IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. CHRISTOPHER PETEK, Respondent.	**No. 102156-9** PETITIONER'S ANSWER TO RESPONDENT'S MOTION TO STRIKE

COMES NOW the Petitioner and submits its Answer to Respondent's Motion to Strike. Petitioner respectfully requests this Court deny the Respondent's Motion.

I. ARGUMENT

WA RAP 13.4(b) is as much a question as it is a rule. The question it asks, is why the Washington Supreme Court should

examine and rule upon a case. To answer that broad question, a petitioning party must qualify under one of the four subparts.

In its Petition for Review (hereinafter the "Petition"), the State chose three of those subparts and supplied Appendices C & D in support of the last subpart. Subpart (b)(4) requires a showing that, "[the petition involves] an issue of substantial public interest…." WA RAP 13.4(b)(4). Prior to Respondent's Motion to Strike, it went without saying that no lower court had considered the contents of Appendices C & D because those contents were not relevant to the issues in the lower courts.

Counsel for Respondent should be required to certify that it read RAP 13.4 and the cases it cited in support of its Motion to Strike. Unfortunately, reading comprehension cannot be guaranteed by a certificate. No case cited by Counsel for Respondent supports Respondent's position.

In re Hatcher does not recite what the offending appendix A was. The most that can be gleaned from the case is that appendix A was an attempt by one of the parties to supplement

the record with "…relevant documents." In re Hatcher, 196 Wash.2d 797, 834, 478 P.3d 1077, 1096 (2021).

In re Hatcher cited Nelson v. McGoldrick; Counsel for Respondent cited the same but also gave no case discussion. Nelson v. McGoldrick supplies a bit more detail than In re Hatcher:

> Finally, McGoldrick has moved to strike all or some portions of the Supplemental Brief of Respondent on the basis it refers to evidence not supported by the record. The supplemental brief, which is barely over nine pages long, contains numerous factual assertions unsupported by the record, **and evidence (including one and a half pages of deposition testimony) which was never submitted to nor considered by the trial court in deciding the summary judgment motion.** We grant the motion to strike those portions of the brief containing the factual material about which McGoldrick appropriately complains.

Nelson v. McGoldrick, 127 Wash.2d 124, 141, 896 P.2d 1258, 1266 (1995) (emphasis added).

The next case cited by Counsel for Respondent gives the least detail: "[d]efendant's motion to strike the appendices to the

State's brief is granted because they are not in the record." State v. Krall, 125 Wash.2d 146, 149, 881 P.2d 1040, 1041 (1994).

State v. Leach contains the most detail but this is where reading comprehension becomes crucial. In Leach, the petitioner moved to strike the respondent's brief because the respondent attempted to provide testimony about the impact of Division I's ruling:

> Since Division I of the Court of Appeals decided State v. Leach, 53 Wn.App. 322, [766] P.2d [1116] (1989), defense attorneys in Seattle Municipal Court have stopped requesting clarification of complaints that may be incomplete or unclear. Instead, the practice is now to raise it for the first time after a conviction, asking for a dismissal and citing as authority State v. Leach. It is considered malpractice to object to the sufficiency of a complaint prior to trial. Since this request for dismissal occurs immediately after the verdict, it is obvious that the alleged defect was known to the defendant at a time when it could have been remedied.

State v. Leach, 113 Wash.2d 679, 692–93, 782 P.2d 552, 558 (1989) (alterations in original). "Petitioner…is correct. **Cases on**

appeal are decided only on evidence in the record." Id. at 693 (emphasis added).

The State is not asking this Court to decide the case based upon Appendices C & D. The State is asking this Court to accept review if and only if the State satisfies the tests set forth in RAP 13.4(b). The State supplies Appendices C & D to meet one of those tests. Again, those tests are just for acceptance of review, not for ruling on the issues decided by the lower courts.

Appendices C & D cannot rationally be thought of as evidence pertaining to whether the Court of Appeals committed reversible error. In other words, if this Court were to accept the Petition, it naturally would not consider Appendices C & D in determining whether the Court of Appeals committed reversible error because Appendices C & D would not be relevant to those questions.

An analogy by contrast is appropriate before Counsel for Respondent misunderstands, points to the above paragraph, and declares victory in its Reply, claiming some kind of concession

that Appendices C & D are not relevant to any question. Had the State created and presented an affidavit of one of the arresting officers in this Case, in which that officer elaborated on what he believed or experienced when he arrested Mr. Petek and searched the trailer, then Respondent would be entirely correct in moving to strike. In that example, the cases cited by Counsel for Respondent would be on all fours. However, the State did not do that. Instead, it used Appendices C & D to demonstrate to this Court that the case has a broad impact on Washingtonians. Appendices C & D are not relevant to the underlying arrest and search, but they are relevant to satisfying the test imposed by RAP 13.4(b)(4).

Including data from the United States and Washington State governments provides factual support for what would otherwise be a bald and unsupported assertion of general impact. Citing to statistics and including source documents, as Petitioner did, is no different than a court's citation to statistics, journal articles, or studies. For example, other than anecdotal evidence

or life experiences, when this Court or any other court wants to discuss implicit bias, it points to sociological or psychological studies on the prevalence and manifestations of implicit bias. Those studies are not evidence in the underlying case; they are studies tending to illuminate the conclusion that the court is reviewing a broadly impactful question.

II. CONCLUSION

Petitioner respectfully requests that this Court deny Respondent's Motion to Strike.

I, Will Ferguson, certify that the number of words in this document are within the limits permitted by WA RAP 18.17. According to Microsoft Word, this document contains 1,061 words, excluding those portions exempted by rule.

DATED this 16th day of August, 2023.

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