FILED
SUPREME COURT
STATE OF WASHINGTON
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Note: The objection (motion to strike) was denied in the En Banc order dated March 8, 2018. The document also responds to the ACLU's amicus brief.

No. 95012-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

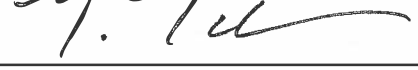
vs.

WAYLON JAMES HUBBARD,

Petitioner.

OBJECTION TO PORTION OF THE BRIEF OF *AMICUS CURIAE* ACLU OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, WASHINGTON DEFENDER ASSOCIATION. RESPONSE TO *AMICUS CURIAE*

MARK McCLAIN
Pacific County Prosecuting Attorney

By: 

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I. IDENTITY OF OBJECTING PARTY

The State of Washington, Respondent, asks for the relief designated in part II and responses in part III.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 10.6(d), the State objects to the extra judicial materials and requests the extra judicial materials be stricken.

III. ARGUMENT

Amicus has not provided the Court with a brief in conformance with the Rules of Appellate Procedure, but instead submitted extra-record materials which should not be considered. Matters outside the record cannot be considered. *State v. Tolias*, 135 Wn.2d 133, 140-41, 954 P.2d 907 (1998). Briefs must comply with RAP 10.3(a)(5) which require references to the record for factual assertions. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 469-70, 229 P.3d 735 (2010); *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 97, 117 P.3d 1117 (2005). Facts unsupported to the record will not be considered by an appellate court. *Northlake Marine Works v. City of Seattle*, 70 Wn.App. 491, 513, 875 P.2d 283 (1993).

Here, Amicus asserts Washington Association of Criminal Defense Lawyers (WACDL) "members have clients who are eligible

for [Certificate of Discharge] (COD) but were never informed of their eligibility until they discussed the matter with an attorney."[1] That "as a matter of routine, "they are not advised of the process to obtain a COD" and "frequently" find themselves in a position "whereby they have either been eligible to obtain a COD or a long time, or do not know the eligibility criteria, and that "courts and prosecutors around the state routinely agree with this interpretation of the statute," and that the effective date is often "years earlier."[2] This is unsupported by the record. Amicus also cites articles and a caseload report which are not part of the record below.[3] These extra-record materials are also not contained in the record below. *See Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 629, 90 P.3d 659, 690, n.30 (2004)(Court struck amicus brief that addressed issues not related to the statute before the court).

Amicus next asserts the rule of lenity should apply. However, because this statute was found to be plain and unambiguous in *State v. Johnson*, 148 Wn. App. 33, 197 P.3d 1221 (2008), and below in

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[1] Brief of Amicus at page 5

[2] Id.

[3] Brief of Amicus at 8-9 referencing Washington State Courts Caseload Report, a news article entitled Background Checking—The Use of Criminal Background Checks in Hiring Decisions, and American Journal of Sociology Article.

State v. Hubbard, 200 Wn.App. 246, 402 P.3d 362 (2017), the rule of lenity does not apply. *State v. McDaniel*, 185 Wn.App, 932, 344 P.3d 1241 (2015), citing *State v. Evans*, 177 Wn.2d 186, 192–94, 298 P.3d 724 (2013). Furthermore, the legislature is presumed to know the existing state of the case law in those areas in which it is legislating. *State v. Fenter*, 89 Wash.2d 57, 62, 569 P.2d 67 (1977). Thus, the decision in *Johnson* demonstrate the legislature agreed with the court's interpretation of their intent. The decisions in *Johnson*, *State v. Porter*, 188 Wn.App. 735, 356 P.3d 207 (2015), and *Hubbard* should not be disturbed.

IV. CONCLUSION

The materials which are outside of the record below should be stricken. Furthermore, Amicus assertion that the rule of lenity should apply is misplaced. The statute and the legislature's intent is clear, unambiguous, and further demonstrated by the legislature's actions in conformity with a nearly decade-old case. Finally, further consideration of this appeal is unnecessary as there is no conflict between the divisions of the courts of appeals.

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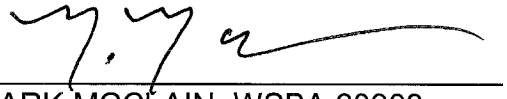
RESPECTFULLY submitted this 17th day of December, 2017.



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Transmittal Information

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Superior Court Case Number:	04-1-00153-4

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