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NO. 94995-6

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF PATRICK MCGAFFEE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Patrick McGaffee was committed as a sexually violent predator in 1998. The trial court granted him an unconditional release trial in 2013, and he now seeks review of the Court of Appeals decision affirming the unanimous jury verdict determining that he continued to be a sexually violent predator. In the Court of Appeals, McGaffee argued that the trial court made erroneous evidentiary rulings and that the State committed misconduct during its closing argument. Using the proper standard of review on each issue, the Court of Appeals rejected each claim in an unpublished decision. *Det. of McGaffee v. State*, No. 73727-9, 2017 WL 3478091 (Wash. Ct. App. August 14, 2017). Specifically, the court found that the trial court did not err in determining that a risk assessment tool known as the Structured Risk Assessment: Forensic Version (SRA-FV) meets standards of admissibility; the trial court did not abuse its discretion when it allowed expert testimony comparing McGaffee's risk to other sex offenders; McGaffee was not prevented from presenting his defense; and the prosecutor's comments in closing were proper statements of the law or reasonable inferences drawn from the evidence.

Review of the Court of Appeals decision should be denied because McGaffee fails to present argument or other basis to believe the decision meets any of the four standards outlined in RAP 13.4(b). None of the court's opinion conflicts with any other published case, there is no significant issue of

constitutional law, and there is no substantial public interest that should be determined by this Court.

II. STATEMENT OF THE ISSUES

There is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. If this Court were to accept review, the following issues would be presented:

A. **Did the Court of Appeals properly determine a risk assessment tool that is widely accepted and capable of producing reliable results meets the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) test for admissibility?**

B. **Was evidence of statistical data properly admitted through expert testimony where the data was relied upon by the expert in forming his opinion and was relevant in assessing McGaffee's risk if he were unconditionally released?**

C. **During his testimony, McGaffee's expert provided his opinion regarding a particular psychological instrument despite a trial court ruling prohibiting the testimony. Did the Court of Appeals correctly hold that the trial court ruling did not prevent McGaffee from presenting his defense?**

D. **Where the trial court declined to ask a juror's question but did not prohibit McGaffee from asking the same question, was McGaffee prevented from presenting his defense?**

E. **Where McGaffee misrepresents the record in his claim of prosecutorial misconduct, did the Court of Appeals correctly determine no misconduct took place?**

III. STATEMENT OF THE CASE

During his early adulthood, Patrick McGaffee repeatedly approached isolated boys and solicited sex from them at playgrounds and parks in Everett, Washington. RP 06/11/15 at 473-474. McGaffee suffers from pedophilic

disorder and a fetishistic disorder focused on the clothing of boys and young men whom he finds attractive. RP 06/17/15 at 1065. At his unconditional release trial, McGaffee admitted to orally and anally raping these boys and then obtaining their socks as mementos. RP 06/17/15 at 1065. He later used the sock as a masturbatory aid. RP 06/17/15 at 1065.

In late 1991, McGaffee became infatuated with a young-looking 15-year-old boy. RP 06/16/15 at 791; RP 06/11/15 at 513. McGaffee never met the boy but stalked him by following him home from school, calling his phone and threatening to rape him, and breaking into the boy's house and stealing mementoes from his room. CP at 1097-1099. Eventually, a neighbor caught McGaffee after McGaffee broke into the boy's house and waited in his room intending to rape him. CP at 1099. In 1992, McGaffee pleaded guilty to residential burglary and attempted second degree rape. CP 1121-1122. McGaffee served about six years for his offense. CP 2136.

Following McGaffee's prison sentence, he was committed as a sexually violent predator in 1998 and remanded to the control, care, and treatment of the Department of Social and Health Services (DSHS) where he has lived in total confinement ever since. CP 2136. While at the Special Commitment Center (SCC), McGaffee satisfied his sexually deviant interest in children by engaging in sexual activity with young-looking, special needs residents. RP 06/16/15 at 822-823. McGaffee traded items for the resident's clothing and used the clothing to fanaticize about sex with children. RP 06/17/15 at 974-975.

He also obtained child-themed media (books, movies, and video games) with a focus on Daniel Radcliff, the child actor who portrayed Harry Potter. RP 06/16/15 at 822-823.

