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Supreme Court No. 87929-0

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THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

TIMOTHY LEE DYE,  
Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

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PETITIONER'S ANSWER TO AMICUS BRIEF  
FILED BY NATIONAL CRIME VICTIM INSTITUTE AND  
COURTHOUSE DOGS FOUNDATION

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JAN TRASEN  
NANCY P. COLLINS  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ARGUMENT

1. Amici curiae ignore the requirement of a case-specific finding of necessity in order for an accommodation, such as a dog, to be permitted in the courtroom.

The State requested that a dog accompany Douglas Lare to the witness stand to allay his potential anxiety about testifying and for his personal comfort. CP 104; 11/8/10 RP 27-28. The prosecutor did not refer to Mr. Lare's developmental disability when requesting that he be accompanied by the dog, nor did she claim that Mr. Lare was in fear of the accused. The only bases were Mr. Lare's alleged need for "comfort" while testifying and his potential anxiety.

The case law regarding accommodations provided to witnesses indicates there must be a case-specific finding of necessity made by a trial court. In State v. Hakimi, the only Washington case in which a witness was permitted to testify with a comfort item (although an inanimate one), the trial court considered case-specific testimony from a qualified expert witness and thus was able to make findings on the child witness's difficulty in testifying without the accommodation. 124 Wn. App. 15, 19, 98 P.3d 809 (2004). The Hakimi Court noted that the trial judge made specific findings that one of the children was "highly reluctant" to testify against the accused, following the court's review of the testimony of an expert witness in child interviewing, who had testified concerning the

benefit to children who are permitted to hold security objects while testifying in court. Id. at 21. These specific findings made by the trial court distinguish Hakimi from the instant case, a distinction not addressed by amici.

No finding of necessity was made here. The State did not argue that Mr. Lare was unable to testify without a comfort dog. Neither did the trial court ask why having a comfort dog or other accommodation was necessary. 11/18/10 RP 28-29. The record does not reflect that Mr. Lare had difficulty testifying or being in the same room as Mr. Dye, which makes this case different from Hakimi, and from each case cited by amici.<sup>1</sup>

Amici cite Maryland v. Craig for the proposition that victims need not incur undue emotional stress and tension for confrontation to be constitutionally effective. 497 U.S. 836, 857, 110 S.Ct 3157, 111 L.Ed.2d 666 (1990). However, amici's lengthy discussion of closed-circuit television cases such as Maryland v. Craig and State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998), shed little light on the instant case, since both

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<sup>1</sup> The court ruled that it would "accommodate somebody who has a developmental disability when they're testifying in the courtroom." 11/18/10 RP 29. This was unrelated to the State's request, or to the case-specific necessity requirement, however, since the request was not based upon Mr. Lare's disability, and because the State concedes Ellie is not a service dog, but a facility dog.

courts held quite narrowly, limiting their holdings to child victims of sexual abuse.

In fact, amici misapprehend the holding of Maryland v. Craig, which actually supports Mr. Dye's position. 497 U.S. at 857. In Craig, the Court held there must be a case-specific finding of necessity in order for a trial court to provide an accommodation to a witness – in that case, the opportunity to testify by closed-circuit television. Id. The Craig Court specified that this necessity finding must be quite specific: that the witness is not only suffering from severe emotional distress from the prospect of testifying in the courtroom in general, but from the prospect of testifying in the defendant's presence specifically. Id. Likewise, in State v. Foster, this Court held that a finding of necessity must be case-specific, and specifically related to a fear of the accused, rather than a fear of the courtroom process. 135 Wn.2d at 469. The Foster Court also emphasized that a child witness's emotional distress must be more than de minimus. Id. Lastly, this Court's holding in Foster was extremely narrow, limited to sexual or physical assault cases involving children under the age of ten. Id.

In fact, in every case where courts have addressed comparable situations, a showing of necessity is required – a point that amici overlooks in its brief. See, e.g., State v. Palabay, 9 Haw. App. 414, 424,

844 P.2d 1 (1992) (error to allow 12 year-old witness to testify holding teddy bear, absent finding of necessity). Even those cases in which a witness was ultimately permitted to testify with an inanimate “comfort item,” a case-specific necessity finding was made by the trial court after weighing the impact of the accommodation on the witness and on the jury. For example, in State v. Cliff, 116 Idaho 921, 924, 782 P.2d 44 (1989), the court permitted a child witness to hold a doll, but only allowed this to occur after it conducted a hearing, learned that the child was in great physical distress about testifying, and held that testifying with a doll would stop her from compulsively chewing her nails or covering her face while testifying. Id. at 923. The court found that coherent testimony from the young child was otherwise impossible. Id. at 924. See also State v. Powell, 318 S.W.3d 297, 304 (Mo. Ct. App. 2010) (emphasizing “trial courts must be cognizant of the possibility that comfort items or other accommodations for minors may unfairly engender sympathy for complaining witnesses”).

