

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	Supreme Court No. 89926-2
	)	(consolidated with No. 90005-1)
Respondent,	)	
v.	)	
	)	PETITIONER'S ANSWER/OBJECTION
CASMER VOLK,	)	TO STATE'S MOTION TO SUPPLEMENT
	)	RECORD ON APPEAL
Petitioner.	)	

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1. Identity of Responding and Moving Party.

Petitioner Casmer Volk is the responding party to the State's motion to supplement the appellate record and asks for the relief designated in Part 2 of this motion.

2. Statement of Relief Sought.

Denial of the State's motion to supplement the appellate record with untimely proposed findings of fact and conclusions of law that have not been entered at the trial court, were not in the record before the Court of Appeal Div. III and not contained in the Petition for Review or Answer.

3. Facts Relevant to Motion.

1. Mr. Volk was sentenced on March 12, 2012: the trial court imposing an exceptional sentence of 120 months in addition to the 216 month standard range sentence.
2. Mr. Volk filed and served his notice of appeal on March 14, 2012.
3. Appellant's opening brief, filed February 8, 2013, assigned error to the trial court's failure to enter written findings of fact and conclusions of law for the imposed exceptional sentence.

4. The State's Response Brief was filed on or about April 18, 2013. The State's position was that written findings of fact and conclusions of law were unnecessary. (Brief of Respondent, p. 36).
5. The Court of Appeals Division III considered this case and filed an opinion on February 4, 2014, affirming the conviction and finding that the failure to enter written findings of fact and conclusions of law for the exceptional sentence was harmless and a mere formality.
6. Mr. Volk, through counsel, filed a Petition for Review. On April 21, 2014, the State filed an answer to the Petition for Review, urging the Court not to accept review.
7. On April 30, 2014, this Court granted review on the specific issue of the exceptional sentence and consolidated it with State v. Friedlund, No. 89926-2.
8. The State drafted and presented proposed findings of fact and conclusions of law to the trial court on August 11, 2014. The superior court ruled that under RAP 7.2 it was constrained from signing them, as the case was on review on that very issue.
9. On September 4, 2014, the State filed a Motion to Supplement the Appellate Record with the proposed findings of fact and conclusions of law, pursuant to RAP 1.2 and 9.10, in this Court.

4. Grounds for Relief and Argument.

When a case proceeds to the Washington Supreme Court, "the record in the Court of Appeals is the record on review in the Supreme Court." RAP 13.7(a). The record before Division III did not include written findings of fact and conclusions of law. The only documents this Court should consider are the briefs filed in Division III, the Petition for Review and the

answer. RAP 13.7 prohibits the prosecution from supplementing the record at this late date, after review has been accepted. The State does not cite RAP 13.7 in its motion.

The State's motion to supplement the record on appeal cites to RAP 9.10: "Correcting or Supplementing Record After Transmittal To Appellate Court" (State's Motion to Supplement Record p.1) as the basis for requesting this Court to grant a motion to supplement the record.

RAP 9.10 requires that a party make a *good faith* effort to provide those portions necessary for review. The written findings of fact and conclusions of law were not prepared and available to Div. III. Rather, the State did not prepare proposed findings of fact and conclusions of law for presentment to the superior court until August 11, 2014, approximately 882 days after the exceptional sentence was imposed and approximately 188 days after Division III issued its opinion.

The State has steadfastly maintained that written findings and conclusions, mandated under RCW 9.94A.535, are unnecessary and a mere formality in this case. The State's dilatory attempt to enter written findings and conclusions appears to have been occasioned only by this Court's acceptance of Mr. Volk's petition for review. (State's Motion to Supplement the Record pp. 1- 3). Further, the issue accepted for review by this Court is the exceptional sentence: whether a trial court is statutorily mandated to enter written findings of fact and conclusions of law when imposing an exceptional sentence, and the proper remedy when they are not entered.

