts to racist argument and appeals to racial stereotypes or racial bias to achieve convictions. *State v. Monday*, 171 Wash.2d 667, 257 P.3d 551 (2011). “If prosecutors are permitted to convict guilty defendants by improper, unfair means then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means.” *State v. Torres*, 16 Wn.App. 254, 263, 554 P.2d 1069 (1976).

Like appeals to racism, national origin discrimination unacceptably taints any proceeding in which it occurs. *See Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116–17 (9th Cir. 2009). *See*

also *Hernandez v. New York*, 500 U.S. 352, 371–72 (1991) (prosecutor's preemptory challenges of Spanish-speaking jurors may be pretext for ethnic discrimination).

In *Monday*, a case where witness credibility was “particularly at issue,” the prosecutor made a “blatant and inappropriate appeal to racial prejudice and undermined the credibility of African American witnesses based on their race,” through the use of derogatory language and by implying that African-Americans have a “code” that precludes them from testifying truthfully against other African-Americans. 171 Wash.2d at 775. This Court held: “The constitutional promise of an ‘impartial jury trial’ commands jury indifference to race. If justice is not equal for all, it is not justice. We hold that when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict. We also hold that in such cases, the burden is on the State.” *Id.*

In this case, the prosecutor used Mr. Khan's lack of English proficiency to imply that he was being dishonest. This Court should treat this argument the same as the improper argument in *Monday*.

Monday focused less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice

could have been cured. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932). Once the showing of misconduct is made, this Court held in *Monday*, the burden shifted to the State to show the race-based misconduct was harmless beyond a reasonable doubt, *i.e.*, that it is beyond a reasonable doubt that the conduct did not affect the jury's verdict. *Id.* at 680. In *Monday*, the evidence that the defendant had committed the crime at issue was quite strong. But, the prosecutor's misconduct was so pervasive that nearly every witness's testimony was tainted by it. “Under those circumstances, we held that the State could not make the harmlessness showing.” *Id.* at 681. Despite the strong evidence of Monday's guilt, the taint of the improper conduct pervaded the trial, making it impossible to say whether the jury could have come to a conclusion not influenced by racial bias.

The same is true in this case.

IV. CONCLUSION

In the ethnic richness and diversity of Washington, many languages are spoken. The people of this state, through the clear and express terms of their statutory law, require that all persons tried in a Washington court understand what is happening about them, for them, and against them.

Mr. Khan was denied that right. His prosecutor made matters worse by exploiting Mr. Khan's limited English proficiency during cross-examination and by arguing that Khan's lack of English proficiency made him untrustworthy.

Based on the above, this Court should vacate Khan's judgment of conviction and remand this case to Snohomish County Superior Court for a new trial. Alternatively, this Court should remand this case to the trial court for an evidentiary hearing.

DATED this 27th day of October, 2014.

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

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