CASE NO. 92277-2

SUPREME COURT OF THE STATE OF WASHINGTON

BRENT McFARLAND,

Petitioner,

v.

BNSF RAILWAY COMPANY,

Respondent.

RESPONDENT BNSF RAILWAY COMPANY'S ANSWER TO PETITION FOR REVIEW

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IDENTITY OF ANSWERING PARTY

Respondent BNSF Railway Company ("BNSF"), the defendant at trial and appellee on appeal, asks this Court to deny Mr. McFarland's *Petition for Discretionary Review in the Washington Supreme Court Pursuant to 13.4 RAP.*

COURT OF APPEALS DECISION

McFarland seeks review of the unpublished Court of Appeals decision in *McFarland v. Burlington N. Santa Fe Ry. Co.*, No. 32066-9-III, 2015 WL 4164784 (Wn. Ct. App. July 9, 2015). The Court of Appeals denied *Plaintiffs-Appellant's [sic] Motion for Reconsideration Pursuant to Rule 12.4 RAP* on August 11, 2015.

ISSUES PRESENTED FOR REVIEW

Whether the Washington Supreme Court should accept review of a case in which the Court of Appeals followed well-established law, reviewed the record, and applied the harmless error review standard to a trial court's failure to perform the analysis required under *Burnet v. Spokane Ambulance*[1] before excluding undisclosed witnesses.

[1] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) (if a lesser sanction would suffice, if the violation was willful or deliberate, and if the opponent's ability to prepare for trial was substantially prejudiced).

BNSF requests that the Washington Supreme Court decline McFarland's petition for review. However, if the Court accepts review, BNSF presents two issues that were raised but not decided in the Court of Appeals pursuant to RAP 13.4(d), as alternative bases for affirming judgment for BNSF: (1) whether exclusion of the witnesses' testimony was harmless because the described testimony lacked probative value, and (2) whether McFarland's repeated disregard for the trial court's scheduling orders justifies creating an exception to the *Burnet* test.

STATEMENT OF THE CASE

McFarland did not identify the three witnesses at issue in this appeal in his witness disclosures. These undisclosed witnesses were excluded by the trial court in response to a motion in limine filed by defendant/respondent BNSF.[2] When McFarland appealed the jury verdict for BNSF, BNSF conceded that the trial court did not perform a full *Burnet* analysis, on the record, before excluding undisclosed witnesses.[3] At trial, however, McFarland was able to offer the same purported evidence through other witnesses. McFarland also strategically decided

[2] RP Vol. I at 50:7–25.

[3] *Brief of Respondent, McFarland v. Burlington Northern Santa Fe Railway Co.*, 2015 WL 4164784 (No. 32066–9–III) at 32.

not to call other properly disclosed witnesses, including an expert,[4] for the same topics.

On appeal, the Court of Appeals reviewed nearly 800 pages of Clerk's Papers and over 650 pages of trial transcript and held that the proffered testimony of the excluded nondisclosed witnesses was needlessly cumulative, given the admitted testimony[5]; thus, the Court of Appeals concluded the exclusion of the witnesses, even without a *Burnet* analysis, was harmless error. McFarland now in essence asks the Washington Supreme Court to rule that the Court of Appeals cannot perform a harmless error review based on cumulative testimony if the trial court did not do so first.[6]

ARGUMENT SUMMARY

Petitioner Brent McFarland's *Petition for Discretionary Review in the Washington Supreme Court Pursuant to 13.4 RAP* fails to meet any of the four considerations set forth in RAP 13.4(b) to trigger additional discretionary review by the Washington Supreme Court. The Court of

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[4] CP 200.

[5] *See generally* Clerk's Papers and Trial Transcript; *see also McFarland*, 2015 WL 4164784, at *3 ("Ample testimony from multiple witnesses showed the existence of a hydraulic installer at the Pasco facility after Mr. McFarland's injury, but the installer was not being utilized. . . . [A]dditional testimony would be largely cumulative. Under *Jones*, when the excluded testimony is largely cumulative, like here, then a *Burnet* violation is harmless. The court's ruling did not amount to reversible error.").

