No. 103024-0

THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SERGEY KOVALENKO, Appellant.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, State of Washington, by Hilary Thomas, Appellate Deputy Prosecutor for Whatcom County, seeks the relief designated in Part B.

B. DECISION AND RELIEF REQUESTED

Respondent asks this Court to deny Petitioner Kovalenko's Petition for Review of the Court of Appeals decision in State v. Sergey Kovalenko, __ Wn. App. 2d __, 546 P.3d 514 (2024).

C. ISSUES PRESENTED FOR REVIEW

1. Whether Kovalenko has presented a significant constitutional question, and/or whether the Court of Appeals' opinion conflicts with other cases, meriting further review where the opinion applies the rationale in State v. Talbott and traditional waiver principles in holding that a defendant waives a for-cause challenge when they fail to exercise a peremptory challenge as to that juror but use all their peremptory challenges as to other jurors they didn't challenge for cause.

2. Whether Kovalenko's claim the Court of Appeals applied the wrong standard in determining that the judge did not abuse his discretion in not sua sponte excusing Juror 9 merits further review where the juror's comments in response to defense counsel's

question regarding Kovalenko's use of an interpreter, as a whole and in context, did not implicate his national origin or immigration status.

3. Whether Kovalenko has presented a significant constitutional question or question of substantial public import meriting further review in requesting this Court to overrule the holding in State v. Clayton that a non-corroboration instruction in sex cases does not constitute a comment on the evidence where he failed to address whether the holding is incorrect and harmful.

4. Whether the Court of Appeals decision regarding allegations of prosecutorial misconduct based on religion merits further review where the Court applied the traditional standard of review regarding unpreserved claims of misconduct it has previously applied regarding misconduct claims based on religion and where the heightened standard of review is reserved for claims of racial bias.

5. Whether the Court of Appeals decision regarding the analysis to be applied regarding a claim the trial court failed to provide verbatim translation as to certain testimony merits further review where the defense specifically asked, or agreed, that the testimony did not need to be translated again because it had already been translated when it was initially presented.

D. STATEMENT OF THE CASE[1]

Kovalenko was born in the USSR and immigrated to the United States with his wife in 1987. Kovalenko has 17 children, 12 sons and 5 daughters. The family built and lived in a home on five acres in Whatcom County.

The children's daily lives included going to school, doing chores, and attending church twice per week. The older children often helped take care of the younger children. The girls were responsible for chores inside the home, including cleaning, laundry, and preparing food. The boys were responsible for projects outside the home including tending to animals.

While they attended public school, the girls felt that they stood out because of the clothing they wore and because their family did different things from other families. The children were expected to speak only Russian at home. The transition to

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[1] This is the verbatim statement of facts set forth in the Court of Appeals Opinion; a more complete version is set forth in the State's Response Brief.

speaking and learning English in school was challenging for them. The children were not involved in after school events provided at the school. The children's friends were rarely allowed to come to the house and the girls were not allowed to go to friends' houses or attend sleepovers.

The girls were taught that pants were for boys, not girls, and that it was not Christian for girls to wear pants. The girls were not allowed to cut their hair or wear makeup. To move out of the home, the girls had to get married. They were not allowed to tell their father "no."

The oldest daughter, L.K., moved out of the family home after she got married at nineteen. L.K. later disclosed to her husband that Kovalenko had abused her during her childhood. L.K. presumed that she had been the only daughter Kovalenko abused. But when L.K. received a call from her sister K.K., who was crying and very upset, L.K. became concerned for her sisters. L.K. confronted Kovalenko in front of her mother and asked if he was touching her sisters, Kovalenko denied it. L.K.

told Kovalenko that if she found out he was abusing her sisters, she would go to law enforcement.

L.K. then spoke with her aunts about the abuse she experienced and one aunt reported it to the Whatcom County Sheriff's Office. L.K. spoke with Detective Kevin Bowhay and gave a written statement about Kovalenko's abuse.

Detective Bowhay began an investigation and spoke with daughters C.K., E.K., and K.K. at the family home. Both C.K. and E.K. disclosed that Kovalenko had molested them repeatedly for several years.

Kovalenko was charged with multiple counts of child molestation and rape of a child.

Three of Kovalenko's daughters testified against him at trial: L.K., C.K., and E.K. Because of health issues, the parties agreed to take E.K.'s testimony by video deposition. They also agreed that the testimony would be played and admissible at trial.