In 2013, McGaffee petitioned for, and was granted, an unconditional release trial. CP 2061-2082. The trial began on March 3, 2014, but was continued that same day in order hold a *Frye* hearing on an instrument known as the Structured Risk Assessment: Forensic Version (SRA-FV). RP 06/03/15 at 14. The court held the hearing over multiple days and ultimately ruled that the SRA-FV satisfied *Frye* and was admissible at trial. RP 10/21/14 at 4-7.

When the trial recommenced more than a year later, the State presented evidence from Dr. Harry Goldberg, who diagnosed McGaffee with pedophilic disorder and fetishistic disorder concluding those disorders amounted to a mental abnormality. RP 06/17/15 at 1065. Dr. Goldberg also assessed McGafffee's risk using a method known as structured clinical judgment. RP 06/18/15 at 1137. He used multiple actuarial tools to consider static (unchanging) risk factors, an instrument intended to assess dynamic risk factors (also referred to as psychological vulnerabilities), considered protective factors, and looked at case-specific factors. RP 06/18/15 at 1139-1140. Dr. Goldberg concluded McGaffee was likely to reoffend. RP 06/18/15 at 1135-1136.

McGaffee called Dr. Brian Abbott, who testified that he did not believe McGaffee suffered from a mental abnormality. RP 06/23/15 at 1533-1534. As

a result, Dr. Abbott testified he did not conduct a risk assessment. RP 06/23/15 at 1533-1534. He did, however, criticize Dr. Goldberg's methodology, including Dr. Goldberg's use of an instrument called the Violence Risk Appraisal Guide – Revised (VRAG-R) and the SRA-FV. RP 06/23/15 at 1610-1614, 1620-1621. Dr. Abbott testified McGaffee was not likely to reoffend but he did not testify regarding the basis for that opinion. 6/23/15 VRP at 1595. Following Dr. Abbott's examinations, the court allowed the jury to propose questions. RP 06/24/15 at 1778-1786. The court declined to ask one question of Dr. Abbott that specifically related to the basis for his opinion about McGaffee's risk. *Id.*

In closing, the State argued Dr. Abbott's opinion was unsupported and compared and contrasted Dr. Goldberg's testimony to Dr. Abbott's. RP 06/24/15 at 1833. McGaffee objected, claiming the State had impermissibly shifted the burden of proof. *Id.* The court overruled the objection and denied McGaffee's motion for a mistrial. *Id.* The jury found McGaffee continued to meet the definition of an SVP. RP 06/25/15 at 1886.

McGaffee appealed from the jury verdict arguing procedural and constitutional error as well as prosecutorial misconduct. Slip Opinion at 1. On August 14, 2017, the Court of Appeals found no error or misconduct and affirmed the jury's verdict. *Id.* McGaffee now seeks review.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

This Court's review of a Court of Appeals decision is granted only in four limited circumstances: (1-2) when the decision conflicts with a decision of this Court or a published decision of the Court of Appeals; (3) the decision involves a significant constitutionally-based question of law; or (4) when the issues addressed in the petition are ones of "substantial public interest." RAP 13.4(b).

Failure to present this Court with argument on the relevant issues waives them. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Much like a party who raises constitutional issues on appeal, a petitioner should present considered arguments to this Court. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). When a petition does not cite to applicable authority or develop his argument, this Court need not consider the claim. *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004) (*citing State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990)). The Court and an adversary should not be expected "to do counsel's thinking and briefing." *State v. Chapman*, 140 Wn.2d 436, 453, 998 P.2d 282 (2000) (internal quotations omitted).

McGaffee's petition fails because it does not address any of the factors outlined in the rule, and thus fails to develop any bases for review by the Court. McGaffee fails to develop argument, cite to relevant authority, and discuss the relevant factors. His petition for review should be denied.

A. McGaffee Fails to Show the Decision Upholding the Admission of the SRA-FV Warrants Review.

1. The Court of Appeals Decision Comports with Every Other Appellate Court Decision.

McGaffee fails to satisfy the RAP 13.4(b) requirements regarding the SRA-FV. He does not and cannot show that the Court of Appeals' decision affirming the trial court conflicts with any other published decision because its decision on the issue of the SRA-FV concurs with the published decisions that came before it. *In re Det. of Ritter*, 192 Wn. App. 493, 502, 372 P.3d 122 (2016) (Div. III), *review denied, In re Det. of Ritter*, 180 Wn.2d 1028, 331 P.3d 1172 (2014); *In re Det. of Pettis*, 188 Wn. App. 198, 211, 352 P.3d 841 (2015) (Div. II), *review denied In re Det. of Pettis*, 184 Wn.2d 1025, 361 P.3d 748 (2015). Here, Division I also came to the same conclusion as the two other divisions. Slip Op. at 5-6. It even noted that the State's experts in *Ritter* and *Pettis* used the tool "in the same way that it was used in this case," despite McGaffee's claim to the contrary here. *See* Pet. for Review at 10. McGaffee has thus failed to show any conflict and review is not appropriate.