[6] *Petition for Discretionary Review in the Washington Supreme Court Pursuant to 13.4 RAP* ("PETITION") at 1.

Appeals held, based on the substantial factual record before it, that the trial court's exclusion of three of McFarland's (undisclosed) witnesses from trial without first performing a full *Burnet v. Spokane Ambulance* test on the record constituted harmless error. Contrary to McFarland's contentions in his petition for review, longstanding Washington law prohibits courts from reversing judgments if the only error therein is harmless. No conflict among cases, constitutional question, or unresolved issue of substantial public importance exists. This Court should decline to review the Court of Appeals' decision.

ARGUMENT

1. McFarland's Petition for Review should be denied.

If this Court decides to excuse McFarland's late filing, it should reject McFarland's petition because the petition does not meet the standards set forth in the RAP for acceptance of discretionary review.[7]

RAP 13.4(b) states that discretionary "review will be accepted by the Supreme Court" only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

[7] BNSF filed a separate answer to McFarland's motion for extension. *See BNSF Railway Company's Answer to Motion to Extend Time.*

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

BNSF examines each consideration in turn below.

A. Neither RAP 13.4(b)(1) nor (b)(2) applies because the *McFarland* opinion does not conflict with Washington Supreme Court or other Court of Appeals cases.

McFarland argues that Division Three's *McFarland* unpublished opinion is at irreconcilable odds with this Court's opinion in *Jones v. City of Seattle*[8] and Division One's opinion in *In re Dependency of M.P.*[9] To the contrary: Division Three in the instant case applied the same well-established law governing harmless error review as was applied in *Dependency of M.P.* and *Jones*.

McFarland's contention that the trial court needs to consider the cumulative nature of the testimony in order for the Court of Appeals to conclude that error in excluding evidence is harmless stands Washington law on its head.[10] Rather, determining if excluded evidence would have

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[8] *Jones v. City of Seattle*, 179 Wn.2d 322, 356, 314 P.3d 380 (2013), as corrected (Feb. 5, 2014).

[9] *In re Dependency of M.P.*, 185 Wn. App. 108, 340 P.3d 908 (2014).

[10] McFarland suggests that the trial court must consider harmless error for the Court of Appeals to do so. *See* PETITION at 4 (". . . the McFarland opinion purports to authorize the Court of Appeals to assume the trial court's role and make decisions on admissibility in the first instance and, thereafter, decide whether the trial court's Burnet violations were harmless in the complete absence of any trial court rulings on these issues";". . .

been cumulative is part of the reviewing court's well-established harmless error analysis, and is conducted by examining the trial record.

The Washington Supreme Court recognized in 2013 that

> Washington courts have ***never*** reversed civil judgments for harmless error. RCW 4.36.240 ("The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."); *see also* Laws of 1854, § 71, at 144; 28 U.S.C. § 2111 ("the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.") . . . .

Saleemi v. Doctor's Associates, Inc., 176 Wn.2d 368, 381–82, 292 P.3d 108 (2013) (emphasis added). As Justice González noted in 2014:

> From our very beginnings, Washington has rejected the common law rules under which even trivial trial error could result in reversal. Instead, it has been the law here since before our constitution was written that . . . no judgment shall be reversed or affected by reason of [harmless] error or defect.

State v. Shearer, 181 Wn.2d 564, 577, 334 P.3d 1078 (2014) (González, J., concurring in part and dissenting in part) (internal citation and quotation omitted). Not only was the Court of Appeals therefore well within its right to review the record to consider whether harmless error occurred, it was required to do so.

McFarland empowers the Court of Appeals to decide that Burnet violations were 'harmless' even though such issues were given no consideration at all by the trial court").

The *Jones* court, not surprisingly, recognized this longstanding Washington law. In stating its intent to apply the harmless error standard to *Burnet* violations, the *Jones* court explained that "courts traditionally apply harmless error analysis to witness-exclusion in contexts other than *Burnet* violations." *Jones*, 179 Wn.2d at 356.