After E.K.'s recorded testimony was played for the jury, jurors reported trouble hearing it. The agreed upon solution was to prepare a transcript of the testimony and reenact it with an "actor" reading E.K.'s responses.

Following Kovalenko's direct testimony, jurors reported issues hearing the testimony. Defense counsel suggested the same remedy as with E.K.'s testimony: providing a transcript and reading it. The parties agreed to reenact Kovalenko's direct testimony with an "actor" the next morning before his cross-examination.

The jury found Kovalenko guilty of rape of a child in the first degree, two counts of child molestation in the first degree, five counts of child molestation in the second degree, and three counts of child molestation in the third degree.

E. ARGUMENT IN OPPOSITION TO DISCRETIONARY REVIEW

Kovalenko requests this Court accept review of a number of issues he failed to preserve at trial and raised for the first time on appeal. He has not shown a conflict with a Supreme Court case or amongst Court of Appeals authority warranting acceptance of review. The Court of Appeals decision found Kovalenko waived his for-cause challenge to a juror because he had an opportunity to exercise a peremptory challenge as to that juror, but didn't, although he ultimately used all his peremptory challenges. Kovalenko claims that is a "newly invented additional requirement." On the contrary, it is an extension of the rationale in State v. Talbott[2] to the factual circumstances of this case.

Kovalenko also asks this Court to adopt new analyses and/or standards of review regarding a few issues, seeking to expand the application of heightened standards of review

[2] State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022).

previously limited to racial and ethnic bias issues. The Court of Appeals properly applied precedent as to the analyses regarding proof of actual bias, prosecutorial misconduct, and interpretation requirements. Kovalenko also asks this Court to overrule long-standing precedent, State v. Clayton[3], regarding a non-corroboration jury instruction in sexual abuse cases, but fails to address the standard for overruling precedent. Kovalenko's petition fails to demonstrate that his claimed issues fall within the narrow parameters for this Court's discretionary review under RAP 13.4(b).

1. The Court of Appeals decision determining that Petitioner waived his for-cause challenge as to one juror when he failed to exercise a peremptory challenge as to that juror, six times, was a logical application of this Court's rationale in State v. Talbott.

The purpose of peremptory challenges is to facilitate securing a fair and impartial jury. As such, it is reasonable to

[3] State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949).

require a defendant to exercise a peremptory challenge as to a juror the defendant believes should have been stricken for cause. Requiring a party to cure, or waive, the statutory and court-rule based peremptory challenge right maximizes a defendant's constitutional right to an impartial jury and fair trial in the first instance. It encourages a party to correct known errors when they have an opportunity to so, instead of waiting until appeal to contest the denial in order to obtain automatic reversal of the conviction if successful.

The rationale applied in State v. Talbott applies equally to the factual scenario where, as here, a defendant fails to cure an alleged erroneous denial of a for-cause challenge by not striking that juror when they had the opportunity to do so. Talbott held that a defendant who challenges a juror for cause may not appeal the denial of that challenge if the defendant did not exhaust their peremptory challenges, because a defendant cannot show prejudice from the retention of a particular juror if they fail to exhaust their peremptories. Talbott, 200 Wn.2d at

743-44. If defense knowingly chooses not to exercise a peremptory challenge to cure an alleged erroneous denial of a for-cause challenge as to that juror, they similarly cannot show prejudice from retention of that juror. In such circumstances, defense has made a strategic decision the juror was not objectionable, or certainly not as objectionable as the other jurors they chose to strike.

There is no constitutional right to peremptory challenges. Ross v. Oklahoma, 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). "They are a means to achieve the end of an impartial jury." Id. "[T]he forced use of a peremptory challenge is merely an exercise of the challenge and not the deprivation or loss of a challenge." State v. Fire, 145 Wn.2d 152, 162-63, 34 P.3d 1218 (2001), *citing,* U.S. v. Martinez-Salazar, 528 U.S. 304, 314-15 (2000). The U.S. Supreme Court has previously upheld state law requiring a defendant to use a peremptory challenge to cure an erroneous ruling regarding a for-cause challenge under the rationale that elevating the right

to an impartial jury over the "freedom to use a peremptory challenge as one wishes" does not violate due process. Ross, 487 U.S. at 90.

