95881-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MEGAN LARES-STORM, Petitioner.

PETITION FOR REVIEW

RESPONDENT'S ANSWER TO MEMORANDA OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. ARGUMENT

A. CONSIDERATIONS FOR ACCEPTING REVIEW OF THE ACTUAL CASE AND RECORD OF LARES-STORM AND NOT SOME OTHER RECORD.

In a Sixty Minutes segment this spring, Adolfo Cambiaso, the number one polo player in the world, shared his secret. He has a stable of clones. The DNA is eliminated from a mare's egg, replaced with the DNA from his star pony Cuartetera, and then implanted in a surrogate. The results are guaranteed.

The Amici have done the same thing in their memoranda in support of review. They have implanted entirely different DNA into the case of Megan Lares-Storm, in order to advance their agenda against the use of canines in law enforcement. Their issues have no resemblance to the actual record and do not provide a basis for review. RAP 13.4(b). They ask for an advisory opinion on subjects which are no case or controversy here.

Amicus Korematsu argues a drug sniffing canine is just another

version of Clever Hans, projecting the beliefs of its handler, including the handler's racist beliefs. Memorandum filed by Amicus Curiae Fred T. Korematsu Center for Law and Equality (MAC-K) at 5. Amicus argues this is an issue of substantial public interest. MAC-K at 2 (citing RAP 13.4(b)(4). But in the instant case, there is no record of the Defendant's race, no record of the handler's perception of the Defendant's race, and no record the handler had seen the Defendant or knew her name so as to form an opinion about her race. The issue that is of interest to the amicus is not present in the facts of this case.

Amicus ACLU argues that new technologies are being discussed in TED talks which will capture conversations in another room by interpreting the vibrations of the leaves of a house plant. Memorandum filed by Amicus Curiae ACLU (M-ACLU) at 7. Amicus argues this is an issue of substantial public interest. MAC-K at 9 (citing RAP 13.4(b)(4)). But in the instant case, there is no new technology peering into a home, only a dog's nose in a public parking lot. This case does not even present the privacy concerns of a snout thrust into a traveler's crotch or a biting dog. Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending Protection of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. 735, 752-53 (2007)

(the dog sniff of an inanimate object is minor). Here K9 Pick arrived after the Defendant had been arrested and transported to jail. She sniffed the exterior of a parked, sealed car in the public lot. This case does not contain a record for a discussion of emerging technologies.

The amici argue that K9 Pick's nose is either unreliable or too reliable. The court of appeals declined to address this claim.

> A party may not generally raise a new argument on appeal that the party did not present to the trial court. *In re Detention of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007).
> ....
> the formulation of a new rule requiring disclosure of a police dog's record of reliability before the issuance of a search warrant based on a sniff is a subject ***best left to the trial court after a full exploration of the evidence*** supporting and opposing the reliability of a sniff or best reserved for our Supreme Court or the state legislature.

Unpublished Opinion at 15 (emphasis added). Because no such claim was made below, there is no record to support any such argument above. Because the court of appeals made no ruling on the unpreserved claim, there is nothing for this Court to review.

Amici would inject new adjudicative facts from unvetted studies and opinions outside of the area which speak neither to Pick's training nor her reliability. It is this clone they would like the Court to consider, not the actual case and record of Megan Lares-Storm.

This Court will accept discretionary review "only" to resolve a conflict of case law, a significant question of constitutional law, or an issue of substantial public interest. RAP 13.4(b). The issues the amici would like reviewed, interesting while they may be, were not raised below. Therefore, there is no record upon which to develop any meaningful new rule. The Court must deny review.

B. THE ACTUAL CASE DOES NOT INVOLVE THE ISSUES AMICI WANT REVIEWED.

Prior to a stipulated facts trial (CP 56-57), defense counsel filed a motion arguing:

> So, here is the heart of the issue. Did Detective Harris establish probable cause to obtain the search warrant?

