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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 SUPPLEMENTAL BRIEF

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A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED

The complaining witness in the burglary prosecution against Timothy Dye was an adult man, Douglas Lare. Over Mr. Dye's vigorous objection, the prosecution lent Mr. Lare a "comfort dog," which sat by Mr. Lare's side to "comfort" him while he testified before the jury.

It is axiomatic that a person accused of a crime has a due process right to a trial that is fair and that appears to be fair, which includes a full opportunity to cross-examine the complainant and to be free from undue prejudice resulting from outside influences such as bolstering or vouching by the prosecution. Does it undermine the fairness of the trial and inject impermissible prejudice into the proceedings when the prosecution places a dog next to the complaining witness during his testimony for the purpose of comforting the witness?

B. STATEMENT OF THE CASE

Timothy Dye was involved in a romantic relationship with Alesha Lair – a relationship that continued even while Mr. Dye resided in Shelton, Washington during 2007. 11/22/10 RP 70-72; 12/2/10 RP 87-89.<sup>1</sup> During the time Mr. Dye and Alesha were apart,<sup>2</sup> Alesha became involved with

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<sup>1</sup> The fact that Mr. Dye was an inmate at Washington Correctional Center during that time period was not before the jury. 11/18/10 RP 24.

<sup>2</sup> Because the spelling and pronunciation of the complainant's and co-defendant's last names are so similar, first names were apparently used in the record.

Douglas Lare, a neighbor who was developmentally disabled. 11/30/10 RP 21, 26-27; 12/1/10 RP 14-20.

Alesha eventually moved into Mr. Lare's apartment, opened several lines of credit in his name, encouraged him to purchase a car, bought additional items for the home with his credit cards, and liquidated his retirement account. 11/30/10 RP 29-32; 12/1/10 RP 21-29.

When Mr. Dye returned to Seattle, Alesha left Mr. Lare and moved into an apartment with Mr. Dye. 12/1/10 RP 40-41. On January 24, 2008, Mr. Lare awoke to find Mr. Dye in his apartment, asking to collect some of Alesha's belongings. 12/1/10 RP 38-40. The following day, Mr. Lare arrived home from work to find his front door propped open and several items missing. Id. at 35-37. Police found no evidence of forced entry, but were told that Alesha still had keys to Mr. Lare's apartment. Id. at 111; 12/2/10 RP 31-33, 54-65.

Alesha Lair was charged with and pled guilty to theft in the first degree with a vulnerable adult aggravator. CP 1-12; 12/6/10 RP 12.

Mr. Dye was charged with residential burglary. CP 29-30. At trial, the State sought to have Douglas Lare testify with Ellie, a dog owned by the prosecutor's office. 11/18/10 RP 28-30. Mr. Dye objected that the dog's interjection into the trial would cause "extreme prejudice" and

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violated his right to a fair trial. Id. He told the court he had allergies to dogs, and the presence of a dog in the courtroom would be difficult for him.<sup>3</sup> Id. The trial judge overruled the objection and permitted the dog to appear at Mr. Lare's side as he testified. Id. at 32.

Following a jury trial, Mr. Dye was convicted of the sole count of residential burglary. CP 68. The Court of Appeals affirmed Mr. Dye's conviction, concluding that the trial court had implicitly balanced Mr. Dye's due process rights with the complainant's need for emotional support, and that in any case, there was no prejudice. State v. Dye, 170 Wn. App. 340, 283 P.3d 1130 (2012), rev. granted, 176 Wn.2d 1011, \_\_\_ P.3d\_\_\_ (2013).

### C. ARGUMENT

#### PERMITTING A COMPLAINING WITNESS TO TESTIFY WITH THE AID OF A DOG PROVIDED BY THE PROSECUTION WITH NO SHOWING OF NECESSITY VIOLATES DUE PROCESS.

1. The federal and state constitutions guarantee the accused the right to due process of law and a fair trial.

Every person accused of a crime has the right to a fair trial. 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

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<sup>3</sup> He also argued that if the complainant were permitted a dog to ease his anxiety, then Mr. Dye's anxiety should also be accommodated by letting him hold something while testifying that would make him more comfortable, such as his baby. 11/18/10 RP 28. This request was denied. Id. 28-29.

