Supreme Court No. 10374-1
COA No. 38726-7-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent

v.

DAVID LARUE PETTIS,
Defendant/Petitioner.

ANSWER TO DEFENDANT'S PETITION FOR REVIEW

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I. INTRODUCTION

David Pettis's alleged errors were all unobjected to at trial. Thus, this appeal is about error preservation and whether the alleged errors are both constitutional and manifest.

Although the Court of Appeals found two instances of manifest constitutional error – a subheading on a single PowerPoint slide presented during the testimony of data analyst, Mark Voightlaender, and testimony from Pettis's son that he believed Pettis "had something to do with his mother's death," neither of which the State repeated or argued in closing – the Court of Appeals found those errors harmless beyond a reasonable doubt given the strong circumstantial case against Pettis. The Court of Appeals found two other alleged unpreserved errors were not manifest.

Pettis's case makes a poor vehicle by which this Court may advance the law regarding the extent to which a witness who

summarizes voluminous records may discuss those records beyond merely reciting them for the jury. Pettis made no objection below to this testimony on evidentiary or constitutional grounds. Regarding the PowerPoint slide, the State conceded its impropriety, and a majority of the Court of Appeals found the error harmless beyond a reasonable doubt.

Similarly, this case is a poor vehicle by which this Court may clarify existing law on whether certain witness testimony is an explicit or near explicit comment on a defendant's guilt. The Court of Appeals applied the proper legal analysis to determine whether the unobjected-to testimony amounted to manifest constitutional error. Even assuming the testimony commented on Pettis's guilt, the evidence presented at trial, much of which Pettis minimizes, establishes any error was harmless beyond a reasonable doubt.

II. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

III. STATEMENT OF RELIEF SOUGHT

Respondent seeks denial of Mr. Pettis's petition for review of the opinion (Op.) issued by the Court of Appeals on August 20, 2024.

IV. ISSUE PRESENTED

Where the Court of Appeals properly applied this Court's precedent when analyzing Pettis's unpreserved claims that testimony commented on his guilt, finding some alleged errors harmless beyond a reasonable doubt and other errors not manifest, does Pettis's petition fail to present any RAP 13.4(b) basis for review?

V. STATEMENT OF THE CASE

Factual Background.

Pettis's actions, both before and after his wife's death, established an overwhelming circumstantial case that he committed first degree premeditated murder.

In the year before Peggy Pettis's death, Pettis rekindled a sexual relationship with a former girlfriend, Robin Kaylor, who lived in New York. RP 1114, 1120. Pettis became noticeably hostile toward Peggy,[1] although he told law enforcement there had never been a harsh word between them. RP 310, 322, 445; Ex. P-26 at 00:38:37-00:38:50.

Pettis professed love for Kaylor by text and telephone; in November 2017, six months before Peggy's death, Pettis requested Kaylor's ring size, promising, "[t]here will come a day

[1] The opinion below refers to Mrs. Pettis as Peggy. For consistency, the State does so here. No disrespect is intended.

in the not so distant future I will be on my knee in front of you." RP 428, 459, 684-85, 726-27; Ex. P-60. However, Kaylor told Pettis she was not a homewrecker. RP 1121.

After returning from a visit to Kaylor in March 2018, and concerned he was losing her, Pettis placed an advertisement to sell his farm, surprising multiple people, including Peggy, and their daughter, Elizabeth Culp. RP 853, 1193-94; *see also* Ex. P-10 at 1186, 1230, 1268. Pettis's written communications continued to profess his love for Kaylor and his disillusionment and conflict with Peggy. RP 853, 858; Ex. P-10 at 1186, 1230, 1232, 1259, 1397, 1558.

Peggy never told her sister, Melissa Mabe, that she planned to move to New York with Pettis. RP 282-83, 292. However, in the month preceding Peggy's death, Pettis contacted a New York property owner, making plans to purchase a home to share with Kaylor, telling the homeowner the "earliest time

frame" for purchase was August. Ex. P10 at 1667-77, 1856; *and see* Ex. P-10 at 1653-54; RP 1132. On May 21, 2018, approximately one month before Peggy' death, Pettis told the seller, "Let's see what the next 30 days brings," indicating he would attempt to expedite his farm's sale. Ex. P-10 at 1667-77. Four days before Peggy's death in June 2018, the property owner told Pettis she imminently planned to reduce the price of her home and list it with a realtor; Pettis responded, "Darn! Hoping to be there next month"; "Wish I could get there sooner." Ex. P-10 at 1856. Pettis and Kaylor also discussed potential employment for Pettis in New York on May 20, 2018. Ex. P-10 at 1658.