CP 12. Amicus ACLU states that the motion alleged "the sniff was a warrantless search." M-ACLU at 2. This is false. The only question to the court was whether the warrant was supported by probable cause. [The inventory exception argument was not reached, because the court found the warrant was valid. CP 13-15. And the Defendant's claim that the police reports misrepresented where the sniff occurred was reserved for the defense to find evidence in support of its allegation. RP 6-7.]

The only record before the court was the motion (CP 9-15),

warrant (CP 37-38), affidavits supporting the warrant (16-36, 39-41), and the warrant return (CP 42-47).

The motion was heard at a release hearing, because the judge thought a ruling on the motion "might lend some clarity to the OR[1]." RP 4. The court relied upon the defense "memorandum and cases." RP 4. Apparently the defense had also provided a bench copy of an unpublished case. RP 5 (referring to *State v. Tonies*, 193 Wn. App. 1007 (2016) as appropriate for consideration under *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 248, 178 P.3d 981, 988 (2008)). No testimony was taken. The prosecutor's only comment in the hearing was in respect to whether the Defendant should be released from custody on her own recognizance. RP 9.

Although the canine alert was one bit of information available to the magistrate who issued the warrant, the defense did not challenge the reliability of the K-9 Pick. In fact, the court specifically noted that "the issue of the dog sniff really isn't addressed" in the motion. RP 5.

If defense had challenged the dog's reliability, the State could have called canine handler Officer Fulmer to testify, and he could

have provided a 5-inch thick binder chronicling Pick's trainings and, at that time, 400 deployments. CP 33. The binder tracks all kinds of variables, including time of day, temperature, and many other things. It is a binder Ofc. Fulmer has brought to court in the past when relevant to a defense motion. The binder and testimony are not part of this record, because Pick's reliability was not challenged below.

At the trial level, there was no claim that the handler influenced the canine to alert to the vehicle. There was no claim of racial bias. Neither the Defendant's race nor the canine handler's perception of her race are a part of this record. The record suggests that the handler did not see the Defendant prior to the sniff procedure or know the identity of the suspect associated with the vehicle. CP 27. The Defendant had been transported to the jail before the canine handler was even summoned. CP 27, 37.

Officer Fulmer's report reads, in relevant part:

> I started K9 Pick at the driver front of the vehicle and she sniffed in a counter clockwise direction around the vehicle. As she first went past the driver door she (sic) I noticed a little change of behavior indicated by her passing the driver door and turning to go back toward the driver door but I encouraged her to keep moving in a counter clockwise direction around the vehicle at a

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[1] "OR" is the release without bail on one's own recognizance.

> fast pace. As we got around to the driver door on the second trip around the vehicle, I noticed another change of behavior again on the driver door area. K9 Pick slowed down, focused her nose around the driver door handle and door seam. K9 Pick showed a final alert on the driver door indicating the presence of narcotic odor for which she was trained to detect. During the deployment of K9 Pick I only directed her around the outside of the vehicle and did not at anytime direct her or encourage her to touch or climb on the vehicle.

CP 27. In the absence of a preserved claim of error, Officer Fulmer had no opportunity to respond to allegations raised for the first time on appeal and no opportunity to provide more specific and relevant information about his and the dog's training.

C. THE AMICI SEEK TO INJECT ADJUDICATIVE "FACTS" INTO THE RECORD ON REVIEW IN VIOLATION OF COURT RULE, PROCEDURAL DUE PROCESS, AND ETHICAL RULES FOR ATTORNEYS AND JUDGES.

Generally, the court's review on a direct appeal is limited to the record. RAP 9.1(a); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251, 1257 (1995). Every factual statement must include a "reference to the record." RAP 10.3(a)(5).

The only exception to the general rule is judicial notice under ER 201(b). CJC 2.9(C) (a judge "shall consider only the evidence presented and any facts that may properly be judicially noticed.");

Formal Opinion 478, ABA Standing Committee on Ethics and Professional Responsibility (Dec. 8, 2017)[2]; Sarah Andropoulos, ABA Guidance on Judicial Internet Research: Ethics, Due Process, and the Murky Law of Judicial Notice, Verdict, July 17, 2018.[3] "The canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution." *In re Sanders*, 159 Wn.2d 517, 524, 145 P.3d 1208, 1212 (2006). The judicial notice exception does not apply to the facts submitted by amici in our case.