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)).

It is the “burden of the courts” to “try all cases in an atmosphere of complete impartiality, not only without any reservation whatever but devoid of appearance by any such reservation.” 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). Thus, our courts have consistently held that the appearance of fairness and impartiality in the courtroom is important.

This Court noted in State v. Finch, “Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial.” 137 Wn.2d 792, 845, 975 P.2d 967 (1999) (shackling of defendant was abuse of discretion). In a similar vein, this Court has held that a trial cannot be held in a jailhouse courtroom, because a defendant is entitled to “the physical indicia of innocence.” State v. Jaime, 168 Wn.2d 857, 861, 233 P.3d 554 (2010). In another example, prosecutorial conduct during trial that implicitly connotes racial bias is impermissible, because even though it may be subtly invoked, it

has a lasting impact on the fact-finders. State v. Monday, 171 Wn.2d 667, 678, 257 P.3d 551 (2011).

The same prohibition applies to prosecutorial vouching. When a prosecutor vouches for a witness, it encourages the jury to convict a defendant for improper reasons. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (citing United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir. 2007)) (“Improper vouching” occurs “if the prosecutor indicates that evidence not presented at trial supports the witness's testimony.”).

Here, the trial court’s decision to allow the prosecutor’s dog to sit with the complaining witness on the witness stand impermissibly interfered with Mr. Dye’s right to due process. Ellie lives with the prosecutor who tried the case against Mr. Dye, Page Ulrey. Casey McNerthney, Dogs Give Prosecutors a Hand in Difficult Cases, Seattle Post-Intelligencer, Sept. 2, 2007.<sup>5</sup> The presence of a comfort dog distracted the jury from its role in assessing the veracity and accuracy of the complaining witness.<sup>6</sup> As

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<sup>5</sup> Available at: <http://www.seattlepi.com/local/article/Dogs-give-prosecutors-a-hand-in-difficult-cases-1248466.php> (last viewed April 7, 2013).

<sup>6</sup> In disability rights law and literature, the terms “comfort dog” and “therapy dog” are used interchangeably, along with “emotional support animal.” 42 U.S.C. §§ 12101 et seq.; RCW 49.60 et seq.; Lara Bogle, Therapy Dogs Seem to Boost Health of Sick and Lonely, National Geographic News, Aug. 8, 2002; William Glaberson, By Helping Girl to Testify at a Rape Trial, a Dog Ignites a Legal Debate, N.Y. Times, Aug. 8, 2011 (hereafter, Glaberson); <http://www.tdi-dog.org> (last accessed September 27, 2012).

In its Court of Appeals brief, the State exclusively referred to Ellie as a “trained service dog” or “service dog.” Brief of Respondent at 2, 7, 10, 12, 14, 16. At oral

discussed below, the witness's testimony was given an aura of truth and sympathy, which undermined the presumption of innocence.

2. The use of a "comfort dog" fundamentally taints proceedings and undermines the defendant's right to confrontation, leading to unreliable results.

An accused person is guaranteed a fair opportunity to defend against the State's accusations. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010). The rights to confront and cross-examine witnesses have long been recognized as essential to due process. Chambers, 410 U.S. at 294; Jones, 168 Wn.2d at 720.

The right of confrontation has been called the means by which the mission to advance truth-determination in criminal trials is achieved. Tennessee v. Street, 471 U.S. 409, 415, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985). This mission is foiled by the use of a comfort dog, whose presence suggests the ultimate issue of fact for the jury by presuming the victimhood of the complainant, and undermining the defendant's presumption of innocence. Estelle v. Williams, 425 U.S. at 503; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

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argument in the Court of Appeals, the State called Ellie a "facility dog;" this terminology was adopted by the Court of Appeals. State v. Dye, 170 Wn. App. at 343 n.5.

Here, the State requested the dog to allay Mr. Lare's potential anxiety about testifying and for his personal comfort. CP 104. However, the jury is instructed to assess a witness's demeanor while testifying, in order to assess his or her credibility. CP 45-46. The use of a "comfort" dog creates the risk that jurors may look to the dog for cues about the witness's reliability or honesty. They may be distracted by the dog and fail to look at the facial and other physical expressions of the witness.