Both before and after Peggy's death, Pettis told others she had dementia, a claim unsupported by Peggy's medical provider and unobserved by many who were close to her; in fact, she

continued paying household bills. RP 280-81, 293, 333, 433, 450-51, 560-61, 882-83; Ex. P-29 at 00:33:48-00:34:24.

Three days before Peggy's death on June 25, 2018, Pettis received an email confirming a recent $150,000 life insurance policy for Peggy, applied for on March 23, 2018, and which may have covered suicide or accidental overdose, had taken effect that day. RP 810-11. In the month preceding the approval of the policy (and Peggy's death), Nancy Porter, who lived with the Pettises, observed Pettis regularly, if not daily, ask Peggy whether she had "call[ed] and [got] that life insurance." RP 452. During a June 5, 2018, physical examination required for that policy, which Peggy passed, Pettis insisted the medical office's completion of the insurance paperwork was urgent. RP 878.

Peggy's life was also insured by two other policies – a $250,000 policy through her employer covering accidental

overdose, and the other, a $150,000 policy, which did not cover suicide or accidental overdose. RP 653-57, 1078-79.

Peggy died on June 25, 2018, from a lethal amount of hydrocodone, as well as trazadone, cyclobenzaprine, and diphenhydramine, the levels of which were within nontoxic limits. RP 342, 370, 475, 496. However, the combination of the hydrocodone and other drugs caused her to die more quickly. RP 496.

After Peggy's death, Pettis claimed to some family members that, after she went to bed, he fell asleep on the couch, awoke to a "thump," and found her on the bedroom floor. RP 298, 327, 1102-03. To at least one person, however, Pettis contradicted that claim by stating he was in bed with Peggy, felt her get out of bed, and when she did not return, he left the bed and found her on the floor. RP 942. Although Pettis summoned paramedics, he did not attempt to wake the Porters, as he did not

want to "bother" them. RP 328-29, 335, 458, 462, 578. In the days following her death, multiple witnesses observed Pettis did not appear to be grieving. RP 298, 1089-92, 1103.

Pettis made statements that Peggy may have had a heart attack, may have aspirated on water, or may have accidentally overdosed on hydrocodone. RP 298, 399, 463, 1088, 1102-03, 1139. Notably, those causes of death may have resulted in life insurance payouts from one or more policies.

In his July 2018 police interview, Pettis denied Peggy was suicidal, claiming she was the most "upbeat person you could ever imagine." Ex. P-26 at 00:23:06-00:23:16. By the conclusion of his October 2018 police interview, however, Pettis claimed he had begun to think Peggy's pain and lack of sleep led her to commit suicide. Ex. P-29 at 01:09:20-01:11:30, 01:24:48-01:25:42.

In telephone calls to the medical examiner, Pettis demanded an expedited finding of Peggy' cause of death, using abusive language in his final call, and falsely claiming he could not bury Peggy until a cause of death was determined so he could collect the life insurance; however, Peggy's burial expenses were fully paid on July 6, 2018, prior to Pettis's calls. RP 591, 596, 912-14, 918-20; *see also* Ex. P-26 at 00:53:44-00:54:18.

Law enforcement's investigation revealed Peggy's prescriptions primarily consisted of anti-inflammatory medications, but she was prescribed 12 hydrocodone pills in February 2018 and was directed to take one-half tablet three times per day as needed for pain. RP 896, 898. Many witnesses observed Peggy generally took Tylenol for pain, would swallow whole pills, did not grind her pills, and disliked hydrocodone. RP 287, 289, 314-15, 339, 432, 442, 462, 570, 935, 938, 948-49, 1097, 1099-1100, 1263-65. None of the pill bottles located in

the Pettis home bore her name, but investigators found at least one bottle bearing Pettis's name. RP 400-05, 520.

Pettis, conversely, was prescribed hydrocodone as recently as March 2018, trazadone in 2015, and cyclobenzaprine in March 2018, as well as after Peggy's death in June 2018. RP 868-71, 894-95. In a police interview, Pettis initially denied he was ever prescribed trazadone. Ex. P-29 at 00:16:40-00:16:53.