In Talbott, the court held that a defendant who does not exhaust their peremptory challenges cannot appeal the seating of an alleged biased juror. Talbott, 200 Wn.2d at 732. The court relied on a long line of precedent that "a party who accepts the jury panel without exhausting their peremptory challenges cannot appeal 'based on the jury's composition.'" Id. at 732, 743-44. The defendant is presumed then to be satisfied with the composition of the jury. Id. at 738-39. The court reached its conclusion in part because requiring exhaustion of peremptory challenges "encourages parties to cure jury-selection errors," thus promoting a defendant's right to an impartial jury and a fair trial. Id. at 738.

The court emphasized the benefits of requiring parties to exhaust peremptory challenges: promotion of the defendant's right to a fair trial; avoidance of unnecessary retrials; and

ensurance that peremptories are used "to promote, rather than inhibit, the exercise of fundamental constitutional rights." Talbott, 200 Wn.2d at 746. It noted to hold otherwise "could improperly discourage counsel from curing potential jury-selection errors … in order to obtain reversal on appeal." Talbott, 200 Wn.2d at 746-47.[4] *See also,* People v. Mills, 226 P.3d 276, 302 (Calif. 2010) ("a party may not complain on appeal of an allegedly erroneous denial of a challenge for cause because the party need not tolerate having the prospective juror serve on the jury.")

The Court of Appeals simply extended the rationale of Talbott to the specific factual scenario here, where defense used

[4] Requiring exhaustion of peremptories also encourages appropriate deference to the trial court's discretion in deciding for-cause challenges. *See,* Whiting v. State, 969 N.E.2d 24, 31 (Ind. 2012) ("Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty.")

all their peremptory challenges, but chose not to exercise one, six times, with respect to the juror they claimed exhibited actual bias. Instead, defense chose to exercise peremptories regarding jurors they had not challenged for cause. In applying the Talbott rationale to its conclusion, the Court of Appeals followed the analysis announced in Division III's case of State v. Munzanreder, 199 Wn. App. 162, 398 P.3d 1160 (2017): "We hold, consistent with Munzanreder, and the policy outlined Talbott, that a party that unsuccessfully challenges a potential juror for cause, and then does not use any of their peremptory challenges to remove the challenged juror, and instead accepts the jury panel with the challenged juror, waives the right to have the for-cause challenge considered on appeal."

Defense challenged for cause eighteen jurors[5] in addition to Juror 9. Juror 9 was one of only two challenges for cause not

[5] Jurors 5, 11, 17, 23, 27, 30, 33, 41, 45, 46, 47, 52, 55, 57, 59, 61, 62, 63

granted by the judge.[6] Defense counsel then exercised his six peremptory challenges as to jurors[7] none of whom he had challenged for cause. RP 428-30. Defense counsel had six times he could have stricken Juror 9, and chose not to six times. After the denial of the for-cause challenge, there was no question Juror 9 would be seated if defense counsel did not strike her with a peremptory. The judge even alerted defense counsel that he was on his sixth peremptory before he exercised his last one. RP 430. Defense did not object to the panel or request any extra peremptory challenges in order to remove Juror 9. RP 430-32. Under traditional waiver principles, Kovalenko waived his for-cause challenge by choosing not to cure the alleged error when he had an opportunity to do so.

As noted by the Court of Appeals, Kovalenko's desired approach could encourage the misuse of the peremptory

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[6] The other juror was Juror no. 52, who did not sit on the jury. RP 427.

[7] Jurors 34, 21, 13, 25, 22, and 1, in that order.

challenge process by discouraging "counsel from curing potential jury selection errors with peremptory challenges in order to obtain reversal on appeal." Kovalenko, 546 P.3d at 519. Petitioner's desired approach elevates a defendant's non-constitutional right to the use of peremptory challenges over the defendant's constitutional right to an impartial jury and fair trial. The Court of Appeals did not invent a new, additional, requirement, but applied Talbott's rationale to the factual circumstances of this case.

Moreover, the trial court did not abuse its discretion in denying the for-cause challenge. The juror's comments, when reviewed in context and as a whole, do not demonstrate that she was probably, actually biased.[8]

[8] The State relies on its underlying briefing as to this argument.

2. The Court of Appeals decision applied the correct standard of review in determining the trial court did not abuse its discretion in not sua sponte disqualifying Juror 9 for comments related to use of an interpreter.