Indeed, it is the very physical and physiological responses produced by testimony that a jury utilizes to determine a witness's credibility. While the "face-to-face presence may, unfortunately, upset the truthful rape victim or the abused child,... it may [also] confound and undo the false accuser." Coy v. Iowa, 487 U.S. 1012, 1020, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

A dog is unable to distinguish between the stress associated with truth-telling and that associated with bearing false witness. "When [witnesses] start talking about difficult things," ... one psychologist who works with therapy dogs notes, the dog "picks up on that and goes over and nudges them. I've seen it with my own eyes." William Glaberson, By Helping Girl to Testify at a Rape Trial, a Dog Ignites a Legal Debate, N.Y. Times, Aug. 8, 2011 (hereafter, Glaberson), at 4. Since defense counsel cannot cross-examine the dog as to the source of the witness's stress – truth-

telling or subterfuge – the jury is left to interpret the dog’s signals as testimony from an unsworn witness that the complainant is upset because he or she is telling the truth. *Id.*, at 2. Even if the dog were to lie perfectly still, but had eye-contact with jurors, these physiological responses are troubling in the context of a trial, where a certain level of tension is integral to the process of confrontation. *See, e.g., Street*, 471 U.S. at 415; *Coy*, 487 U.S. at 1020.

Many studies indicate that working with therapy dogs leads to positive mood alteration and decreased blood pressure.<sup>7</sup> The relationship between a dog’s presence and the lowering of human blood pressure is linked to oxytocin – an endocrine associated with human attachment and bonding.<sup>8</sup> A 2009 study found that a person’s oxytocin level would spike after interacting with a dog; gazing into the dog’s eyes was considered particularly significant. Homans, *What’s a Dog For*, *supra*, at 40. This same phenomenon would affect both witnesses and jurors,<sup>9</sup> interfering not

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<sup>7</sup> Odendaal, J.S., “Animal-assisted therapy: Magic or medicine?” *Journal of Psychosomatic Research*, 49, 275–80 (2000); Allen, Karen, *American Psychological Society*, 2003; John Homans, *What’s a Dog For? The Surprising History, Science, Philosophy, and Politics of Man’s Best Friend* (2012) (reprinted in *The Week* (Penguin Press), Mar. 8, 2013, at 40-41).

<sup>8</sup> Odendaal, J.S., *supra*, at 275–80; Allen, *supra*; Homans, *supra*, at 40-41).

<sup>9</sup> Furthermore, if a witness’s stress is the reason for having the dog in the courtroom, the trial is no less stressful for the accused person. If the court permits a dog to comfort a witness based on stress, the same comforting tool should be sitting next to the accused if requested. As Ellen O’Neill-Stephens, a former King County prosecutor

only with a witness's testimony, but with jurors' dispassionate assessment of the evidence given.<sup>10</sup> As the trial court recognized, many Seattle jurors are "dog lovers."<sup>11</sup> But the court did not acknowledge that dog-loving jurors may feel more aligned with the complaining witness, who was "a complete dog fan," according to the State, and who informed the jury during his testimony that he had treats for the dog. 11/8/10 RP 28; 12/1/10 RP 10. The trial prosecutor did not mention that she lived with or trained the dog Ellie, or that this dog could be considered her personal pet. See McNerthney, *supra*.

On the other hand, jurors, defendants, or defense lawyers may be uncomfortable around dogs. Like Mr. Dye, they may be allergic, causing unintended physiological effects on the accused's appearance and ability to observe the trial. 11/18/10 RP 28-30. A lawyer may act hesitantly because

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and founder of the Courthouse Dogs Foundation says, a correctly trained dog "is legally neutral and does not take sides, providing unconditional love to anyone who wants it." Christine Clarridge, *Courtroom Comfort*, Seattle Times, Sept. 22, 2012 (available at: [http://seattletimes.com/html/localnews/2019235703\\_courthousedogs23m.html](http://seattletimes.com/html/localnews/2019235703_courthousedogs23m.html)).