Under harmless error review, "the exclusion of evidence which is cumulative or has speculative probative value is not reversible error." *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169–70, 876 P.2d 435 (1994). "The evidence need not be identical to that which is admitted; instead, harmless error, if error at all, results where evidence is excluded which is, in substance, the same as other evidence which is admitted." *Id.* at 170. *See also Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 173–74, 947 P.2d 1275 (1997) (exclusion of evidence harmless where it was substantively same as admitted evidence); *Mason v. Bon Marche Corp.*, 64 Wn.2d 177, 179, 390 P.2d 997 (1964) (no reversible error where no offer of proof and no showing that excluded evidence differed "in any material respect" from that which was admitted); *Gaffney v. Scott Pub'g Co.*, 41 Wn.2d 191, 194, 248 P.2d 390 (1952) (no reversible error where other testimony was "in substance, the same as" the excluded evidence), cert. denied, 345 U.S. 992, 73 S.Ct. 1131, 97 L.Ed. 1400 (1953).

In September 2015, Justice González reiterated that *Burnet* violations are subject to harmless error review:

> [W]hile it is an abuse of discretion for the trial court to impose harsh discovery sanctions without finding the three *Burnet* factors, it is not per se reversible error. *See Jones v. City of Seattle*, 179 Wn.2d 322, 338, 360, 314 P.3d 380 (2013) (holding *Burnet* error can be harmless); *see also Blair v. TA–Seattle E. No. 176*, 171 Wn.2d 342, 351, 254 P.3d 797 (2011) (declining to do the *Burnet* analysis on appeal for the first time). Reversal is strong medicine and will not be administered when it is plain from the record that the error was harmless. *See Jones*, 179 Wn.2d at 360, 314 P.3d 380 (citing *Holmes v. Raffo*, 60 Wn.2d 421, 424, 374 P.2d 536 (1962)).

Keck v. Collins, No. 90357-3, 2015 WL 5612829, at *8 (Wash. Sept. 24, 2015) (González, J., concurring).

McFarland, however, ignores RCW 4.36.240 and insists that the Court of Appeals cannot consider harmless error unless the trial court first interpreted the trial evidence for the Court of Appeals. Appellate decisions involving harmless error analysis do not rely on a trial court considering harmless error first, since by definition trial courts do not believe or necessarily realize that they have made an error. *See, e.g., Kimball*, 89 Wn. App. at 174 (concluding that omitted evidence as generally described by the appellant would be cumulative to evidence actually presented and in the record, without any mention of relying on interpretation of this evidence by the trial court below). In addition, appellate courts have the

benefit of a full record to review, including the entire trial transcript. Appellate judges do not need trial court judges to interpret a trial transcript for them.

Here, the Court of Appeals reviewed the same trial testimony that was presented before the trial judge, and found that admitted evidence made the same point as the evidence that was excluded without the full *Burnet* analysis. It held that "when the excluded testimony is largely cumulative, like here, then a *Burnet* violation is harmless," noting that:

> [a]mple testimony from multiple witnesses showed the existence of a hydraulic installer at the Pasco facility after Mr. McFarland's injury, but the installer was not being utilized. A BNSF supervisor testified that he and Mr. Russell came up with an idea for a hydraulic installer, and that some facilities were now using the hydraulic installer developed by Mr. Russell. Finally, Mr. McFarland's counsel was able to and did argue his theory that a hydraulic installer was safer for the employees.

McFarland, 2015 WL 4164784, at *3. That the trial court never heard and decided on Mr. Russell's (or Mr. Holm's or Mr. Pillar's) actual testimony is beside the point with respect to the harmless error analysis; as in *Kimball*, the Court of Appeals had McFarland's briefing and pretrial materials in the record to determine what the witnesses would have said,

and the trial transcript to determine whether that testimony would have been cumulative to evidence presented at trial.[11]

(1) There is no conflict with Jones.

Contrary to McFarland's contentions,[12] the *Jones* court did not rely solely on the trial court's determinations of admissibility or inadmissibility in determining whether the trial court's error was harmless. Rather, though the *Jones* court referred to the trial court's exclusion of evidence related to Mark Jones' alcohol consumption, it went through the record before it and explained how "evidence that the three excluded witnesses would have given was cumulative." *Jones*, 179 Wn.2d at 357. The *Jones* court applied the harmless error standard articulated in numerous other Washington cases, as explained above.

