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SUPREME COURT  
STATE OF WASHINGTON  
Feb 24, 2012, 3:45 pm  
BY RONALD R. CARPENTER  
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No. 86119-6

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

(Court of Appeals No. 64466-1-I)

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STATE OF WASHINGTON,  
Respondent,  
v.

BRYAN EDWARD ALLEN,  
Petitioner.

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**MOTION TO RECONSIDER THIS COURT'S  
FEBRUARY 16, 2012 ORDER GRANTING, IN PART,  
THE STATE OF WASHINGTON'S MOTION TO STRIKE**

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## INTRODUCTION

The Innocence Network, by and through the undersigned attorneys, requests that the Court reconsider the part of its order entered on February 16, 2012 (the “Order”) which grants the State’s motion to strike the portions of the Memorandum of *Amicus Curiae* The Innocence Network which address article I, section 3 of the Washington Constitution (such portion of the Order shall henceforth be referred to as the “Due Process Order”). This Motion does not seek reconsideration of the part of the Order which denied the motion to strike the portions seeking a “new legal framework.”

## RELEVANT FACTS

On January 13, 2012, the Innocence Network filed its Motion to File *Amicus Curiae* Brief and related Memorandum of *Amicus Curiae* Innocence Network in Support of Supplemental Brief of Petitioner (with Appendix) (the “*Amicus* Brief”).

Over a month later, on February 14, 2012, the State filed a Motion to Strike Issues Raised for the First Time in *Amicus* Brief (the “Motion to Strike”). Based on a claim that the *Amicus* Brief raised issues for the first time, the Motion to Strike specifically moved to strike sections of the brief related to: (1) due process issues raised under article I, section 3 of the

Washington Constitution and (2) the Innocence Network's request for implementation of a new legal framework to address eyewitness testimony evidence. On February 15, 2012, the State filed its Consolidated Response to *Amicus Curiae* Briefs.

Two days later, on February 16, 2012, before the Innocence Network could reply, the Court entered the Order finding that "The motion to strike the separate analysis under the Washington Constitution's guarantee of due process contained in article 1, section 3, is granted. The motion to strike the argument for a 'new legal framework' is denied."

On February 22, 2012, the Office/Case Manager of the Court circulated to the parties a redacted version of the *Amicus* Brief with due process content removed from pages five and 12.

### ARGUMENT

The Innocence Network timely moves for reconsideration of the Due Process Order based on Superior Court Civil Rule 59. *See* CR 59(a)(1), (7), and (9). The Innocence Network respectfully notes that it was not afforded a chance to reply to the Motion to Strike before the Order was issued and seeks now to be heard on the merits.<sup>1</sup> The State's arguments against inclusion of the due process arguments in the *Amicus*

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<sup>1</sup> As the Innocence Network does not seek reversal of the part of the Order which denied striking of the "new legal framework" content of the *Amicus* Brief, this Motion does not reply to that portion of the Motion to Strike. However, by filing this Motion, the Innocence Network does not waive any rights to response.

Brief should not be accepted by the court because (1) they are untimely, and (2) they misconstrue the relevant Washington law.

**I. The Motion to Strike was Untimely.**

The Motion to Strike should have been disregarded by the Court as untimely. Under RAP 10.6(d), an objection to a motion to file an *amicus* brief must be received within five days of receipt of the motion. The *Amicus* Brief was filed on January 13, 2012. The State did not file the Motion to Strike until 33 days thereafter. The State offers no argument to excuse its failure to comply with the mandatory provisions of RAP 10.6(d). See *Sorenson v. Dahlen*, 136 Wn. App. 844, 855 (2008) (“As a general rule, the use of the word “shall” in a statute or court rule is mandatory and operates to create a duty.”)

As it did not file a motion to strike any portion of the *Amicus* Brief within the five days provided for by RAP 10.6(d), the State had one other remedy: argument in its responsive brief.<sup>2</sup> Based on an Order of this Court and the Rules of Appellate Procedure, the State filed a response to the *Amicus* Brief. RAP 10.6(c) (“The appellate court may ask for an *amicus* brief at any stage of review, and establish appropriate timelines for the filing of the *amicus* brief and answer thereto.”). Therefore, the State

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<sup>2</sup> As is set forth more fully below, even if the State’s Motion to Strike had been timely, the test provided by the adversarial process, rather than striking the arguments set forth by *Amicus* the Innocence Network, is the appropriate remedy.

has been given an opportunity to be heard on the substance of the *Amicus* Brief and the Court, upon reconsideration, should deny the State's belated Motion to Strike.

## **II. *Amicus Curiae* Are Permitted To Raise Arguments Outside of the Scope of the Parties' Briefs**

It is clear that the Court has discretion to consider issues raised for the first time by an *amicus* party. *See, e.g., Shoreline Community College Dist. No. 7 v. Employment Sec. Dept.*, 120 Wash. 2d 394, 402 (1992) (court considers an issue that was first raised in a supplemental brief after acceptance of review saying "the court has inherent authority to consider the issue if such consideration is necessary to reach a proper decision"). Such discretion is essential to allowing *amicus curiae* to fulfill their role as "friends of the court" that can provide valuable assistance in cases involving important issues that affect many citizens and/or depend on specialized information or experience.

As set forth in the Innocence Network's brief, eyewitness misidentification is a troubling reality that contributes to wrongful convictions and the Innocence Network, by virtue of its work in the area of post-conviction DNA exonerations, is an expert on the contributing causes of eyewitness misidentification. The Innocence Network has been