2. The Court of Appeals Applied the Proper Standard of Review the Trial Court's *Frye* Ruling.

Nevertheless, McGaffee urges this Court to accept review arguing the trial court improperly applied the *Frye* standard. Pet. for Review at 14. McGaffee's argument fails.

The Court of Appeals applied the correct legal standard on review. When a Washington court considers the admissibility of novel scientific evidence, it follows the standard this Court set out in *Frye*. *State v. Copeland*, 130 Wn.2d 244, 255-56, 922 P.3d 1304 (1996) (*citing generally Frye*, 293 F. 1013). Under that standard, the court must determine whether "(1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results." *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 175, 313 P.3d 408 (2013). Whether evidence meets the *Frye* test is a mixed question of law and fact. *Pettis*, 188 Wn. App. at 204-05. The Court of Appeals applied these standards when considering McGaffee's appeal.

As below, McGaffee's argument focuses on outdated issues unrelated to the *Frye* standard. He complains that use of the SRA-FV instrument has not been endorsed in a peer-reviewed article and that it has yet to be cross-validated on a modern population. Pet. for Review at 12-14. However, since the *Frye* hearing here, peer reviewed literature has been published supporting the use of the SRA-FV. Slip. Op. Footnote 2, *citing Pettis*, 188 Wn. App. at 208-09.

In addition to correctly reviewing the issue, the Court of Appeals noted that the courts have already determined the SRA-FV, used in the way the

State's expert used it, meets the *Frye* standard in Washington. Slip Op. at 5-6; *Ritter*, 192 Wn. App. at 502; *Pettis*, 188 Wn. App. at 209-11. Since there is no conflict in the opinions, there is no basis for review.

3. The *Frye* Issue Here Does Not Implicate a Significant Question of Constitutional Law.

This Court could accept review if the issues involved a significant question of constitutional law. RAP 13.4(b)(3). However, none of McGaffee's arguments about the SRA-FV are constitutional in nature. Indeed even the *Frye* court did not reach its decision on constitutional grounds. *Frye*, 293 F. at 1014. Because there is no colorable constitutional issue to address, McGaffee fails to meet the standard in RAP 13.4(b)(3).

B. None of the RAP 13.4(b) Factors Are Applicable to The Court's Evidentiary Rulings.

The State must prove that the SVP's mental abnormality makes him more likely than not to commit predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18). While "more likely than not" has been explained in a numerical concept as more than 50 percent, the State is not required to prove any particular actuarial tool estimates risk exceeding 50 percent. *In re Meirhofer*, 182 Wn.2d 632, 645, 343 P.3d 731 (2015). Instead, risk assessment in SVP cases commonly follow a structured clinical judgment approach in which experts use tools that assess both static and dynamic risk factors, as well as apply their own clinical judgment. *In re Det. of Sease*, 190 Wn. App. 29, 44, 357 P.3d 1088 (2015) (*citing Meirhofer*, 182 Wn. 2d at 646).

The preeminent professional organization for sex offender treatment and assessment – the Association for the Treatment of Sexual Abusers (ATSA) – supports this process as well. RP at 1722-1724. Dr. Goldberg followed ATSA's recommendation and common practice when he assessed McGaffee's risk.

At trial, Dr. Goldberg testified that percentile-ranking data is helpful in considering how rare an offender's particular score is, that the data provides a baseline for the expert to begin a risk analysis, and that it provides specificity regarding the person's level of risk. RP 06/17/15 at 1002-03, 1017. Dr. Goldberg testified that other forensic psychologists in his field rely upon the percentile ranking and that its use is "a standard practice." RP 06/17/15 at 1023. Based on the testimony and argument, the trial court found the evidence was relevant and admissible, and would be helpful to the jury. RP 06/17/15 at 1031. On review, the Court of Appeals agreed that percentile ranking was "certainly relevant" and its probative value was not outweighed by risk of unfair prejudice or confusion of the issues. Slip Op. at 8-9. In so finding, the Court of Appeals properly determined the trial court did not abuse its discretion in allowing testimony about the percentile-ranking data. *Id.*

McGaffee fails to make any argument regarding RAP 13.4(b) regarding the percentile ranking data and does not present this court with anything new to consider. His arguments were rejected by the trial court and by the Court of Appeals. McGaffee does not claim that the Court of Appeals' decision on percentile rank conflicts with another published opinion; nor could he because

there are not any. The issue raised by McGaffee is merely an evidentiary one based in the Rules of Evidence and is not constitutional in nature. Review of this issue should be denied.