The motion should not be granted because it cites to an incorrect rule, the State did not make a good faith effort to provide the necessary portions of the record in a timely way to the reviewing court, and supplementation of the record after a case has been accepted for review by this Court is governed by RAP 13.7.

RAP 7.2(e), provides a trial court has authority to hear and determine (1) post-judgment motions authorized by the criminal rules or statutes and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The post-judgment motion or action shall first be heard by the trial court, which shall decide the matter. *If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision.* A party should seek the required permission by motion. (Emphasis added). The State has not filed a motion under RAP 7.2 seeking permission from an appellate court for formal entry of the trial court decision. The proposed findings of fact and conclusions of law the State urges this Court to add to the record are not even a part of the trial court record.

The untimely findings of fact and conclusions of law may very well change the issue before this Court and its decision on review. The decision by Division III, on the specific issue of whether written findings of fact and conclusions of law were necessary, as mandated by RCW 9.94A.535 is before this Court. Supplementing the record before this Court is blatantly prejudicial to Mr. Volk: Mr. Volk gave notice he was appealing every part of his trial, judgment and sentence, as is his constitutional right under Article 1 § 22. The mandatory findings of fact and conclusions of law have not been entered at the trial court; he has been deprived of the right to assign error to the written findings and conclusions and to have a full and thorough review of the exceptional sentence in his direct appeal.

The State's purpose in requesting to supplement the record at this late date appears to be an effort to render Mr. Volk's case moot. (State's Motion to Supplement Record p. 3: "Justice to Mr. Volk supports this Court providing him with the opportunity to demonstrate why there remains an issue and/or why the trial court did not satisfy the requirements under RCW

9.94A.585...). Mr. Volk has raised the issue that the *superior court* did not comply with RCW 9.94A.535, which mandates written findings and conclusions: not RCW 9.94A.585 which addresses the analysis for the *reviewing court* to reverse a sentence outside of the standard range.

This Court should review the case on its merits, even if it grants the State's motion. When considering mootness, this Court analyzes three factors: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance of public officers, and (3) whether the issue is likely to recur. *In re Marriage of Horner*, 151 Wn.2d 884, 891-92, 93 P.3d 124 (2004). Applying the factors to the issue presented here, the question of whether written findings of fact and conclusions of law are necessary is an issue of public importance, as it impacts and informs appellants, the Sentencing Guideline Commission, reviewing courts, and the public. *In re Breedlove*, 138 Wn.2d 298, 979 P.2d 417 (1999). Courts of Appeal differ in their treatment of the problem, and guidance from this Court is imperative to ensure that each division of the Courts of Appeal reviews exceptional sentences using the same framework. *See State v. Bluehorse*, 159 Wn.App. 410, 248 P.3d 537 (2011); *State v. Hale*, 146 Wn.App. 299, 189 P.3d 829 (2008); *In re Finstad*, 177 Wn.2d 501, 301 P.3d 450 (2013); *State v. Chambers*, 176 Wn.2d 573, 293 P.3d 1185 (2013). Finally, this issue is likely to recur. The consolidated cases under this cause are from two different counties. Without guidance from this Court, these and other counties may continue to impose exceptional sentences without entering the statutorily mandated written findings of fact and conclusions of law.

## 5. Conclusion

Mr. Volk respectfully urges this Court to deny the State's motion to supplement the record and as prescribed by the rules of appellate procedure, consider only the record before the Court of Appeals and the Petition for Review and answer.

Respectfully submitted on September 8, 2014.

s/ Marie J. Trombley  
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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 89926-2
Respondent ,	)	(consolidated with No. 90005-1)
vs.	)	
	)	PROOF OF SERVICE
CASMER J. VOLK	)	
,	)	(RAP 18.5(b))
<u>Petitioner.</u>	)	

I, Marie J. Trombley , do hereby certify under penalty of perjury that on September 8, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Petitioner’s Answer/Objection to State’s Motion to Supplement.

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