An attorney who references a "fact" that is not the proper subject of judicial notice deprives an opponent of a meaningful opportunity to be heard on the question of whether or not that "fact" is true. This is unfair to the opposing party and violates a rule of the appellate tribunal. RPC 3.4(c). It is particularly unfair, because attorneys know that judges are tempted to consider information outside of the record. Robert Barnes, Supreme Court rule: (Other) justices shouldn't conduct independent research, The Washington Post, Mar. 25, 2018.[4]

The judicial notice rule applies to adjudicative facts as opposed

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[2] http://www.abajournal.com/images/main_images/FO_478_FINAL_12_07_17.pdf
[3] https://verdict.justia.com/2018/07/17/aba-guidance-on-judicial-internet-research
[4] https://wapo.st/2OKdSx0

to legislative facts. 5 Wash. Prac., Evidence Law and Practice § 201.1 (6th ed.). It only permits the consideration of facts "not subject to reasonable dispute" that are either:

> (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

ER 201(b). Amici would like this Court to consider that drug sniffing canines are unreliable or too reliable or racist. Amicus ACLU would like the Court to believe that it "ignores the facts of physics" to say that K9 Pick sniffed molecules outside the car. M-ACLU at 6. These are not facts of the sort that can be judicially noticed. They are reasonably and actually disputed.

An adjudicative fact is the sort normally determined by a jury, e.g. weighing expert testimony relevant for assessing witness reliability. 5 Wash. Prac. § 201.1. While a legislative fact is governed by decisional law, the sort that would be binding on the jury. *Id. See United States v. Gould*, 536 F.2d 216 (8th Cir. 1976) (defendant was not entitled to have jurors instructed that they could disregard the judicially noticed fact that cocaine hydrochloride is derived from coca leaves and therefore a Schedule II controlled substance).

A court may take judicial notice of a public document if its authenticity cannot reasonably be questioned. *Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487, *rev. denied*, 184 Wn.2d 1011 (2015). And a court may take judicial notice of obvious information such as the fact that foreign exchange students "rarely move in family units to the United States." *Fusato v. Washington Interscholastic Activities Association*, 93 Wn. App. 762, 772, 970 P.3d 774 (1999).

However, the rule does not permit the consideration of, for example, information posted on the internet sites of immigrant rights organizations. *In re Marriage of Meredith*, 148 Wn. App. 887, 904, 201 P.3d 1056, *rev. denied*, 167 Wn.2d 1002, 220 P.3d 207 (2009) (party prevented from arguing judicial bias based on financial contributions to NWIRP website that were not part of the record on review). Nor may a court judicially notice a witness' size. *State v. Payne*, 45 Wn. App. 528, 531, 726 P.2d 997 (1986). "The notion of judicial notice should not be confused with a judge's personal knowledge about facts at issue." 5 Wash. Prac., Evidence Law and Practice § 201.3 (6th ed.).

The presentation of facts for the first time on appeal is

especially objectionable, because appellate courts do not determine the facts. Where a matter was not raised below, it is waived. There is no record upon which to decide a claim. A particular canine's reliability or alleged unreliability or even the general theory of the validity of any canine sniff is a matter to be addressed in the trial court on a motion to exclude. It is not appropriate to litigate a particular dog's reliability by select citation to certain studies that have not been vetted at an evidentiary hearing.

Courts occasionally ignore the rule limiting the record on review when the source of adjudicative facts is amicus briefing, perhaps under the mistaken belief that an amicus curiae is a disinterested party. *See New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 502, 687 P.2d 212 (1984) (relying on amicus American Gas Association for an estimate of persons using gas for residential needs when deciding whether companies transporting natural gas should be strictly liable for injuries caused by explosions). That conventional wisdom is deeply flawed where facts submitted by amici today are "funneled through the screen of advocacy." Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757 (2014) ("The result is that the Court is inundated with eleventh-hour,

untested, advocacy-motivated claims of expertise.")[5] Reliance on the perceived neutrality of an amicus can produce disastrous results.