Kovalenko asserts this Court should accept review because the trial court had an independent duty to excuse jurors who exhibit actual bias and the Court of Appeals applied the wrong standard of review in determining the trial court did not err in not excusing the juror. The Court of Appeal applied the correct standard of review because the juror's query did not implicate Kovalenko's national origin or immigration status. Kovalenko has failed to show that Juror 9's query about how long it should take a person to learn general English after having resided in the country for a long time reflected unmistakable bias, requiring the trial judge to intercede in the traditionally sacrosanct jury selection process.

The Court of Appeals acknowledged that trial courts have an independent duty to excuse a juror where that juror is actually biased. CrR 6.4; RCW 2.36.110. "Actual bias occurs

when there is 'the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.'" State v. Lawler, 194 Wn. App. 275, 281, 374 P.3rd 278, *rev. den.*, 186 Wn.2d 1020 (2016); RCW 4.44.170(2). A juror's mere expression of an opinion is not sufficient to sustain a challenge for cause. Id. at 281; RCW 4.44.190. "…[T]he court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190; State v. Sassen Van Elsloo,191 Wn.2d 798, 808, 425 P.3d 807 (2018). "The question is whether a juror with preconceived ideas can set them aside." Sassen Van Elsloo, 191 Wn.2d at 809 (internal citations omitted). The record must demonstrate a probability of actual bias, not merely a possibility, to prove actual bias. Id. at 808-09.

Noting that a trial court has to be cautious to avoid injecting itself into the jury selection process, the Court of Appeals distinguished the case relied upon by Kovalenko, State v. Gutierrez, 22 Wn. App.2d 815, 513 P.3d 812 (2022), from the facts of this case. "A court must not wade into the jury selection process sua sponte dismissing jurors absent an *unmistakable demonstration of bias.*" Lawler, 194 Wn. App. at 285 (emphasis added). The judge does not have an obligation to step in and clarify the extent of a juror's bias if the juror only expresses reservations about their ability to be impartial. State v. Phillips, 6 Wn. App. 2d 651, 666, 431 P.3d 1056 (2018), *rev. den.* 193 Wn.2d 1007 (2019).

In Gutierrez, the juror expressed actual bias by commenting that if the defendant was an immigrant, he was already guilty, that he shouldn't even be in the U.S. Gutierrez, 22 Wn. App.2d at 821. The court applied the GR 37 standard in order to determine whether the juror's comments reflected implicit racial bias. Id. at 822, 824.

Here, defense counsel asked if anyone had concerns about Kovalenko's use of an interpreter. During the ensuing discussion, Juror 9 queried as to how long someone has to live in a country to know the general language, in response to another juror's comment that he felt more respect for persons who make an effort to learn the language of the country in which they're living. She did not express any concerns or feelings about Kovalenko being Russian. Her query did not reflect that she could not be fair to someone who used an interpreter for legal proceedings. Voir dire is frequently used to educate jurors and to have an open discussion regarding topics of concern to the parties. In fact, after Juror 9's comment, two jurors indicated there is a distinction to be made between general knowledge of a language and knowledge required for legal proceedings, with one commenting that a person has a right to an interpreter if English is not their first language, and interpretation would assist them in understanding the proceedings better. One juror commented it is hard to learn

another language. RP 354. Defense counsel noted other jurors were responding to these comments by nodding their heads.

The Court of Appeals found that Juror 9's query did not amount to an unmistakable demonstration of bias warranting any sua sponte action on the part of the judge. Defense counsel did not inquire further of Juror 9 on this issue, did not move to strike her on this basis, or ask the judge to apply GR 37 in assessing Juror 9's ability to be fair. The Court of Appeals appropriately found that Juror's 9's comment about a person's general knowledge of English differed from the egregious actual bias expressed by the juror in Gutierrez. As noted by the Court, while Juror 9's comments might have reflected a *possibility* of prejudice, she did not express an opinion about Kovalenko's national origin or immigration status. Even if the Court were to apply the GR 37 standard, whether an objective observer, aware of implicit racial and ethnic bias and discrimination, could conclude the juror had exhibited *actual bias* with her limited comment, the answer should be no. The

Court of Appeals applied the relevant standard of review and correctly determined that the trial court did not abuse its discretion in failing to sua sponte excuse her for cause because Juror 9's comment did not reflect actual bias based on Kovalenko's national origin or immigration status.

3. The non-corroboration instruction used in this case accurately reflected the state of the law, and Petitioner fails to demonstrate that Clayton is incorrect and harmful.