During the weeks after her death, Pettis gave conflicting accounts of Peggy's ingestion of hydrocodone on the night she died: he first claimed she took a hydrocodone and went to bed; then he claimed she had a drink and a hydrocodone and went to bed; then he stated she had some ice cream with alcohol and went to bed; eventually, he told his son David,[2] Tanya Ibach (David's partner), Culp, and Kaylor, *he* had crushed hydrocodone, put it

[2] Because Pettis and his son share the same first and last name, the State refers to Pettis' son by his first name. No disrespect is intended.

in ice cream, and gave it to her. RP 330, 572, 982, 1141-42. On the night of Peggy's death, Mrs. Porter observed Pettis offer to make Peggy's ice cream, which was unusual as he normally asked Peggy to prepare it. RP 456.

Conversely, during his police interview, Pettis denied admitting he crushed Peggy's pills on the night of her death and was adamant he never ground or mixed pills into Peggy's drink. Ex. P-29 at 00:24:10-00:24:30, 01:16:18-01:16:54; Ex. P-30 at 00:12:47-00:14:45. Instead, Pettis told law enforcement Peggy consumed two to three hydrocodone pills per night and, on the night of her death, *she* made the ice cream with hydrocodone. Ex. P-26 at 00:34:18-00:34:41.

Before her death, Pettis told Ibach that Peggy took pain medications "once in a while," and never mentioned her hydrocodone usage to Kaylor. RP 570, 1140. Yet, Pettis asserted

to another witness Peggy consumed up to five or six hydrocodone pills at a time. RP 941.

Culp blamed Peggy's boar injury and her hydrocodone use for her death, claiming the boar injury was the reason people "don't believe [Pettis] loved [her] mom." RP 1041. Culp, like her father, contended Peggy regularly took hydrocodone[3] and believed she stole up to 800 hydrocodone pills from her mother-in-law four years earlier; however, Culp did not know why Peggy would then need her own hydrocodone prescription in 2018.[4] RP 971-72. Also contrary to Peggy's other family's testimony, Culp claimed Peggy had difficulty swallowing pills and would

[3] Three other defense witnesses testified they observed Peggy take pills, which they assumed to be hydrocodone, on one or two occasions, by grinding them into ice cream. RP 1232, 1248, 1251, 1255-56.

[4] Peggy was injured by a boar in 2016, was prescribed 45 hydrocodone tablets hydrocodone, and was directed to take one every four hours. RP 333, 900. Before 2016, her most recent hydrocodone prescription was in 2011. RP 902.

grind them. RP 980. Yet, when interviewed by police shortly after Peggy's death, Culp instead claimed Peggy had no difficulty swallowing and was unaware of her grinding pills. RP 981, 1200.

During trial, the State called approximately 40 witnesses. RP 4-7. Among those witnesses was Mark Voightlaender, an investigative analyst with roughly 2,500 hours of specialized training and experience, including with the FBI. RP 821-22. Law enforcement requested Voigtlaender analyze the Pettises' electronic communications, consisting of nearly 100,000 lines of data. RP 714, 822.

The State's pretrial motion in limine seeking to admit Voigtlaender's testimony represented he would present a summary of the electronic data if it were properly authenticated and admitted. CP 17. During the pretrial hearing on that motion, the State indicated the parties were still attempting to agree on

whether the summary of the data would be admissible, and the prosecutor asked the defense to notify the State as to its specific objections to permit the State to redact the exhibits prior to trial. Peck RP 92. The court reserved on ruling on the motion. CP 17; Peck RP 93. The court held no further discussion on the motion. RP at *passim*.

Given the volume of data, Voigtlaender prepared a demonstrative PowerPoint presentation to assist with his testimony. RP 716-17, 823-24. In his investigation, Voigtlaender sorted through the 100,000 lines of data, using statistical analysis and a process known as "aggregation and normalization."[5] RP 714-15, 823. During his review, Voigtlaender looked for trends and aberrations to determine the frequency and

[5] "Aggregation and normalization" referred to the process by which Voigtlaender "put all the [electronic] data [such as emails and text messages] together in a similar form, matching froms to froms, tos to tos, identifying time stamps, and creating a chronological list." RP 719, 862.

comparability of communications between Pettis and Peggy and Pettis and Kaylor. RP 717-22. For instance, Voigtlaender noted an increase in communication between Pettis and Kaylor during February and April 2018 but "a steep dropoff in May to June." RP 724.

In analyzing the data, Voigtlaender noted specific word usage and patterns. For instance, Peggy tended to engage in short conversations, using small words and single sentences. RP 726. Voigtlaender noted Pettis often concluded his conversations with "Love you," rather than "I love you" and often misspelled "you're" as "your." RP 729, 738.