In *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009), Chief Justice Roberts relied upon the Solicitor General's amicus brief which argued that deportation does not cause irreparable harm, because DHS had a policy of repatriating victorious litigants. Nancy Morawetz, Convenient Facts: *Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts,[6] 88-5 N.Y.U.L. Rev. 1600 (2013). This turned out to be false. Following FOIA litigation, it was discovered there was no such policy or practice. The Office of the Solicitor General was forced to apologize. But the opinion was written, and the damage was done.

Fred Korematsu was himself a victim of this practice. Following the admission of error in *Nken*, the U.S. Solicitor General further acknowledged doctoring a War Department report "to provide a bogus military justification" in its defense of internment cases involving Fred Korematsu, among others. Morawetz, 88-5 N.Y.U.L. Rev. at 1603. This is why we do not take reports at face value but scrutinize them through established legal procedures at the trial level.

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[5] http://ssrn.com/abstract=2409071

It is not enough to say that the party has an opportunity to rebut the late-presented "fact" in briefing. In one professor's review of what check the adversary system provided on amicus-provided facts, only 35 out of 124 factual claims were even addressed. Larsen, 100 Va. L. Rev. at 1800-02 ("the amicus machine is too big, and the field of possible authorities is too vast for the parties to be able to keep up"). The proper way to vet these claims is at the trial court with a witness list, curricula vitae of experts, and cross-examination under the *Daubert* standard, inquiring into the research methods, sample size, protocols, etc.. Procedural due process requires the restrictive rule. *State v. K.N.*, 124 Wn. App. 875, 883, 103 P.3d 844 (2004). A party has a right to a meaningful opportunity to be heard (to depose, cross-examine) regarding any fact that is adjudicative and determinative of the outcome.

The Court must reject amici's invitation to act as an administrative agency issuing advisory opinions after notice-and-comment regarding TED talk technologies or racial prejudice where neither issue is relevant to or developed in our record. "A court [ ] is necessarily reactive rather than proactive." Larsen, 100 Va. L. Rev. at

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[6] www.nyulawreview.org/sites/default/files/pdf/NYULawReview-88-5-Morawetz.pdf

1806. It is tied to the case or controversy before it. The Court does not enjoy the luxury of time that an agency has. *Id.* And the Walla Walla Prosecutor's Office cannot solicit reports and opinions like a regulating agency in order to prepare a recommendation on a state-wide rule on matters that are not part of this record. It is only defending a single conviction for possessing methamphetamine.

The better practice is to require amici to limit their assistance to illuminating "points of law." *Ochoa Ag Unlimited, LLC v. Delanoy*, 128 Wn. App. 165, 172, 114 P.3d 692 (2005) (striking amicus appendices).

D. THE STUDIES REGARDING CANINE RELIABILITY ARE NOT ADMISSIBLE, RELEVANT, OR HELPFUL.

Amicus Korematsu asks this Court to consider so-called "empirical evidence" regarding rates of "false positives" or "false negatives" in drug-detection dogs as determined by studies that were not presented to the lower court. MAC-K at 2-7. The language reveals the proponent's agenda. There is no such thing as a false positive or a false negative. *See* State's Answer at 15-16. Canines alert to odors, not drugs. The absence of a substance does not indicate the absence of a scent. If a dog fails to alert when the

substance is present, this speaks to the instrument's sensitivity. A defendant can have no standing to complain when there is no alert.

The amicus cites a 2001 study from the Institute for Biological Detection Systems for the proposition that some canines have high rates of "false alarms," particularly when they tire. MAC-K at 3-4.