C. McGaffee was Not Prevented from Presenting His Defense and Does Not Present a Basis for Review of That Issue.

1. McGaffee's Expert Testified Extensively About His Opinion Regarding a Particular Instrument.

In his petition to this Court and below, McGaffee claims that the trial court improperly prevented his expert, Dr. Abbott, from providing his opinion about the Violence Risk Appraisal Guide – Revised (VRAG-R). *Id.* He thus argues that the court's limitation on his expert's testimony arises to constitutional error. Pet. for Review at 16. However, the Court of Appeals correctly determined the record does not support his claim that Dr. Abbott's testimony was limited in any meaningful way. Slip Op. at 5.

In forming his opinion, Dr. Goldberg, considered the VRAG-R, which is a forensic tool for estimating risk based on static factors. RP 06/17/15 at 1052. Dr. Abbott, however, held the view that the instrument was not appropriate for forensic use. RP 06/23/15 at 1611. Following the State's objection during Dr. Abbott's testimony, the court ruled he could testify as to why he did not use the instrument but not why he thought the instrument should not be used in general application. RP 06/23/15 at 1608. It also prevented Dr. Abbott from testifying about the speculative outcome of research "because you can't predict into the future." RP 06/23/15 at 1617.

Despite the court's ruling, Dr. Abbott offered extensive testimony about what he perceived to be the different flaws related to the VRAG-R. RP 06/23/15 at 1610-19. For instance, Dr. Abbott testified "It's not ready for forensic use based on its limitation."[1] He testified the instrument should not be used because the sample population used to normalize the instrument was not like McGaffee,[2] and that the results from the instrument have not been reproduced or cross-validated using other populations.[3] Thus he had "no confidence the results from that sample would apply to any other group of its time." *Id.* Regardless of the trial court's ruling, Dr. Abbott explained precisely why he thought these limitations made the test unreliable in a forensic setting. *Id.*

The only criticism Dr. Abbott could not share with the jury was his expectation regarding the outcome of future research on the VRAG-R. 6/23/15 VRP at 1616-17. The Court of Appeals correctly upheld this ruling, finding that the trial court did not abuse its discretion in limiting this speculative testimony. Slip Op. at 5. Nonetheless, Dr. Abbott's testimony was rife with predictive statements about the replication of the VRAG-R study. For instance, Dr. Abbott was allowed to offer the possibility that, "the results of the original research [might] diminish or decline." RP 06/23/15 at 1618. Additionally, Dr.

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[1] RP 06/23/15 at 1611.

[2] RP 06/23/15 at 1614.

[3] RP 06/23/15 at 1615.

Abbott testified that "[W]e don't know if the risk estimates that they found in the VRAG sample will reproduce in any other group." RP 06/23/15 at 1612. Even though the court properly prohibited speculative testimony about the future of the VRAG-R, Dr. Abbott was still able to provide complete testimony about his prediction.

McGaffee presents this Court with no basis to review the Court of Appeals' decision. Because his claim is factually inaccurate, the issues he presents do not involve significant questions of constitutional law or conflict with other decisions. Review should be denied.

2. The Court of Appeals Correctly Reviewed the Trial Court's Decision to Not Ask a Juror's Question.

McGaffee also seeks review of the Court of Appeals' finding that the trial court did not abuse its discretion when it refused to ask a particular juror question. Pet. for Review at 16. Not only does he fail to present this Court with any basis for review, he also fails to explain how the judge's decision not to ask a question prevented him from asking that same question.