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[11] Insofar as McFarland may argue that not enough was known about the proposed testimony of Pilar and Holm, therein lies the problem: "Under Rule of Evidence 103(a)(2), a party may not challenge a trial court's ruling excluding evidence unless 'the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.'" *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 26, 864 P.2d 921 (1993). BNSF argued this failure to make an offer of proof before the Court of Appeals. *See, e.g., Brief of Respondent, McFarland*, 2015 WL 4164784 (No. 32066–9–III), at 3.

[12] McFarland argues that "[t]his Court's opinion in *Jones* made it crystal clear that the trial court's exhaustive consideration of the admissibility (e.g., relevancy issues, undue prejudice, and cumulative evidence objections) and the trial court's exercise of discretion in making evidentiary rulings were crucial to this Court being capable of determining that the Burnet violations were 'harmless.'" PETITION at 4. McFarland provided no pinpoint citation to *Jones* here, so BNSF is left to guess the point at which McFarland believes Jones is "crystal clear" on this issue.

(2) Nor is there conflict with Dependency of M.P.

Division Three's *McFarland* opinion does not conflict with Division One's *Dependency of M.P.* opinion, as the decisions in the two cases were dependent on the specific facts in the record before each reviewing court.

As in *McFarland* and *Jones*, in *Dependency of M.P.*, the reviewing court considered whether the trial court's exclusion of a party's witnesses without performing a *Burnet* analysis was harmless error. *Dependency of M.P.*, 185 Wn. App. at 118. It noted that the court in *Jones* had held that the error in the case was harmless because the excluded testimony was largely irrelevant or cumulative. *Id.* In the case before it, however, Division One found that it was:

> unable to determine whether the excluded testimony would have been cumulative, irrelevant, or otherwise inadmissible. The admissibility of the excluded testimony was not litigated below and ***there is little in the record*** to indicate, in more than general terms, the nature of the testimony expected to be elicited from the excluded witnesses. ***On this record***, we are unable to say the exclusion of Bramlett's witnesses was harmless. Accordingly, the orders establishing the guardianship and dismissing the dependency must be reversed.

Id. (emphasis added). Thus, Division One's holding with respect to the harmless error standard out of *Jones* was that, ***on the specific record before it***, the court was "unable to say the exclusion . . . was harmless."

Here, using the same methodology but a different set of facts, Division Three examined the record before it and determined that the exclusion was harmless. *McFarland*, 2015 WL 4164784, at *3. Division Three and Division One followed the same law and the same procedure. They examined the records from the courts below, and made a decision based on two different sets of information. That Division One concluded that it could not tell if the error was harmless from the record in *Dependency of M.P.* does not put its decision at odds with Division Three's *McFarland* opinion, in which the court found the record sufficient to arrive at the conclusion that the exclusion was harmless.

Thus, McFarland has not pointed to a discrepancy between Division Three's approach here and the approach in any Washington Supreme Court or Court of Appeals cases. The two cases McFarland cites in support of this proposition support the conclusion that Division Three appropriately considered the harmless error standard, as does examination of the many other cases applying the standard. As such, McFarland's petition does not meet the requirements of RAP 13.4(b)(1) or (b)(2).

B. RAP 13.4(b)(3) does not apply because there is no significant constitutional question.

RAP 13.4(b)(3) triggers review only if "a significant question of law under the constitution of the State of Washington or of the United

States is involved." RAP 13.4(b)(3). Because McFarland did not present constitutional arguments in its petition, no basis exists to review under RAP 13.4(b)(3). *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) ("Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: 'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'") (internal citations omitted).

C. RAP 13.4(b)(4) does not apply because the *McFarland* opinion raises no issue of substantial public interest in Washington.

McFarland's final argument is that this Court should accept review under RAP 13.4(b)(4) ("if the petition involves an issue of substantial public interest that should be determined by the Supreme Court").[13] The Court considers three factors to decide whether an issue involves substantial public interest: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994) (considering whether substantial public interest exception applied to negate general rule that appeal should be dismissed where only moot questions or abstract propositions are involved).