Voigtlaender pointed to a specific message in which Pettis clearly used Peggy's account to send a message. RP 730. Knowing Peggy usually sent short messages and Pettis had access to her accounts, Voigtlaender analyzed communications between accounts held by Peggy and Kaylor, opining some

messages may have been sent by Pettis, using Peggy's electronic device. RP 731-33. Voigtlaender discussed three conversations between Peggy's account and Kaylor – the first indicating Peggy would rather share Pettis with Kaylor than lose him;[6] the second indicating Peggy's comfort in knowing that, "when I'm gone," Pettis would have Kaylor as a "fishing buddy"[7] and "someone to love him"; and, after Kaylor stated she could not "consider being a homewrecker," the third,[8] which stated, "Please do not consider yourself a homewrecker … if something happens, I need to know that he will be looked after and I think you're the best choice for

[6] This message also used the term "in love," a phrase used 14 times in the data set by only Pettis, excluding this message. RP 733-34.

[7] In the data set, Voigtlaender found 49 instances in which Pettis referenced fishing, and no messages associated with Peggy's account that did so.

[8] These messages occurred shortly after Kaylor messaged Peggy stating she (Kaylor) was not the answer to Pettis's happiness, and Pettis did not have "realistic expectations" of her. RP 741-42.

that." RP 732-35, 735-37, 741-43. Voigtlaender opined there was a "mental shift" in the author of the messages – from "I would rather share" to "when I'm gone," to "if something happens." RP 737, 745. About these "transitions," Voigtlaender stated, without objection:

> So one thing that's -- that's interesting that I've used in other investigative arenas, whether it be -- particularly, let's look at counter-intelligence move: When someone is an insider threat and decides to do harm to people that they have sworn to uphold or love, and that person then does something violent, we look at patterns of what changes, if there's something in the way they communicate that communicates where their mindset is, particularly if it's around a time stamp or time frame where there's a lot of emotional upheaval, are there phrases, are there indications of what that individual is looking at or what they're doing.
>
> To me these three conversations, that -- the phraseology, the timing, the internet protocol addresses, and the type of conversation that was being committed at those times -- or that was being made on Peggy's account seem to fit a time where there was -- particularly with these phrases, the first message a wife was saying to a potential lover that I'm willing to share my husband with you. The

second message was that when I'm gone, which is a transition from sharing to saying he's all yours. And then to the third one, if something happens. So that progression from those three messages, that looked to be from Dave, became a significant item of potential consideration in this trial.

Q. Is it unusual for individuals to use those kind of phraseology, those kinds of transitions?

A. I don't know if it's unusual or not. It was noteworthy in this because of what else was happening, so I can't speak to . . .

Q. Okay. When you speak about what else was happening, are you talking about what else was happening around the time of these messages?

A. Correct. Yes. The rest of the -- the other messages that -- that -- the mental and emotional state that I saw Dave was in as I looked at the other messages, these became significant, and other activities that he had done, so, for instance --

MR. CHARBONNEAU: Objection, Your Honor. Narrative.

THE COURT: Sustained.

RP 832-35.

Voigtlaender often used the term "significant" while testifying. *E.g.*, RP 724, 725 ("in terms of data analysis, when we look at this, this is the point where we look at it and say, okay, there's something significant at this time. The data says this. Now we need to delve into those individual data points … to see whether we can find what correlates with that or what potentially causes … those communication anomalies"), 726, 848.

At trial, Voigtlaender did not discuss specific messages after March 2018.[9] RP 716-858. Voigtlaender admitted he did not look at every piece of data. RP 824. During cross-examination, Voightlaender agreed Pettis's misspellings are

[9] Voigtlaender testified there were "significant spots, November, January, March, June, where there were significant deviance from the norm that I looked at." RP 718. He also discussed the frequency with which Pettis texted and called various individuals through June 2018. RP 721.

common and he did not search Peggy's account for similar mistakes. RP 864. In closing, the defense argued:

> The state is trying to prove that it's Mr. Pettis using his wife's account, and I got a little confused at some of the stuff that was just shown and with the witness that, because these messages are so close in time and the evidence was it's coming off the same router, that's going to show it's Mr. Pettis. My house has one router. My guess is most homes have one router.
>
> If my wife and I are laying in bed on our iPads and we're texting Mr. Charbonneau … and we both know him, we're both texting him, and … she looks onto my iPad and she tells him, "Well, you know, you didn't tell Kyle that," and then … we say goodnight at roughly the same time because we're going to bed …, the state would have you believe that that's just not me and her in bed together on our iPads because this is coming off of one household router, but it has to be her faking my identity to talk to Mr. Charbonneau. This hasn't proved anything, certainly not beyond a reasonable doubt.
>
> …
>
> Mr. Pettis wouldn't kill his wife for Ms. Kaylor for all these reasons I'm suggesting, but also because Peggy knew about Ms. Kaylor. We heard William Porter say at some point Mr. Pettis comes out and says, "I'm the luckiest man in the world. I have two

women that love me," and he says that with Peggy there … Peggy knew about Robin Kaylor… We know that from multiple, multiple, multiple people, including Ms. Kaylor herself.