As explained *supra*, the Court may not consider this information, because it is outside of the record. Alleged rates of "false positives" are not "generally known within the territorial jurisdiction" or "capable of accurate and ready determination." ER 201(b). These are not the type of adjudicative facts of which the Court may take judicial notice.

Even at the trial level, this would be inadmissible hearsay. ER 801; ER 802. Before the court would consider any information, the proponent would need to make a real witness available for interviews; provide reports and written statements (CrR 4.7); lay a proper foundation (ER 701, 702, and 703); and there would be briefing and argument prior to any ruling. Here no witnesses have been named, interviewed, deposed, or cross-examined as to their backgrounds, their expertise, the definitions of their terms, their research methods, the study's relevance to the particular case, their familiarity with the

protocols, training, trainer, and canine in the instant case, the validity of their study over time and as compared with other studies, etc..

The Court may not consider these studies presented for the first time by way of amicus memo without violating due process.

Moreover, the study and statistics which the amicus offer are questionable on their face. Two sources broadly discuss the conclusions, but not the data, of surveys in Illinois. There is no information that would permit us to extrapolate those conclusions to procedures in Washington. Other studies, cited on the issue of the handler's racism, are irrelevant in our case where Ofc. Fulmer was not aware of the suspect's identity.

The only remaining study amicus offered is the Garner study. Kelly J. Garner et al., *Duty Cycle of the Detector Dog: A Baseline Study* (Apr. 2001) at iii, 3. It collected data on only four dogs and five research assistants (not professional handlers), a startling sample size from which one is unlikely to be able to draw any conclusions. Garner at iii, 3. The dogs had multiple handlers, a practice you would never see in law enforcement. Garner at 7. In a period of 12 months, the study dogs only worked one or two days a week due to staff limitations. Garner at 19. The study admits this is not how a

professional dog performs, but the researchers were limited by the parameters of their funding. *Id.* The study dogs would perform "relatively long searches," searching 5-7 hours each day, "working as long as possible, given unavoidable logistical limitations." Garner at 7-8, 19. Again this is not how drug dogs perform in the field in Washington. Drug dogs are generally pointed at a bag or vehicle. There is no suggestion that K-9 Pick was fatigued. She was off duty at home when the handler retrieved her. CP 27. The four study dogs would do prolonged searches of perimeters and open fields. Garner at 7-8, 19. K-9 Pick sniffed around a single vehicle twice. CP 27. The "false alarms" increased for searches exceeding 90 minutes – but K-9 Pick's sniff of the exterior of a single vehicle is not likely to have lasted more than a few minutes. Garner at 16. The study is not helpful. ER 701 (expert testimony is only admissible if "helpful" to the trier of fact).

The amicus only asserts that *some* dogs purportedly have a high false positive rate when they are looking for *some* drugs (e.g. heroin which some dogs confuse with pickles) under *some* circumstances (e.g. when some dogs have grown tired). MAC-K at 4. This is a long way from showing that "dog sniffs are unreliable" as a

rule in Washington or that K-9 Pick in particular is unreliable. The Garner study does not compare its methods to current training and practice in Washington. There is no suggestion in this record that K-9 Pick confuses pickles for heroin. In this case, Pick correctly alerted to methamphetamine, not heroin.

The studies proffered by amici are not helpful, admissible, or appropriate for consideration. They are not part of the record in the Lares-Storm case.

There are many proper avenues for amici to address these issues. They can advocate for review of a case with a proper record, assist a trial attorney in making that record, or advocate about what weight is due a canine alert. And recommendations for procedures can be made to the Criminal Justice Training Commission. WAC 139-05-915. But it is improper to create a record for the first time on appeal where error was not preserved below and there is no adequate process for vetting late-presented adjudicative facts.

III. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the petition for review.

DATED: August 6, 2018.

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Lila J. Silverstein lila@washapp.org Robert S. Chang changro@seattleu.edu Jessica Levin levinje@seattleu.edu Antoinette Davis tdavis@aclu-wa.org Douglas Klunder klunder@comcast.net	A copy of this Answer was sent via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 6, 2018, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

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