

34765-6-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MEGAN LARES-STORM,

Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF WALLA WALLA COUNTY

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RESPONDENT'S RESPONSE  
TO BRIEF OF AMICUS CURIAE

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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**

The Appellant/Defendant Lares-Storm made two challenges in this appeal: (1) whether a canine sniff is a search and (2) whether the canine in question was shown to be reliable.

The State has responded that (1) the first question is a decided matter under the United States Supreme Court and that the Defendant did not perform a proper *Gunwall* analysis; and (2) the question of the canine's reliability has not been preserved for review.

The Amicus Curiae Fred T. Korematsu Center for Law and Equality entirely disregards the actual record and arguments of the parties, seeking only to offer adjudicative "facts" outside of the record on review as to the unpreserved question of the particular canine's reliability. The brief is of no assistance to the Court.

For the first time on appeal, amicus presents adjudicative facts regarding implicit racial bias and canine error rates. These "facts" were not before the lower court. No foundation has been laid. No experts have been

vetted or cross examined. The arguments violate procedural due process.

They should be stricken or disregarded.

- A. THE COURT MUST DISREGARD OR STRIKE ADJUDICATIVE “FACTS” WHICH ARE NOT PART OF THE RECORD BELOW SUCH THAT THEIR CONSIDERATION VIOLATES PROCEDURAL DUE PROCESS.

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). And every factual statement must include a “reference to the record.” RAP 10.3(a)(5).

There is an exception which would permit a court to take judicial notice of facts. That exception does not apply here.

The court may take judicial notice of a fact that is:

... not subject to reasonable dispute in that it is 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). This rule applies to adjudicative facts as opposed to legislative facts. 5 Wash. Prac., Evidence Law and Practice § 201.1 (6th ed.).

An adjudicative fact is the sort normally determined by a jury, e.g. weighing expert testimony relevant for assessing witness reliability. *Id.*

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 (8<sup>th</sup> 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).

Under this rule, 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).

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). This reliance 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,<sup>1</sup> 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.

The supposed neutrality of the party providing an adjudicative fact for the first time on appeal is irrelevant. 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 better practice is to require amici to limit their assistance to

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<sup>1</sup> [www.nyulawreview.org/sites/default/files/pdf/NYULawReview-88-5-Morawetz.pdf](http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-88-5-Morawetz.pdf)

illuminating “points of law.” *Ochoa Ag Unlimited, LLC v. Delanoy*, 128 Wn. App. 165, 172, 114 P.3d 692 (2005) (striking amicus appendices).

If an attorney references a “fact” that he or she knows is not the proper subject of judicial notice, then that attorney 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).

**B. ARGUMENTS REGARDING RACIAL BIAS MUST BE STRICKEN AS IRRELEVANT.**

A considerable portion of the amicus brief here requests this Court to consider the canine handler’s implicit racial bias against the Defendant Lares-Storm. Brief of Amicus Curiae (BAC) at 2-3, 10-17. There is no record which makes this argument relevant in the instant case. Neither the Defendant’s race nor the canine handler’s awareness or perception of her race is a part of the record.

In *State v. Payne*, 45 Wn. App. 528, 531, 726 P.2d 997 (1986), the sentencing court imposed an exceptional sentence, finding that the victim was particularly vulnerable as being a physically small person. The victim’s size was unsupported by any record, and the exceptional sentence was reversed on

appeal. The lower court was not permitted to take “judicial notice” of someone’s appearance, a fact which may reasonably be in dispute. *See also* 5 Wash. Prac., Evidence Law and Practice § 201.3 (6th ed.) (“The notion of judicial notice should not be confused with a judge’s personal knowledge about facts at issue.”).

In this case, canine handler Fulmer arrived on the scene subsequent to the Defendant’s arrest. It is not apparent from the record whether he observed the Defendant. CP 2, 4. Nor is there any record regarding what race he may have perceived her to be or whether his perception was accurate or consistent with other societal norms or her own self-identification of race. Indeed, the amicus acknowledges “race is not directly involved in this case.” BAC at 2. Accordingly, it may not be a part of this Court’s consideration. The Court should strike or disregard amicus arguments III and IV as being irrelevant to the record.

**C. ARGUMENTS REGARDING RATES OF FALSE POSITIVES  
MUST BE STRICKEN HAVING NOT BEEN PRESENTED TO OR  
PRESERVED BEFORE THE TRIAL COURT.**

The amicus is asking this Court to consider so-called “empirical evidence” regarding rates of false positives in drug-detection dogs as determined by studies that were not presented to the lower court. BAC at 2,

4-6. 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. BAC at 4-5.

This would be expert testimony which a court would admit if relevant for assessing a witness’ reliability. In other words, these are adjudicative facts. Alleged rates of false positive are not “generally known within the territorial jurisdiction” or “capable of accurate and ready determination.” ER 201(b). These are not adjudicative facts of which the Court may take judicial notice.

An expert’s testimony may be admitted at a trial only after the witness had been disclosed in discovery and made available for interviews together with reports and written statements as required under CrR 4.7. In addition, the party would first need to lay a proper foundation under ER 701, 702, and 703. And the court would need to rule on whether the expert may be admitted after briefing and argument.

Here no witnesses have been interviewed, deposed, or cross-examined. The authors of this 16 year old study have not been subpoenaed. They have not been 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.. No foundation has been laid. The adjudicative “facts” presented for this Court’s consideration have not been held to any cross-examination.

Because this study was not offered for the lower court’s consideration, their foundation, reliability, credibility, etc. has not been vetted. The Court may not consider these studies presented for the first time by way of amicus brief without violating due process.

Additionally, the study and statistics which the amicus offers are questionable on their face. The Garner study collected data on only four dogs and five research assistants (not professional handlers). Kelly J. Garner et al., *Duty Cycle of the Detector Dog: A Baseline Study* 12 (2001) at iii, 3. It is a startling sample size from which one is unlikely to be able to draw any conclusions. The dogs had multiple handlers, a practice you would never see in law enforcement. Garner at 7. In a period of 12 months, the 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 work “relatively long searches” and be 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. Blood hounds may search for hours at a stretch. Drug dogs are generally pointed at a bag or vehicle. 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. 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). BAC at 5. 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 does not compare their 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. There is no suggestion in this record that K-9 Pick was fatigued.

Finally, the conclusion which the amicus draws is flawed. The

amicus argues that, because dog sniffs are supposedly unreliable, they should be held to be a search. This is not logical. It is like saying that looking through the window of a parked car is lawful only if the officer has good eyesight, but a search requiring a warrant if the officer has bad eyesight. The trial court has the ability to weigh the evidence, but that evidence must be before it. Here the Defendant presented no evidence that K-9 Pick was unreliable.

All the amicus has demonstrated is that courts should continue to enforce *existing* restrictions on search warrants which rely upon canine alerts – i.e. a showing that the particular dog is reliable. That happened here.

### **III. CONCLUSION**

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

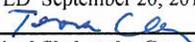
DATED: September 20, 2017.

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September 20, 2017 - 1:51 PM

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34765-6  
**Appellate Court Case Title:** State of Washington v. Megan Cherisse Lares-Storms  
**Superior Court Case Number:** 16-1-00145-6

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