…

There's no way to prove this case beyond a reasonable doubt. *The state is using smoke to try to prove a fire. The state went to great lengths to go through all those messages and to show you a handful of unsavory messages. There were so many more messages in there, if you want to look, but I have a few for you that have been admitted and are in there from Mr. Pettis.*

"Nights are the worst. It's hard having the spot next to me empty. I reach for her and she's not there, so I wake up and realize I'm alone. I just feel empty." That's shortly right after Peggy death.

He also said, "Hard being here. So many memories flooding my mind." Another post, "Feeling lost. I miss you, Peggy. Thirty-five years of my life. I will miss you my dear. Rest easy in God's arms." "It's easy to see so why so many guys die shortly after their wife dies."

…

These are messages that were not shown to you. If you want to look, you would find many … more of

> Dave describing what he's going through after his best friend has passed away.

RP 1328-29 (emphasis added).

After six days of testimony, a jury found Pettis guilty as charged. RP 1356.

Court of Appeals' Decision.

Pettis appealed, alleging four errors – claiming all were improper opinions on guilt. Op. at 1. These included: (1) the second slide of Voigtlaender's PowerPoint, entitled "Timeline of Events," bearing a subtitle reading "Pathway to Premeditation"; (2) Voigtlaender's testimony that certain messages were noteworthy or interesting, and his counter-intelligence experience analyzing "insider threats"; (3) Culp's testimony that family members had concerns about Peggy's death; and (4) David's testimony that he "came to believe that [his father] had something to do with [his] mother's death." Op. at 1. Pettis alleged counsel was ineffective for failing to object. Op. at 42.

The State conceded the PowerPoint slide's subheading was improper, but argued the alleged errors were not preserved or manifest, all alleged errors were harmless beyond a reasonable doubt, and Pettis failed to show prejudice for his ineffective assistance claim. Op. at 2, 36.

The majority found the PowerPoint slide's subheading and David's testimony were "explicit or nearly explicit opinions of guilt," and, therefore, were manifest constitutional errors. Op. at 2, 33-36, 39. The majority's review of the evidence – comprising 31 of its 47-page opinion – deemed those errors harmless beyond a reasonable doubt. Op. at 2, 40-42. The majority found the other alleged errors were not manifest, declining review, but found counsel was not ineffective for failing to object, for reasons similar to those contained in its constitutional harmless error analysis. Op. at 2, 37-40, 44-45.

The Honorable George Fearing dissented and would have found all errors manifest. Dissent at 1. However, the dissent raised concerns not assigned as error by Pettis, including that Voigtlaender was not qualified as an expert witness. Dissent at 3-4, 12-16.

Pettis petitioned for review, and this Court requested the State respond.

VI. ARGUMENT

THE PETITION DOES NOT MEET THE RAP 13.4 CRITERIA.

This Court accepts a petition for review only where it meets at least one of RAP 13.4(b)'s requirements: (1) the decision conflicts with a decision of this Court; (2) the decision conflicts with a published decision of the Court of Appeals; (3) a significant question under the Washington or federal constitution is involved; or (4) the petition involves an issue of substantial

public interest. Pettis's argument supporting his petition falls short of meeting this burden. Pet. at 26-31.

1. Applicable rules recognized by the Court of Appeals.

No witness may offer testimony in the form of an opinion regarding the guilt of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (first alteration in the original). But if the testimony does not directly comment on the defendant's guilt, helps the jury, and is based on inferences from the evidence, it is not improper opinion testimony. *Id.* at 579. In determining whether statements are, in fact, impermissible opinion testimony, the court will generally consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of

defense, and (5) the other evidence before the trier of fact. *Id*. at 579; Op. at 33-35. As recognized by the majority below, "[t]estimony in the form of an opinion … is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704; Op. at 33-35.

