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STATE OF WASHINGTON  
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THE SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL *E CPJ*

STATE OF WASHINGTON, ) NO. 90552-5  
Respondent, )  
v. ) SECOND MOTION  
TODD DALE PHELPS, ) TO STRIKE AND  
Petitioner. ) RESPONSE TO  
MOTION TO SUPPLEMENT  
THE RECORD

**1. IDENTITY OF MOVING PARTY**

Respondent State of Washington, by and through Sara I. Beigh, Senior Deputy Prosecuting Attorney for Lewis County, requests the relief set out below.

**2. STATEMENT OF RELIEF SOUGHT**

The State requests that this Court strike the portions of the petition for review that incorporate other arguments by reference.

**3. FACTS RELEVANT TO THIS MOTION**

Todd Phelps was charged in the State of Washington v. Todd Phelps, Lewis County Superior Court Cause No. 11-1-00790-6, by information filed on November 10, 2011, with one count of Rape in the Third Degree and one count of Sexual Misconduct with a Minor in the Second Degree. In April 2012 Phelps was convicted by a jury of his peers as charged.

Phelps' convictions were reviewed by Division II of the Washington State Court of Appeals, Case No, 43557-8-II, and the

COA affirmed Phelps' convictions on June 17, 2014. Phelps filed a petition for review before this Court without the aid of counsel. In his original petition Mr. Phelps included three declarations attached as appendixes and included references to those declarations in his argument. These declarations contain inadmissible evidence, but of even more importance, are not part of the record on review below. The State is filed this timely motion to strike.

Mr. Phelps has now resubmitted a petition for review without the declarations. Mr. Phelps is now requesting to supplement the record with these declarations. Mr. Phelps has also submitted within his brief arguments from the original appellate briefing by incorporating these argument by reference.

#### **4. ARGUMENT**

RAP 9.1 governs the composition of the record of review for direct appeals. "The record on review may consist of (1) a report of proceedings, (2) clerk's papers, (3) exhibits, and (4) certified record of administrative proceedings." RAP 9.1(a) (internal quotations omitted). RAP 10.3 governs the contents of briefs in a direct appeal, and includes that arguments must contain citations to the relevant parts of the record. RAP 10.3(a)(6). RAP 13.4 requires citation to the relevant record in a petition for review. RAP 13.4(c).

The declarations of Bregg W. Phelps, Allen Phelps, and

Amanda Phelps, contained in the original Appendix F attached to the first petition, are not contained with the record on review. See VRP; CP. These declarations contain extrinsic evidence, which may be presented in a personal restraint petition, but not in a matter on direct review. See RAP 9.1, RAP 10.3, RAP 16.7. A party who wishes to supplement the record on direct review must file a motion with the COA or this Court. RAP 9.10. Further, a party may request, under limited circumstances, to present additional evidence on review, which is usually handled through a reference hearing in the trial court. RAP 9.11. To be allowed at this point in the proceedings to present extrinsic evidence, that was not part of the trial proceedings, is improper. This is a petition for review, it is a review of the decision by the Court of Appeals. Statements by biased parties, some of which contain inadmissible statements should not be allowed. The declarations should be stricken as improper and all references to and arguments based upon these declarations in Mr. Phelps' original petition should also be stricken. See Petition, pages 7, 9, 16-17.1

RAP 13.4(c)(7) requires the argument portion of a petition for review to be "[a] direct and concise statement of the reason why review should be accepted under one or more of the tests

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<sup>1</sup> The State makes this argument in part because it is unclear if this Court is going to allow the second petition for review to be considered or go off the first petition.

established in section (b), with argument. A petitioner is limited to 20 pages, excluding appendices, for their petition for review. RAP 13.4(f). Argument incorporated by reference is not properly before this Court. *State v. Gamble*, 168 Wn.2d 161, 180, 255 P.3d 973 (2010). Mr. Phelps incorporates by reference arguments numbered 3, 4 and 5 found on page 15 of his petition. This is improper and should not be considered by this Court. Further, the incorporated argument would add an additional 16 pages of argument, bring the length of the brief to 32 pages which well above the 20 page limit for petitions for review. RAP 13.4(c)(7).

#### **4. CONCLUSION**

The State respectfully requests this Court deny the motion to supplement the three declarations listed above which can be found in Appendix F attached to Mr. Phelps' petition for review. The State further requests that this Court strike the facts cited to in his original petition which are contained in the declarations and any arguments that are based upon the declarations. The declarations of Bregg W. Phelps, Allen Phelps, and Amanda Phelps are not part of the record on review and should not be considered by this Court.

The State respectfully requests this Court strike the arguments Mr. Phelps incorporated by reference in his petition for review. The incorporations by reference are improper and

additionally make the brief over length.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of September,  
2014.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



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SARA I. BEIGH, #35564  
Senior Deputy Prosecuting Attorney  
Attorneys for the Respondent

**SUPREME COURT OF THE STATE OF WASHINGTON**

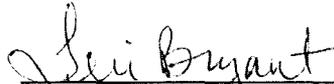
STATE OF WASHINGTON,	)	NO. 90552-5
Respondent,	)	
vs.	)	DECLARATION OF
	)	MAILING
TODD DALE PHELPS,	)	
Petitioner.	)	
	)	
	)	
	)	
	)	
	)	

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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: September 8, 2014, the petitioner was served with a copy of the State's **Second Motion to Strike and Response to Motion to Supplement the Record** by depositing same in the United States Mail, postage pre-paid, to the petitioner at the name and address indicated below:

Todd Dale Phelps, DOC #357684  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

DATED this 8<sup>th</sup> day of September, 2014, at Chehalis, Washington.

  
\_\_\_\_\_  
Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

Declaration of  
Mailing

## OFFICE RECEPTIONIST, CLERK

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**To:** Teri Bryant  
**Subject:** RE: Supreme Ct. No. 90552-5 - State of WA v. Todd Dale Phelps

Received 9-8-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Teri Bryant [mailto:Teri.Bryant@lewiscountywa.gov]  
**Sent:** Monday, September 08, 2014 9:17 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Supreme Ct. No. 90552-5 - State of WA v. Todd Dale Phelps

Attached for filing in the above referenced case is the State's Second Motion to Strike and Response to Motion to Supplement the Record.

Thanks,

*Teri Bryant*, Paralegal  
Lewis County Prosecuting Attorney  
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Chehalis, WA 98532  
(360) 740-1258