Here, the Court of Appeals assumed the trial court made the necessary findings “implicitly,” even though it had not done so on the record. State v. Dye, 170 Wn. App. 340, 347, 283 P.3d 1130 (2012), rev. granted, 170 Wn.2d 1011 (2013). This assumption is misguided since there is no evidence the court understood or applied the correct legal

standard. On-the-record analysis should be mandatory when weighing the various factors at issue, for a court to take the highly unusual step of permitting a live animal to sit beside the complaining witness for purposes of easing the anxiety of testifying witnesses. Cf. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (requiring on-the-record balancing and finding by preponderance of the evidence for admission of ER 404(b) evidence); State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982) (court's balancing must be "careful and methodical" in ER 404(b) context).

Amici do not address the requirement of a case-specific finding of necessity in order for a facility dog or other type of accommodation to be permitted in the courtroom.

2. Because a live dog is a different accommodation from a doll or a teddy bear, amici's extended discussion of victims' rights is irrelevant.

Amici engage in an extended discussion of access to the courts, grounded in the United States and Washington Constitutions. Brief of Amici Curiae at 10-15. The brief offers broad generalizations about the right of public access to judicial proceedings. Id. It also repeatedly and selectively quotes from article I, § 35 in a misleadingly fashion. Article I, § 35 grants two specific rights to victims of crimes: the right to be informed of and attend court proceedings, and the right to make a

statement at sentencing or other proceeding where a defendant may be released. Mr. Dye has never suggested that Mr. Lare should not have been informed of the court proceedings or should not have been permitted to attend them. Yet amici offer very little discussion of the effect of dogs accompanying the accuser to the witness stand in the courtroom, even though this is the novel issue before the Court.

A dog is not only a living a breathing creature, unlike the inanimate blanket or doll discussed by amici; a dog comes to court with societal baggage that is difficult to discern and eradicate. For example, in dog-tracking cases, this Court has recognized the “dangers inherent” in testimony that a dog successfully tracked certain evidence. State v. Loucks, 98 Wn.2d 563, 567, 656 P.2d 480 (1983). Jurors tend to have a “trustworthiness [that] may be misplaced” in a dog’s senses. Brott v. State, 70 Neb. 395, 97 N.W. 593 (1903) (cited with approval in Loucks).

Prevalent beliefs about the infallibility of dogs may encourage jurors to believe that a person who is comforted by a dog must himself be a trustworthy person. People who trust dogs are more likely to trust the person who sits beside a dog. This type of speculation is at the root of the reason that introducing a dog into a jury trial unsettles the appropriate assessment of a witness’s credibility and may affect jurors in intangible ways.

Amici's discussion of victims' rights does not incorporate the issues this Court must address in this case. The alleged victim, Mr. Lare, was provided with a living and breathing "comfort item," with which he interacted in the presence of the jury. 12/1/10 RP 10 ("This is Ellie ... Ellie is to help me and to make it easier for me. And I have treats here."). This alone distinguishes this case from any cited by amici. See Hakimi, 124 Wn. App. at 19 (no interaction with doll in front of jury); State v. Dickson, 337 S.W.3d 733, 743-44 (Mo. Ct. App, 2011) (teddy bear never referred to in presence of jury); Powell, 318 S.W.3d at 304 (no reference to teddy bears in presence of jury).

This type of interaction between the witness and the dog in the jury's presence is unprecedented. It also distinguishes this case from cases involving dolls and teddy bears, and remains unaddressed by amici.

3. Amici ignore the due process violation established by Mr. Dye.

Timothy Dye's constitutional right to receive a fair trial was violated when the trial court permitted the complaining witness to testify while accompanied by the prosecutor's dog – a point not addressed by amici.

The right to receive a fair trial is fundamental. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 2798, 101 L.Ed.2d 857 (1998); U.S. Const. amends. VI, XIV; art. I, sec. 3, 22. This right, guaranteed by the Sixth and

Fourteenth Amendments, is premised upon the principle that “one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on ... other circumstances not adduced as proof at trial.” Holbrook v. Flynn, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (quoting Taylor v. Kentucky, 436 U.S. 478, 485, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468 (1978)). Because the appearance of fairness and impartiality is important, cases must be tried in an “atmosphere of complete impartiality.” State v. Swenson, 62 Wn. 2d 259, 281, 382 P.2d 614 (1963), overruled on other grounds by State v. Land, 121 Wn.2d 494, 851 P.2d 678 (1993).

Amici argue that the trial court’s instruction to the jury was adequate to cure any prejudice resulting from the dog’s presence at trial. Brief of Amici at 5-6. However, this instruction was wholly inadequate and came far too late in the proceedings to mitigate the prejudice created by the dog’s presence, which had already altered the jurors’ perceptions of the integrity and veracity of the complaining witness. CP 53.

In addition, it is well settled that the appearance of fairness is so intrinsic to the due process right to a fair trial that certain violations cannot be cured by a jury instruction. See, e.g., Estelle v. Williams, 425 U.S. at 503; Holbrook v. Flynn, 475 U.S. at 568 (“Our faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has

never been absolute"); State v. Finch, 137 Wn.2d 792, 843-45, 975 P.2d 967 (1999) (shackling of defendant was abuse of discretion). In cases where the appearance of fairness is undermined, or where the presumption of innocence is shifted by the procedures followed at trial, as here, an instruction given by the court to not draw any conclusions based upon the very error is simply insufficient to cure the resultant prejudice.