2. The Court of Appeals applied the proper test related to error preservation for alleged comments on guilt.

The Court of Appeals found Voigtlaender's "pathway to premeditation" slide was an impermissible comment on Pettis's guilt, but was harmless beyond a reasonable doubt, given the wealth of evidence detailed above. However, it found his unobjected-to "insider threat" language and associated testimony regarding the "noteworthiness" of certain electronic messages was not an "explicit or nearly explicit" comment and declined to review the error. Op. at 32-38. This was the proper analysis for review of unpreserved allegations that testimony offered an opinion on guilt.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless, as relevant here, the claim involves a manifest error affecting a constitutional right. "[T]he constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Manifest constitutional errors must have an effect on the trial that is "practical and identifiable," or "so obvious on the record" that it warrants review. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

Where a defendant alleges testimony commented on his guilt but fails to object, this Court requires the alleged comment to be "an explicit or almost explicit statement [… about the witness's] personal opinion on the defendant's guilt." *State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007) (citations

omitted). Such a constitutional error must also cause actual prejudice or practical and identifiable consequences in the trial. *Id*. at 934-35. The Court of Appeals applied the proper standard in its decision below, Op. at 37-38, and Pettis gives this Court no basis from which to deviate from its precedent. *See State v. Otton*, 186 Wn.2d 673, 678, 374 P.3d 1108 (2016) (before this Court will abandon precedent, stare decisis requires a party demonstrate it is both incorrect and harmful).

Following *Kirkman*, this Court declined review of an unpreserved claim that *multiple law enforcement* witnesses gave opinions on guilt in *State v. Montgomery*, 163 Wn.2d 577, 589, 183 P.3d 267 (2008). This Court characterized the law enforcement officers' opinions on Montgomery's guilt as "quite direct," using "explicit expressions of personal belief," and "troubling." *Id*. at 594-95. However, notwithstanding the *multiple* direct law enforcement opinions on Montgomery's

guilt, he was not entitled to relief on that basis[10] because he failed to object at trial and he failed to demonstrate actual prejudice. *Id*. at 594-96.

Reiterating the manifest error exception is a "narrow one," this Court declined review of the police officers' comments on Montgomery's guilt/criminal intent because (1) the jury was properly instructed that it was the sole judge of the credibility of the witnesses and was not bound by any expert's opinion, (2) there was no evidence the jury was unfairly influenced by the officers' comments, and (3) if Montgomery had objected, any prejudice could have been remedied by a curative instruction. *Id.* at 595-96.

[10] This Court reversed due to instructional error. 163 Wn.2d at 600.

a. Voigtlaender's "insider threat" testimony was not an explicit or nearly explicit comment on guilt and Pettis fails to demonstrate actual and substantial prejudice.

As in *Montgomery* and *Kirkman*, Pettis's jury was properly instructed they were the sole judges of the value and weight of testimony, the factors they should weigh in determining credibility, and that they need not accept an expert's opinion.[11] CP 27-28, 35. Although Pettis argues Voigtlaender's testimony was "especially problematic" because he was affiliated with law enforcement and offered an opinion Pettis characterizes as "closing argument from the [witness] stand,"

[11] To be clear, the State has never disputed Voigtlaender's slide's subheading was improper. However, if *Montgomery*'s direct comments on guilt were not reviewable, it also cannot be said that a subheading on a single slide, briefly shown mid-trial, during a six-day, 40-witness trial, which was not verbalized by the witness or repeated by the State, and which was subject to the same proper instructions as in *Montgomery*, prejudiced Pettis such that the error should be reviewed. Nonetheless, the Court of Appeals reviewed it, but found the error harmless beyond a reasonable doubt.

Pet. at 27, 29, neither this Court nor the attorneys now involved are positioned to determine whether Voigtlaender appeared credible to the jury, given that some of his opinion rested on common misspellings and references to fishing.

Although the dissent below would have held Voigtlaender's testimony directly dubbed Pettis an "insider threat" to Peggy, Dissent at 8, the majority did not find the testimony did so, instead characterizing the testimony as Voigtlaender drawing on his own professional experience, referring to a hypothetical person, and applying his training and experience to the data to explain why the jury should focus its attention on messages ostensibly sent by Peggy. Op. at 37. This is supported by Voigtlaender's testimony that the messages were items of "potential consideration" in the trial. RP 833. Voigtlaender did not testify with any certainty that the messages were, in fact, sent by Pettis. RP 832-33 (testifying the messages

"looked to be from" Pettis). Peggy, characterized by the defense as a distraught, withdrawn, pain-ridden woman contemplating suicide, could also pose an "insider threat" and Voigtlaender's "transitions" testimony could have applied equally to her.