Kovalenko asserts this Court should accept review in order to overrule this Court's long-standing precedent in State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949), that a non-corroboration instruction, reflected in RCW 9A.44.020(1), does not constitute an impermissible comment on the evidence. While Kovalenko references a comment in the WPICs disapproving the giving of a non-corroboration instruction and notes comments in some Court of Appeals decisions questioning the appropriateness of such an instruction, he does not address the standard for overruling precedent. In order to

overrule Clayton, the Court would have to determine that the case's holding that such a non-corroboration instruction does not constitute a comment on the evidence is incorrect and harmful. Moreover, while attitudes may have evolved over the years since Clayton was issued, the instruction's purpose remains valid today where just a decade or so ago the MeToo Movement commenced, and where there is a growing desire of jurors to want, and require, CSI type of corroboration in order to find the elements of a crime met. Child sexual offenses are frequently committed under circumstances not capable of corroboration.

Article IV, Section 16, of the Washington Constitution states "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. Art. IV §16. This provision prohibits judges from "conveying to the jury his or her personal attitudes towards the merits of the case or instructing a jury that 'matters of fact have been established as a matter of law.'" State v Levy, 156 Wn.2d 709,

721, 132 P.3d 1076 (2006) (*quoting* State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). A challenge to jury instructions is also reviewed in context to all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). To evaluate whether a jury instruction rises to a comment on the evidence, the court first examines the facts and circumstances of the case. Levy, 156 Wn.2d at 723; State v. Sivins, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). An instruction that accurately states the law is not an impermissible comment on the evidence. State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

In order to overrule precedent, the party seeking to overrule the precedent must demonstrate that the precedent is both incorrect and harmful. State v. Kier, Wn.2d 798, 804-05, 194 P.3d 212 (2008). "A clear showing" is required because the Court does not set aside precedent lightly. State v. Crossguns, 199 Wn.2d 282, 290, 505 P.3d 529 (2022).

In asserting the instruction here is worse than that in Clayton, Kovalenko neglects to include the entire language of

the instruction. While the language here did use the word "shall," the instruction in full read:

> In order to convict a person of rape of a child or child molestation, it shall not be necessary that the testimony of the alleged victims be corroborated. *The jury is to decide all questions of witness credibility*.

CP 83 (Jury Instruction 25) (emphasis added). The complete instruction reminded the jury they still need to determine credibility of the witnesses. Moreover, the use of the phrase "shall not be necessary" comes straight from the statute. RCW 9A.44.020(1). The purpose of the instruction is not to instruct the jury that the victim's testimony "is entitled to the *same* consideration as that of other witnesses," as argued by Kovalenko. The purpose of the instruction is to inform the jury that if the jury is convinced beyond a reasonable doubt of the defendant's guilt based solely on credible testimony of the victim, the lack of corroborating evidence shall not preclude them from finding the defendant guilty.

Kovalenko fails to address the required standard of review in seeking this Court's acceptance of review on this issue, and thus has not demonstrated that review is warranted in order to overrule Clayton's holding that a non-corroboration instruction does not constitute a comment on the evidence.

4. The Court of Appeals applied the correct prosecutorial misconduct standard to Kovalenko's claims of prosecutorial misconduct based on his religion.

Kovalenko does not address the RAP 13.4 criteria in asking this Court to accept review of his alleged prosecutorial misconduct issue based on his religion. Instead, he generally requests this Court to apply the heightened prosecutorial misconduct standard that has been reserved for racial bias misconduct claims. *See,* State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011). That is the sole basis for his request the Court accept review of this issue. The Court of Appeals applied the correct standard of review regarding Kovalenko's claim of

prosecutorial misconduct based on his religion. Therefore, review of this issue isn't warranted.

The heightened standard in Monday was adopted to address a prosecutor's flagrant or apparently intentional appeals to *racial bias* because such appeals "fundamentally undermine the principle of equal justice" and are "repugnant to the concept of an impartial trial." Id. at 680 (emphasis added). The Court of Appeals here applied the traditional standard of "flagrant and ill-intentioned" regarding claims of prosecutorial misconduct where no objection was lodged below. That is the same standard this Court applied to a claim of prosecutorial misconduct based on religion in State v. Dhaliwal, 150 Wn.2d 559, 576-81, 79 P.3d 432 (2003).