McGaffee cites note 3 of *U.S. v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992) in support of his claim of error. Pet. for Review at 16. But *Sutton* does not support his position and does not represent a conflict with existing case law. Rather, the Court of Appeals' decision here adheres to *Sutton*: "we hold that allowing juror-inspired questions in a criminal case is not prejudicial per se, but is a matter committed to the sound discretion of the trial court." *Id.* at

1005. Note 3 of the *Sutton* opinion recognizes that a juror's question could alert "the attorneys to points that bear further elaboration." *Id.* Similarly, McGaffee here could have asked Dr. Abbott for the basis of his risk assessment opinion during direct examination or recalled him to testify about the subject following the jury question.

The trial court's decision not to ask a juror question is ultimately irrelevant to whether McGaffee was permitted to present a defense. As the Court of Appeals observed, McGaffee did not present the defense because he "chose not to ask Dr. Abbott about, or have Dr. Abbott discuss, the assessment he had used." Slip Op. at 13. The trial court's decision to not ask the jury question was entirely within its discretion and did not affect McGaffee's right to present his defense.

D. The Court of Appeals' Decision Correctly Found McGaffee's Trial Free from Prosecutorial Misconduct.

As with McGaffee's other issues, he fails to present this Court with any argument regarding how the RAP 13.4(b) factors applies to his prosecutorial misconduct claims. Consequently, this Court should deny review of the Court of Appeals' decision. The Court of Appeals applied the correct standards on review, the constitutional issues related to potential misconduct are well-established and not implicated here, and a decision on an idiosyncratic closing in a sexually violent predator case is not an issue of substantial public interest.

In a sexually violent predator commitment case, the State bears the burden of proof beyond a reasonable doubt. RCW 71.09.060, .09.090. Certainly, it would be improper for a prosecutor to comment on the respondent's failure to present evidence because he has no duty to do so. *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011) (citing *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003); *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990)). However, "a prosecutor has wide latitude to argue reasonable inferences from the evidence." *Thorgerson*, 172 Wn.2d at 453.

A prosecutor's statements during closing argument should be reviewed in context with the rest of the argument. Slip Op. at 14 (*citing State v. Magers*, 164 Wn.2d 174, 191-92, 189 P.3d 126 (2008)). On review, the court must also consider whether the opponent of the statement objected timely. *Id.* When the appellant alleges prosecutorial misconduct for the first time on appeal, he must establish the alleged "misconduct was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Hecht*, 179 Wn. App. 497, 503, 319 P.3d 836 (2014). Absent a showing of "flagrant and ill-intentioned" misconduct reviewing courts reject the claimed misconduct.

McGaffee challenges four statements. Pet. for Review at 17-19. Recognizing that McGaffee only timely objected to one of the four, the Court

of Appeals properly reviewed three under the "enduring and resulting prejudice" and found no misconduct.

1. The Court of Appeals Found the State Did Not Shift the Burden

A prosecutor generally cannot comment on the defendant's failure to present evidence because the defendant has no duty to present evidence. *Thorgerson*, 172 Wn.2d at 453. However, a prosecutor's argument about the quality or amount of evidence does not necessarily shift the burden. *Id.* at 466-467; *see also State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009).

Here, the Court of Appeals followed existing case law and found it did not apply because the State did not comment on the amount and quality of the evidence when it criticized the defense's expert's opinion. Slip Op. at 18. The State's comments went to the credibility of Dr. Abbott's opinion that McGaffee was not likely to engage in predatory acts of sexual violence if not confined to a secure facility. The Court of Appeals properly found:

> "The State clearly explained to the jury that the State had the burden of proof. The State also explained that the jury was the sole judge of credibility and outlined numerous reasons why it should find the State's witness more credible than McGaffee's witness."

Slip Op. at 18.

As the Court of Appeals determined, the State's arguments did not shift the burden; it simply asked the jury to consider the veracity of the two expert's

testimony about risk. 6/24/15 VRP at 1833-34. Moreover, the State repeatedly reminded the jury that it had the burden and that the burden was beyond a reasonable doubt. 6/24/15 VRP at 1818, 1819, 1832. The Court of Appeals' decision does not conflict with any law, the issue does not involve a constitutional question of law, and there is nothing of significant public interest involved in the State's comments. This Court should deny review.

2. The State's Analogy Did Not Trivialize the Standard of Proof.

McGaffee argues review should be accepted because the State's "soup" analogy trivialized the beyond a reasonable doubt standard. Pet. for Review at 18. The Court of Appeals correctly determined the State's analogy was not misconduct. Slip Op. at 17.While he is correct that the State may not trivialize its burden, McGaffee's argument ultimately fails because the analogy had nothing to do with the standard of proof. The State argued that a *risk assessment* is like a soup because a risk assessment – like soup – is only complete when all of the ingredients are included. 6/24/15 VRP at 1832-33. McGaffee's argument simply mischaracterizes the analogy.