The dog's presence next to the alleged victim as he testified inevitably led jurors to conclude that the dog was in court to shield him from the accused, which would only be necessary were he guilty or a frightening person. See State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). The dog's presence would also be interpreted as a signal that Lare was vulnerable because he was in the presence of the person who had committed a crime against him, undermining the presumption of innocence. Finally, the fact that Mr. Lare bonded with a sweet dog bolstered his trustworthiness to the jurors in a manner that jurors could not simply disregard at the end of the case.

Although the prosecutor told the court during motions practice that the dog was the property of the prosecutor's office and not Mr. Lare's, the

prosecutor did not mention that the dog actually lived in Ms. Ulrey's own home, or that she personally is Ellie's trainer.<sup>2</sup>

While amici point out that during trial, a dog's trainer can often be cross-examined, this would have been impossible at Mr. Dye's trial, since Ms. Ulrey was the prosecuting attorney handling the trial at the time. Brief of Amici at 8 n.7; RPC 3.7. Moreover, the prosecutor never disclosed the six-year dog-trainer relationship between Ellie and Ms. Ulrey at the time of trial.<sup>3</sup>

There was no need to diminish Mr. Dye's right to a fair trial in order to afford Mr. Lare his right to attend the court proceedings. There is no reason to believe Mr. Lare would have had any trouble testifying without a dog by his side. Absent a necessity, such as a service dog who provides a verifiable accommodation to a witness, the risk that jurors alter their perception of the complainant based on the presence of the dog is too

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<sup>2</sup> Talking Animals: Page Ulrey, an Attorney and Pioneer in the Use of Courthouse Dogs (WMNF radio broadcast, Nov. 16, 2011) (available at: <http://www.talkinganimals.net/2011/11/page-ulrey-an-attorney-and-pioneer-in-the-use-of-courthouse-dogs/>) (last accessed May 2, 2013). In this interview, DPA Ulrey discusses her home life with Ellie, and the dog's daily routine, including morning jogging with Ms. Ulrey, trips to the dog park, and the attorney's experience of "falling in love" with Ellie at a week-long training approximately six years prior to Mr. Dye's trial; Casey McNerthney, Dogs Give Prosecutors a Hand in Difficult Cases, Seattle Post-Intelligencer, Sept. 2, 2007 (available at: <http://www.seattlepi.com/local/article/Dogs-give-prosecutors-a-hand-in-difficult-cases-1248466.php>) (last viewed May 2, 2013) (noting Ms. Ulrey pays for the dog's food).

<sup>3</sup> Although amici contend that a facility dog is not a "personal pet," DPA Ulrey has stated that Ellie lives in her home, watches television with her each night, and is financially supported by her. See n.2, *supra*.

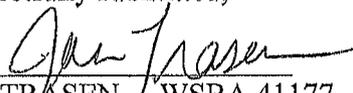
great to permit the routine use of dogs as tools for comforting witnesses on the stand at trial.

B. CONCLUSION

For the foregoing reasons, Mr. Dye respectfully requests this Court reverse his conviction for residential burglary, and hold that the use of a “comfort dog” during the complainant’s testimony violated due process.

DATED this 3<sup>rd</sup> day of May, 2013.

Respectfully submitted,



JAN TRASEN - WSBA 41177  
Washington Appellate Project (91052)  
Attorneys for Petitioner

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
 )  
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 ) NO. 87929-0  
 v. )  
 )  
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 )  
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**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

[X] SETH FINE, DPA (X) U.S. MAIL  
[sfine@snoco.org] ( ) HAND DELIVERY  
SNOHOMISH COUNTY PROSECUTOR'S OFFICE ( ) \_\_\_\_\_  
3000 ROCKEFELLER  
EVERETT, WA 98201

[X] MARGARET GARVIN (X) U.S. MAIL  
REBECCA S.T. KHALIL ( ) HAND DELIVERY  
NATIONAL CRIME VICTIM LAW INSTITUTE ( ) \_\_\_\_\_  
310 SW 4<sup>TH</sup> AVE. STE 540  
PORTLAND, OR 97204

**SIGNED** IN SEATTLE, WASHINGTON THIS 3<sup>RD</sup> DAY MAY, 2013.



X \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

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### State v. Timothy Dye

No. 87929-0

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#### **Answer to Amicus Brief**

Jan Trasen – WSBA #41177  
Nancy P. Collins - WSBA #28806  
Attorneys for Petitioner  
Phone: (206) 587-2711  
E-mail: [jan@washapp.org](mailto:jan@washapp.org)  
E-mail: [nancy@washapp.org](mailto:nancy@washapp.org)

By

**Maria Arranza Riley**  
**Staff Paralegal**  
**Washington Appellate Project**  
**Phone: (206) 587-2711**  
**Fax: (206) 587-2710**  
**[www.washapp.org](http://www.washapp.org)**

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