The Court of Appeals addressed the standard or review in a footnote. Kovalenko, 546 P.3d at 524 n.10. It declined to apply the heightened Monday, "flagrant or apparently intentional," standard of review applicable to racial bias claims because Kovalenko's claim did not involve an allegation of

racial bias. Kovalenko strains to characterize his religion-based claims as partially ethnically based by claiming his religious practices "were perceived as a Russian variation of Christianity." On the contrary, Kovalenko left Russia in order to be able to practice his religion here in the United States, and Kovalenko denied it was a Russian model of Christianity they practiced in his home. RP 889, 892.

The Court of Appeals appropriately applied the traditional standard of "flagrant and ill-intentioned" to Kovalenko's claim of prosecutorial misconduct, the same standard applied in Dahliwal to a claim of misconduct also based on religion. While the prosecutor improperly asked Kovalenko's wife what religion they observed, the remainder of the prosecutor's comments that implicated Kovalenko's religion, were in direct response to defense argument and Kovalenko's testimony and were not flagrant or ill-intentioned. The Court of Appeals applied the correct standard of review.

5. The Court of Appeals applied the correct analysis to Kovalenko's claim that the failure to translate certain testimony again, as it was being re-enacted, violated Kovalenko's constitutional rights.

Kovalenko asserts he did not receive "word for word" translation of certain repeated testimony and that this violated his constitutional right to testify and right to an interpreter. Kovalenko was given an interpreter for all the initial testimony during trial. The only times he didn't, with respect to preserved testimony taken pre-trial and re-enacted testimony due to jurors' difficulty in hearing the testimony, was at his request or with his agreement. The Court of Appeals did not misapply the legal standard in determining that Kovalenko waived his right to a second verbatim translation of testimony by agreeing to, and asking, not to have it interpreted.

The use of interpreters in court is a matter within the trial court's discretion as long as the defendant has the ability to understand the proceedings and to communicate with counsel. In re Personal Restraint of Pheth, 20 Wn. App. 2d 326, 332-33,

502 P.2d 920 (2021). A non-English speaking defendant has a statutory right to interpretation under RCW 2.43.030. State v. Aljaffar, 198 Wn. App. 75, 82-83, 392 P.3d 1070, *rev. den.*, 188 Wn.2d 1021 (2017). The court may rely on defense counsel's representations regarding their client's need for an interpreter. State v. Woo Won Choi, 55 Wn. App. 895, 902, 781 P.2d 505 (1989). A written waiver of interpretation is only required only by statute. RCW 2.43.030(1) (emphasis added); *see also*, Gonzales-Morales, 138 Wn.2d 374, 381, 979 P.2d 826 (1999).

Kovalenko never asserted at trial that his statutory right to interpretation was violated when previously interpreted testimony was presented again without interpretation. The Court of Appeals did not apply the wrong standard in addressing this claim, nor in concluding that Kovalenko waived this claim by failing raise it below. Kovalenko failed to meet his burden under RAP 2.5 to establish the constitutional violations related to the interpretation provided him. In fact, Kovalenko invited any error regarding the playing of E.K.'s

pre-trial testimony without interpretation by requesting the court inform the jury the video and re-enacted testimony was not going to be interpreted because it had already been interpreted.

As explained by the Court of Appeals, In re Personal Restraint of Khan, 184 Wn.2d 679, 363 P.3d 577 (2015) (plurality opinion), relied upon by Kovalenko, is distinguishable. In that case, the defendant was never provided an interpreter in the first place. Id. at 688. The case was remanded to determine if the defendant's fluency in English was such that he required an interpreter and should have been provided one. Id. at 694.

Kovalenko was provided an interpreter for all portions of the trial, except those that he agreed didn't need to be interpreted again. He waived any statutory rights regarding interpretation by failing to raise them at trial, and otherwise waived any constitutional claims by failing to raise them at trial

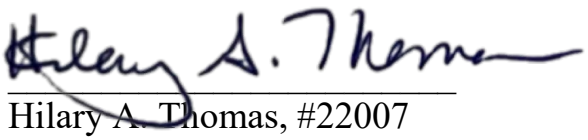
and inviting and/or agreeing not to have the pre-trial testimony and the re-enacted testimony interpreted again.

F. CONCLUSION

Based on the preceding analysis, the Court of Appeals opinion, and the State's briefing below, the Respondent respectfully requests that Kovalenko's Petition for Review be denied.

This document contains 5,044 words, excluding parts of the document exempted from the word count by RAP 18.17(b). DATED this 29th day of July, 2024.

Respectfully submitted,



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WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION

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