If *Montgomery*'s police officers' testimony directly commented on his guilt yet was nonetheless not manifest error, then Voigtlaender's less direct, unobjected-to "insider threat" testimony, seeking to explain why he analyzed certain text messages and not others, should likewise not be reviewed. Neither should his testimony that some messages were "interesting" or "significant." The term "significant" is generally used in statistical analysis,[12] the type of analysis Voigtlaender conducted.

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[12] *See Reese v. Stroh*, 128 Wn.2d 300, 307-10, 907 P.2d 282 (1995) (although an expert may express an opinion based on statistics, such a basis is not required; court erred by excluding expert's opinion on the basis that it was not supported by *statistically significant studies*).

In that regard, and to the extent that Pettis's petition seeks review of the bounds of ER 1006 in the age of electronic data, Pet. at 1, 30, Voigtlaender's analysis and expert qualifications are also not subject to review in this case.

In advance of trial, the State offered Voigtlaender would be called to summarize voluminous records, and the court heard the relevant motion in limine on March 6, 2020. CP 17; Peck RP at *passim*. At that time, the State indicated it would seek to reach an agreement with the defense about "whether the summary is admissible." Peck RP 92. Due to Covid-19, trial did not occur until late 2021, and it appears neither the court, nor the parties, ever readdressed the evidentiary bounds of Voigtlaender's testimony. Sidener RP 10; RP 713. The record is devoid of what agreement, if any, the parties reached.

The dissent's concern that Voigtlaender was not qualified as an expert is a potential evidentiary error under ER 702 and

Frye v. United States, 293 F. 1013 (D.C.Cir.1923). While an expert can never offer an opinion on a defendant's guilt, potential evidentiary errors in Voigtlaender's expert qualifications, methodology, and ER 1006 summary are not subject to review because they were not preserved.

Moreover, because there was no foundational objection to Voigtlaender's qualifications or methodology, this record is inadequate for review. It is purely speculation to presume Voigtlaender would not have been qualified as an expert if defense counsel had objected – or related to an ineffective assistance claim, to presume that counsel did not tactically withhold objection to Voigtlaender's known credentials to prevent the jury from hearing them. On a partial or incomplete record, this Court does not presume the existence of facts to which the record is silent for the purpose of finding reversible error. *See State v. Jasper*, 174 Wn.2d 96, 123-24, 271 P.3d 876

(2012). Thus, whether Voigtlaender's testimony exceeded a proper presentation of voluminous records under ER 1006 is subject to review only for constitutional error, not evidentiary error.

Pettis's petition does not demonstrate any of the RAP 13.4 criteria where the Court of Appeals' opinion is consistent with this Court's jurisprudence requiring *both* an explicit or near explicit comment on guilt *and* actual prejudice before an unpreserved comment on guilt is reviewable. To the extent his constitutional claim intersects with claims of evidentiary error, this Court should decline review because those evidentiary errors are unpreserved, and the record is insufficient for review.

b. The related ineffective assistance claim does not present an issue that should be reviewed under RAP 13.4.

Associated with these claims are a claim of ineffective assistance of counsel, which requires Pettis to demonstrate counsel performed deficiently – by failing to object for no

reasonable tactical purpose – to his detriment. *Kirkman*, 159 Wn.2d at 937-38; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). As above, it is debatable whether Voigtlaender's "insider threat" testimony was inadmissible or a comment on Pettis's guilt. If the testimony was admissible, no objection would have succeeded. *See State v. Vasquez*, 198 Wn.2d 239, 248-49, 494 P.3d 424 (2021).

Further, there was a clear strategic reason for counsel's decision against objecting. Voigtlaender conceded he did not review all 100,000 lines of data and did not review Peggy's messages for the same misspellings he noted in Pettis's; he admitted that he could not testify whether the "transitions" were unusual; and he curiously did not discuss the specifics of any of Pettis's post-March 2018 messages, even though some of those messages were highly probative. Defense counsel's closing argument used those deficiencies in his testimony to argue the

State was "using smoke to try to prove a fire. The state went to great lengths to go through all those messages and to show you a handful of unsavory messages." RP 1328-29. Counsel's failure to object was likely attributable to his strategic decision that Voigtlaender's testimony was less-than-convincing and supported the defense theory that "smoke does not equate to fire." The ineffective assistance of counsel claim does not present an issue meriting review under RAP 13.4.

c. Pettis's family members did not give "explicit or nearly explicit" opinions on his guilt.

