

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,

v.

DANE FORSS,  
Appellant.

Supreme Court No.  
103960-3

COA No. 39056-0-III

REPLY TO STATE'S  
ANSWER TO MR.  
FORSS'S MOTION  
TO STRIKE

**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 relying on outside-the-record facts or evidence. RAP 17.1; *See* Answer 1, 6, 7, 11, 14, 15, 17 (described in Mr. Forss's motion to strike).

## II. GROUNDS FOR RELIEF SOUGHT

- a. This Court should strike the State's reference to outside-the record factual support that the Court of Appeals refused to consider.*

As explained in Mr. Forss's motion to strike, the State's answer to Mr. Forss's petition for review relies on purported facts and documentary materials that are not in the record. The State attempted this same maneuver in the Court of Appeals. *See* State's Response to Appellant's Motion to Take Additional Evidence 2-3; State's Response to Appellant's Motion to Modify 2-3; State's Brief of Resp't 5-6.

The Court of Appeals rejected this maneuver, recognizing that the factual claims the State was basing on such extra-record materials were unsupported by the record. Slip op. at 7. The State's answer to Mr. Forss's petition for review wholly omits that the Court of Appeals rejected the State's attempt to insert such materials into the record and did not rely on them.

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 brought no RAP 9.11 motion to supplement the record in the Court of Appeals. Nor does it attempt any RAP 9.11 analysis in its answer to Mr. Forss’s petition for review, nor in its answer to Mr. Forss’s motion to strike.

*b. RAP 9.11 would not permit the State to supplement the record with these materials, which do not establish any facts that would aid review of the issues presented in this case.*

Additionally, RAP 9.11 limits supplementing the record to proof only of facts “needed to fairly resolve the issues on review,” in addition to several further restrictions. RAP 9.11(a)(1). Here, the legal database records purportedly pertaining to Ms. Cortez’s cases with Mr. Glasby, a rival suspect in Mr. Forss’s case, would not affect the proper analysis for the violation of Mr. Forss’s Sixth Amendment right to

conflict-free counsel.

Significantly, the State's proffered records do *not* support the State's claim on appeal that Ms. Cortez ceased to represent Mr. Glasby by the time of Mr. Forss's trial. The appended screenshots, if veracious, indicate only that, by the time of Mr. Forss's trial, one of Mr. Glasby's cases was on a suspended sentence, where the imposition of further jail time would depend on whether the prosecution proved Mr. Glasby violated his conditions of sentence. *See* State's Response to Appellant's Motion to Take Additional Evidence, App. A. The records the State appended indicate Ms. Cortez had *not withdrawn* from Mr. Glasby's probation case or filed any notice of intent to withdraw from her representation of Mr. Glasby. *Id.* Instead, the records are wholly consistent with Ms. Cortez's present-tense officer-of-the-court assertion, on the morning of Mr. Forss's trial, that "as the court is aware, I represent Mr. Glasby." RP 87.

Moreover, the procedural posture of Mr. Glasby's cases

with Ms. Cortez is irrelevant to the second issue presented in Mr. Forss's petition for review: the Court of Appeals' erroneous analysis of the conflict under a narrowly technical reading of the state professional ethics rules (RPCs), rather than performing a proper analysis of Mr. Forss's right to conflict-free counsel under the Sixth Amendment. *See* Petition for Review, 19-30. Ms. Cortez asked to withdraw based on her conflicting loyalty to Mr. Glasby, explaining that her original defense strategy in Mr. Forss's case would require counsel to seek to "effectively throw [Mr. Glasby] under the bus" for the charged offenses in Mr. Forss's stead, which Ms. Cortez refused to do. RP 87. Ms. Cortez identified the defense theory, and several particular strategic decisions, she was therefore abandoning in Mr. Forss's case out of loyalty to Mr. Glasby. RP 85-88.

Even if the State's proffered records on appeal showed that Mr. Glasby was Ms. Cortez's former client rather than a current client – which they do not – the Washington RPCs do

not govern the accused's Sixth Amendment right to counsel free from "any conflict of interest in the case" or any "division of loyalties" *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003) (citation omitted). The records the State appends are therefore not "needed to fairly resolve the issues on appeal." RAP 9.11(a)(1). Ms. Cortez self-admittedly handicapped her defense of Mr. Forss out of a conflicting loyalty to Mr. Glasby. Even if it is determined that Mr. Forss was a former client and thus that, unbeknownst to Ms. Cortez, she could indeed have "throw[n Mr. Glasby] under the bus" without technically violating the RPCs, this does not cure the fact that Ms. Cortez's division of loyalties between Mr. Forss and a rival suspect in his case adversely affected her defense of Mr. Forss.

Database information as to the procedural posture of Mr. Glasby's cases with Ms. Cortez at the time of Mr. Forss's trial is not "needed to fairly resolve" the issues on appeal in Mr. Forss's case. *See* RAP 9.11(a)(1).

*c. This Court should decline the State's invitation for it to circumvent RAP 9.11 by expanding the limited mechanism of judicial notice.*

Instead of presenting the materials at issue in the trial court or bringing a RAP 9.11 motion to supplement the record, the State asks this Court to take judicial notice of records pertaining to Skyler Glasby's cases. *See* State's Answer to Motion to Strike, 3-5. This Court should decline the State's request to expand the mechanism of judicial notice.

This Court has held that it "cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties." *Spokane Rsch. & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) (citation omitted).

As explained in Mr. Forss's motion to strike, the Court of Appeals in *State v. Cross* held only that a printout of criminal history records, which the State presented to the trial court at sentencing, was a sufficiently reliable basis for the trial court to find the defendant's prior convictions. 156 Wn. App. 568, 588-

89, 234 P.3d 288 (2010). The Court of Appeals did not independently take judicial notice of extra-record case information from a different case in the first instance, as the State asks this Court to do.

This Court's decision in *Vet Voice Found v. Hobbs* did not expand the mechanism of judicial notice as the State suggests. 4 Wn.3d 383, 564 P.3d 978 (2025). In *Hobbs*, this Court took judicial notice of recent election records published by the secretary of state that were relevant to an issue before this Court. *Id.* at 390 n. 4. Unlike here, those records were only published while the case was pending on appeal, so the proffering party had had no opportunity to admit them into evidence in the trial court. *See id.* Here, on the other hand, the State could have presented its proffered records in the trial court by exercising ordinary due diligence. This Court should decline to find facts that the State could have, but did not, assert or present support for in the trial court.

Furthermore, the election record this Court took notice of



in *Hobbs* consisted only of a statewide numerical statistic about the number of ballots disqualified in a recent election. *Id.* The proceedings already involved similar statistics regarding prior election cycles *See id.* at 392-97. This Court simply took judicial notice of the statistics for the most recent election. *Id.* at 390 n. 4. If this Court in *Hobbs* meant to hold that this Court will generally take notice of public records, including case-specific entries and details from cases not before the Court, which the proffering party could have presented below but did not, it presumably would have said so.

### III. CONCLUSION

For the reasons explained above and in Mr. Forss's motion to strike, this Court should strike any portions from the State's Answer to Mr. Forss's Petition for Review relying on outside-the-record facts or evidence.

This motion complies with RAP 18.17 and contains 1,391 words.

DATED this 31st day of July, 2025.

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

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# WASHINGTON APPELLATE PROJECT

July 31, 2025 - 3:53 PM

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