

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DANE FORSS,
Appellant.

Supreme Court No.
103960-3

COA No. 39056-0-III

MOTION TO STRIKE
REFERENCES TO
OUTSIDE-THE-
RECORD FACTS IN
STATE'S ANSWER

I. IDENTITY OF MOVING PARTY AND RELIEF SOUGHT

Counsel for the appellant, Dane Forss, asks this Court to strike portions of the State's Answer to Mr. Forss's Petition for Review citing or relying on outside-the-record facts. RAP 17.1; *See* Answer 1, 6, 7, 11, 14, 15, 17 (described further below).

II. GROUNDS FOR RELIEF SOUGHT

Unless a party has properly supplemented the record

pursuant to RAP 9.11, “the reviewing court will not consider matters outside the trial record” on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995) (citations omitted).

The State’s Answer repeatedly references outside-the-record materials and makes factual assertions based on these materials.

The Court of Appeals already rejected this maneuver by the State regarding precisely the same outside-the-record materials the State now tries to weave into its Answer. *See* Slip op. at 7. In the Court of Appeals, the State repeatedly attached images to its briefing, purportedly showing legal database entries with information about other cases involving Skyler Glasby. *See* State’s Response to Appellant’s Motion to Take Additional Evidence 2-3 (referencing images attached in appendix to that Response); State’s Response to Appellant’s Motion to Modify 2-3 (again referencing images attached in an appendix); State’s Brief of Resp’t 5-6.

The State used the materials that were not part of the record to claim that Mr. Glasby's cases with Mr. Forss's attorney, Rachel Cortez, were traffic matters, that they were unrelated to Mr. Forss's case, and that they were in a post-adjudicatory posture by the time of Mr. Forss's trial. Br. of Resp't 5-6.

But the Court of Appeals already rejected the State's efforts to rely on these outside-the-record materials. It recognized that no party in the trial court admitted, offered, or referenced the materials attached to the State's appellate briefing. Slip op. at 7. The State did not make any formal motion in the Court of Appeals to supplement the record with these outside-the-record materials pursuant to RAP 9.11.

The Court of Appeals found that there was "no evidence to support the State's assertion" that "Glasby was not a current client, but rather a former client, and [that] the attorney represented Glasby on unrelated misdemeanor charges that had resolved prior to Forss's trial." Slip op. at 7. The Court of

Appeals recognized that the State simply attaching images to the end of its appellate briefing did not make those materials part of the record. *Id.* Additionally, the only support the State provided, in a footnote in its Brief of Respondent, was a *trial court* evidentiary rule and a case that held that “a DISCIS printout,” admitted into evidence in the *trial court* at sentencing, “satisfied the State’s burden of proving misdemeanor convictions by a preponderance of the evidence.” Br. of Resp’t 5; *State v. Cross*, 156 Wn. App. 568, 586-87, 234 P.3d 288 (2010).

Even though these materials are not in the record, and the State never brought a RAP 9.11 motion to seek to supplement the record, and the Court of Appeals made clear to the State that these materials are not properly before an appellate court, the State nevertheless tries to insert these outside-the-record materials into its Answer to the Petition for Review. The State does so without ever mentioning the fact that the Court of Appeals refused to consider this information because it was not

part of the record.

The State makes direct and extended reference to the outside-the-record materials in its Answer. These include,

- **Page 6** (both full paragraphs, in their entirety, as well as the footnote on that page)
- **Page 7** (from “However, as noted, review of DISCIS...” to “... a suspended license case.”)
- **Page 15** (from “Moreover, the court records show...” to “... traffic matters has any bearing on Forss’s case.”)

Elsewhere in its Answer, the State makes factual claims that, without explicitly citing the outside-the-record materials, exclusively rely on those materials. These include,

- **Page 1** (counterstatement of issue asserting that trial counsel “previously represented a potential witness in utterly unrelated matters,” even though nothing in the trial court record suggests representation was “previous[]” or that the matters were “utterly

unrelated”)

- **Page 11** (same “previously represented a potential witness in utterly unrelated matters” line in argument heading)
- **Page 14** (reference to “Glasby’s traffic cases” despite record’s silence as to the type of Mr. Glasby’s cases)
- **Page 17** (assertion of Ms. Cortez’s “former representation” of Mr. Glasby despite nothing in record indicating representation had terminated)

The State’s reference to materials outside the record, and its factual assertions based on those materials, should be stricken from its Answer. This includes any descriptions of the purported nature or status of Mr. Glasby’s cases not derived from the record in Mr. Forss’s case.

III. CONCLUSION

For these reasons, counsel for Mr. Forss asks this Court to strike any portions from the State's Answer to Mr. Forss's Petition for Review citing or relying on outside-the-record facts or evidence.

This motion complies with RAP 18.17 and contains 821 words.

DATED this 26th day of June, 2025.

A handwritten signature in black ink, appearing to read "Matt Folensbee".

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WASHINGTON APPELLATE PROJECT

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