David testified he had "concerns" about his mother's death and "came to believe" his father "had something to do with [his] mother's death"; despite expressing that belief, he immediately testified he did not know whether his mother voluntarily ingested the lethal hydrocodone. RP 337-39. Culp testified her mother's family had "suspicions" or "concerns" about Peggy's death, which caused her to have "curiosities," prompting her to call the

medical examiner to ask what a family should do about their "concerns." RP 981-82. However, despite the family's "concerns," Pettis did nothing to raise Culp's suspicions and Culp offered her belief that the boar injury and her mother's hydrocodone use were the reason people "don't believe [Pettis] loved [her] mom." RP 981-82, 1041. None of this testimony was objected to.

The Court of Appeals employed the proper analysis, set forth above, to decide whether these statements were "explicit or almost explicit" comments on Pettis's guilt. Op. at 39-40, 45.

Pettis relies on *State v. Fedoruk*, 184 Wn. App. 886, 890, 339 P.3d 233 (2014), and *State v. Johnson*, 152 Wn. App. 924, 927-28, 219 P.3d 958 (2009), to assert the opinion conflicts with published decisions of the Court of Appeals. But the court's decision finding David's testimony was an explicit or nearly explicit comment on guilt, yet was nonetheless harmless beyond

a reasonable doubt, and Culp's testimony was not manifest error, does not conflict with any decision of this Court or of the Court of Appeals.

In *Johnson*, the defendant was tried for child molestation, a charge often unsupported by corroborating evidence. At trial, the prosecution repeatedly elicited testimony detailing that Johnson's wife, when confronted with proof of the accusations, broke down into tears, "flipped out," apologized to the victims' family, acknowledged that the allegations "must be true" and the victim "was right," and then attempted suicide. 152 Wn. App. at 928-29, 932-33. The appellate court found manifest constitutional error and reversed, concluding the wife's opinion on the child's veracity served no purpose beyond prejudicing the jury. *Id*. at 934.

Fedoruk involved multiple instances of prosecutorial misconduct in closing argument, not manifest constitutional

error during a witness's testimony; the prosecutor's closing argument presented an "appeal to the intuition" of Fedoruk's family members, whose testimony, apparently not assigned as error on appeal, indicated an immediate suspicion that Fedoruk was involved in the victim's disappearance. 184 Wn. App. at 878, 890. Notably, the court was not tasked with deciding whether the family members' testimony was manifest error, because prosecutorial misconduct, not a witness's opinion on guilt, was the issue raised on appeal. *Id*.

Pettis's case is materially different. A family's vague "concerns" with their mother's death does not suggest, let alone overtly present an opinion that Pettis was guilty of murder. Pettis's family's "concerns" do not carry the same emotional impact as Johnson's wife's reaction to allegations that he was involved in a child sexual assault and her belief in the credibility of the victim's statements. David refused to speculate whether

his mother intentionally ingested the lethal dose of hydrocodone, and his vague "concerns" regarding his father's involvement could suggest he thought Pettis may have crushed the pills and *Peggy* voluntarily consumed them; such an opinion does not explicitly or nearly explicitly suggest his belief that Pettis was guilty of murder. The family's other general "concerns" could even suggest Pettis's attraction to another woman led to Peggy's suicide. These statements, considering the witnesses' testimony as a whole, did not explicitly or nearly explicitly convey the family's opinion that Pettis killed Peggy such that the error is manifest and reviewable absent objection. Further, the *Montgomery* analysis also applies to these statements, and proper instructions and lack of any indication the jury was improperly influenced (such as the prosecutor repeating the statements during closing), indicate any error did not cause actual and substantial prejudice.

VII. CONCLUSION

Pettis's petition does not present this Court with any issue that was not addressed by *Kirkman* or *Montgomery* and does not demonstrate the opinion below conflicts with any opinion of this Court or of the Court of Appeals. The analysis for unpreserved claims that a witness has commented on a defendant's guilt are well-established, and the Court of Appeals properly applied that analysis. Because no objection was raised below to Voigtlaender's qualifications or methodology, any purely evidentiary issue is likewise unpreserved. Respondent requests the Court deny the petitioner's request for review.

This document contains 6,553 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 27 day of January 2025.

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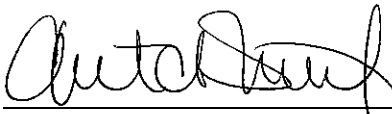

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent, v. DAVID LARUE PETTIS, Defendant/Petitioner.	NO. 10374-1-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on January 27, 2025, I e-mailed a copy of the Answer to Defendant's Petition for Review in this matter, pursuant to the parties' agreement, to:

Erin Moody
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1/27/2025 Spokane, WA

(Date) **(Place)** **(Signature)**

SPOKANE COUNTY PROSE

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