[13] PETITION at 5.

Reviewing courts have found matters to be of continuing and substantial public interest where the issue has serious or ongoing impact. For example, in *City of Seattle v. Johnson*, 58 Wn. App. 64, 66–67, 791 P.2d 266 (1990), the court reviewed the constitutionality of an ordinance under which the defendant was charged, even though the defendant's conviction was reversed on other grounds, noting that the constitutionality of the ordinance was a matter of continuing and substantial public interest. In *In re Marriage of Ortiz*, 108 Wn.2d 643, 646, 740 P.2d 843 (1987), the court accepted review on grounds that the issue was of substantial public interest where question involved whether a holding would be retroactively applied to void an escalation clause in a divorce decree requiring increasing in child support obligation based on cost of living index increases.

Here, McFarland claims that the issue is a matter of public interest "for multiple reasons, but most notably because *Burnet* violations are not uncommon, and consequently present a significant challenge to the efficient administration of justice."[14] He does not, however, attempt to quantify how "common" *Burnet* violations allegedly are. In reality, the most recent case prior to *McFarland* to consider whether a trial court abused its discretion in excluding a witness noted that "[t]he record clearly

[14] PETITION at 5.

demonstrates that the trial court considered all three *Burnet* factors on the record." *In re Marriage of Halligan*, 188 Wn. App. 1018 at *5 (June 15, 2015) (unpublished). In other words, McFarland at best only identifies the vaguest of public interests and does not explain how reviewing the Court of Appeals' unpublished decision would provide clarity in furtherance of public policy. The "efficient administration of justice" that McFarland emphasizes is best served by preventing appellate courts from overturning judgments based on harmless error.

While consistency for courts may be a public interest, there is no inconsistency or lack of clarity here for the Washington Supreme Court to address. *Jones* clearly establishes that a trial court must perform a *Burnet* analysis if it excludes witnesses or evidence as a sanction. It also makes clear that a reviewing court will examine the effect of exclusion without a *Burnet* analysis under the harmless error standard, consistent with RCW 4.36.240. In *McFarland*, the Court of Appeals followed *Jones* to the letter, holding that exclusion without a *Burnet* analysis was an abuse of discretion (as BNSF conceded) and then applying the harmless error standard. No inconsistency remains to be addressed. No additional guidance is needed.

Nor is the exact "issue" likely to recur, in the sense that Division Three applied established law to the unique factual scenario of this case

and concluded that a trial court's exclusion of evidence was harmless error. There is no recurring issue of law to address, unlike in *City of Seattle v. Johnson* or *Ortiz*, above.

Furthermore, as a practical matter, an unpublished appellate court opinion, hinging on the specific evidentiary facts of a case, does not constitute a matter of public concern to the same degree as a published case in light of GR 14.1, which states that, "[a] party may not cite as an authority an unpublished opinion of the Court of Appeals." RAP 13.4(b)(4) therefore provides no support for accepting discretionary review.

2. If the Washington Supreme Court grants McFarland's petition, BNSF asks it to review two issues that were raised but not decided in the Court of Appeals.

If this Court grants McFarland's petition, BNSF respectfully asks it to consider other grounds for affirming the trial court's decision, presented in BNSF's briefing to the Court of Appeals.[15]

A. The exclusion was harmless because the described testimony lacked probative value.

As BNSF argued in its briefing before the Court of Appeals, in addition to being cumulative, exclusion of the witnesses' testimony was

[15] Under RAP 13.4(d), if a "party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer."

also harmless because in light of the other evidence presented at trial, their testimony could not have proven negligence.[16] Whether there is a better or newer tool is not the standard for determining if a current tool is reasonably safe under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq* ("FELA").