3. The State Did Not Call on the Jury to Judge the Case Based on Subjective Beliefs.

Though McGaffee did not object at trial, he now claims the State committed misconduct when it told the jury, "That means *that based on the evidence,* you believe there's at least 50 percent plus something that he will reoffend..." Pet. for Review at 18 (emphasis added). He argues this statement

was improper because it called on the jury to find for the State based on subjective beliefs. *Id.* However, the Court of Appeals properly noted that the State's statement called for the jury to base its decision on the evidence and was not misconduct. Slip Op. at 14-15. Additionally, McGaffee does not argue the RAP 13.4(b) factors and presents nothing new to this Court to warrant review.

4. The State Did Not Ask the Jury to Find In Its Favor Based on a Lack of Evidence.

Without argument and without providing any context to the State's "vacuum" analogy, McGaffee argues the State committed misconduct by misstating the law. Pet. for Review at 19. The Court of Appeals found no misconduct. Slip Op. at 15-16. As the Court of Appeals recognized, the State did not argue there was a lack of evidence. Rather, it argued that a vacuum – like a mental abnormality – is not something that can be observed directly. 6/24/15 VRP at 1868-69. Instead, the phenomenon must be observed by looking at the circumstantial evidence surrounding it. Slip Opinion at 15. The State actually asked the jury to "look at the evidence [ ] to determine whether the condition still exists." *Id.* There is no basis for review of the Court of Appeals' decision regarding McGaffee's claims of prosecutorial misconduct and his petition should be denied.

E. None of the Issues Raised in McGaffee's Petition are of Substantial Public Interest Because They Have No Effect Outside the Context of His Case.

Though McGaffee presents this Court with no argument as to why review is proper, he cites to the RAP 13.4(b)(4) in his issue statements. Pet. for Review at 1. Under that factor, review is appropriate if the Court of Appeals' decision involves an "issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). An "issue of substantial public interest" is one that has the potential to affect parties not involved in the litigation. *See generally State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Even if McGafee had presented proper argument, the issues he presents fail to meet the standard.

The majority of the issues presented by McGaffee relate to expert testimony grounded in well-founded, existing law. Both the trial court and the Court of Appeals correctly followed precedent and applied the correct standard related to the SRA-FV and the percentile ranking issues. There is little public interest in rehashing these well-settled principles. McGaffee's arguments regarding his right to present a defense and prosecutorial misconduct are not supported by the record so even if the issues were of public interest, the facts are not as McGaffee claims.

Additionally, McGaffee's challenges to the trial court's discretionary evidentiary rulings fail to meet the "substantial public interest" test because the standards and application of the rules of evidence are well established and there is nothing unique about the trial court's rulings. The rulings involved simple application of law to facts to determine relevancy, ER 403 balancing, and the

admissibility of facts and data relied upon by an expert testifying about his opinion. Nothing about the evidentiary rulings warrant review by this court.

More generally, there is no issue of "substantial public interest" because the Court of Appeals' decision is unpublished and, consequently, holds no precedential weight beyond McGaffee's specific circumstance. GR 14.1. McGaffee's petition fails to meet the standard addressed in RAP 13.4(b)(4) or any other part of the rule. Consequently, this Court should deny review of the Court of Appeals' decision.

V. CONCLUSION

McGaffee's petition fails to present a basis for review of the Court of Appeals' decision on any of the four issues he presents. None of the issues present significant questions of constitutional law or are of substantial public interest. The only relevant cases concur with the court's decision. This Court should deny review.

RESPECTFULLY SUBMITTED this 12th day of October, 2017.

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NO. 94995-6

WASHINGTON STATE SUPREME COURT

In re the Detention of: PATRICK MCGAFFEE, Respondent.	DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On October 12, 2017, I sent via electronic mail, per service agreement, true and correct copies of Answer to Petition for Review and Declaration of Service, addressed as follows:

Kathleen Shea
Washington Appellate Project
wapofficemail@washapp.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this ___ day of October, 2017, at Seattle, Washington.

_____
ELIZABETH JACKSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

October 12, 2017 - 2:49 PM

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