Under the FELA, the inquiry is whether the railroad's chosen method was reasonably safe, not whether it could have employed a safer, newer, more comfortable, or more convenient alternative. *Stillman v. Norfolk & W. Ry.*, 811 F.2d 834, 838 (4th Cir. 1987) ("The district court sustained the Railroad's objection to this testimony, noting that under the FELA, the relevant inquiry was whether the Railroad had exercised reasonable care, not whether the procedures used by the Railroad could have been made safer. We think that the district court acted properly . . . . As the district court correctly observed, the question the jury had to decide was whether the Railroad had exercised reasonable care for the safety of Stillman, not whether the Railroad could have employed a safer method for installing gears."); *Soto v. Southern Pacific Transp. Co.*, 644 F.2d 1147, 1148 (5th Cir. 1981) ("That there were other, arguably more

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[16] The Court of Appeals considered this argument with respect to excluded documentary evidence (which is not at issue in McFarland's petition for review), but not with respect to the excluded witnesses. *McFarland*, 2015 WL 4164784, at *4. The Court of Appeals had already ruled that the excluded witness testimony was cumulative, and therefore did not need to discuss the testimony in the relevance context.

advanced, methods in use by the defendant for [accomplishing the task at hand] is of no significance where the method in use by [the plaintiff] was not an inherently unsafe one."). Where "[t]he task at which [plaintiff] was injured was one that could be safely done by the method which he was told to use and was using," the railroad is not negligent by failing to provide an alternative method or tool for accomplishing his task. *Soto*, 644 F.2d at 1148.

In this case, the Court of Appeals properly articulated that standard relating to an excluded exhibit:

> Mr. McFarland claims the hydraulic installer would have been safer or easier. But, under *Soto*, the existence of a new tool is irrelevant in a FELA action if the existing tool used is not shown to be unsafe. Mr. McFarland cannot show the 2011–2012 JSA was relevant to negligence, because he did not establish the 12-pound sledgehammers were unsafe. Mr. McFarland failed to produce evidence of injuries from the 12-pound sledgehammers (other than his own) at BNSF or other railroads; no expert testified repetitive sledgehammer swinging presented ergonomic risks BNSF should have investigated or that BNSF failed to follow any safety management principles; and Mr. McFarland's medical expert did not testify that sledgehammers were unsafe.

McFarland, 2015 WL 4164784, at *4.

The Court of Appeals' conclusion applies equally to the excluded testimony (which at the risk of repetition only related to use of the alternative tool):

> [T]here was no showing the sledgehammer Mr. McFarland used was unsafe, there is no logical nexus between the evidence and the fact to be established; and there is no probative value. Thus, under ER 401, ER 402, and ER 403, the evidence was irrelevant and inadmissible.

Id. at *5.

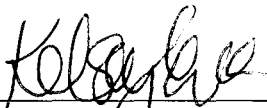
B. McFarland's behavior justifies creating an exception to *Burnet.*

The Court of Appeals did not decide BNSF's argument that McFarland's patterned defiance of witness disclosure obligations during discovery and the pretrial period justifies creating an exception to *Burnet* once the parties reach trial. This reasonable approach was suggested by Justice González' concurrence, joined by Justices Owens and Fairhurst, in *Jones*, 179 Wn.2d at 374, to "restore [witness exclusion] to the reasonable discretion of the trial court" at trial, when opposing counsel lacks adequate time to effectively prepare their case in light of new witnesses.

CONCLUSION

McFarland has had his day(s) in court, and the Court of Appeals decided this matter correctly, in accordance with well-established statutory framework and case law. McFarland fails to meet any of the four standards set forth in RAP 13.4(b), and his petition for Washington Supreme Court review should be denied. If it is granted, BNSF seeks review of the two issues raised, but not decided, in the Court of Appeals.

Dated October 9, 2015
Respectfully submitted,



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CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp , PLLC, whose address is 1218 Third Avenue, Suite 2500, Seattle, Washington, 98101.

I hereby certify that the original and one true and correct copy of *BNSF Railway Company's Answer to Motion to Extend Time, Declaration of Kelsey Endres in Support of BNSF Railway Company's Answer to Motion to Extend Time,* and *Respondent BNSF Railway Company's Answer to Petition for Review* were sent to the Washington Supreme Court via FEDEX and a copy of each served upon the following via U.S. mail:

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DATED this 9th day of October, 2015, at Seattle, Washington.

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