However, at oral argument in the Court of Appeals, the State was asked by the Court whether it envisioned providing dogs to defendants who were experiencing anxiety or were in need of similar comfort. The State was emphatic that its "facility dogs" would not be provided to the accused.

<sup>10</sup> Perceptions of the Impact of Pet Therapy on Residents/Patients and Staff in Facilities Visited by Therapy Dogs, available at, [www.tdi-dog.org](http://www.tdi-dog.org) (last accessed September 27, 2012).

<sup>11</sup> The trial court acknowledged Mr. Dye's concerns about Seattle juries being pro-dog, but warned defense counsel that if potential jurors were asked their opinions of dogs, "This being Seattle, you're going to probably get a near unanimous 'Yes' on the pets and the dog lovers." 11/22/10 RP 75.

of her lack of comfort around the dog and thus be hampered in effectively questioning the witness. Dogs are live animals, after all, and cannot be counted on to always be in control, silent and passive.<sup>12</sup>

3. Permitting the dog to be present during the complainant's testimony prejudiced Mr. Dye.

The trial court here, in its apparent desire to provide comfort to Mr. Lare, lost focus on its paramount responsibility, which was to insure that Mr. Dye received a fair trial. Estelle v. Williams, 425 U.S. at 503; U.S. Const. amends. VI, XIV; art. I, sec. 3, 22.

Although the case law involving service or therapy dogs is scarce, analogous scenarios involving witnesses purportedly in need of some sort of accommodation or protection provide guidance. The vast majority of such cases involve child victims of sex crimes, such as Coy v. Iowa, and its progeny, in which the Supreme Court held that a defendant's right to confront his accuser was violated when a screen was used to shield a victim from the defendant. 487 U.S. at 1022. In Coy, Justice O'Connor suggested in a concurrence that "if a court makes a case-specific finding of

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<sup>12</sup> Even trained K-9s act contrary to their handlers' wishes on occasion, according to a recent Seattle Times article on serious injuries caused by police K9s and resulting lawsuits. Mike Carter, Cop Dogs' Miscues Prove Grisly, Costly, Seattle Times, Mar. 2, 2013 (available at: [http://seattletimes.com/html/localnews/2020474412\\_k9dogbitesxml.html](http://seattletimes.com/html/localnews/2020474412_k9dogbitesxml.html)) ("most dogs are deployed hundreds of times without incident, but ... accidents happen. Dogs lose tracks and make mistakes, and the whole point of having a handler is to control the animal.").

necessity, . . . the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses.” Id. at 1025.<sup>13</sup>

No finding of necessity was made here. The State did not claim or explain how Mr. Lare was unable to testify without a comfort dog. The trial court did not ask why having a comfort dog was necessary. 11/18/10 RP 28-29. At no time did Mr. Lare seem to have difficulty testifying or being in the same room as Mr. Dye, far different from the line of child sex-abuse cases.

State v. Hakimi, the only Washington case in which a witness was permitted to testify with a comfort item, is entirely distinguishable from this case. 124 Wn. App. 15, 19, 98 P.3d 809 (2004). In Hakimi, the witnesses in need of comfort were children, the so-called comfort item was an inanimate doll, and the record indicated no interaction with the object in front of the jury. Id. The features which present the inevitable and unacceptable risk of prejudice in the case of a dog in court were not present in Hakimi. Id.

In fact, in every case where other jurisdictions have addressed a remotely comparable situation, the case involves a young child testifying in

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<sup>13</sup> The Court of Appeals distinguished Coy, noting that the Supreme Court specifically declined to address Coy’s due process claim. State v. Dye, 170 Wn. App. at 345 n.10. The Supreme Court did, however, specifically find a Confrontation Clause violation. Coy, 487 U.S. at 1020-21.

graphic detail about a horrifically violent sex crime. Even in these scenarios, a child has periodically been permitted to testify with a small, inanimate teddy bear or doll in his or her lap, but certainly never with a live animal at his or her side. See, e.g., State v. Palabay, 9 Haw. App. 414, 844 P.2d 1 (1992) (error to allow 12 year-old witness to testify holding teddy bear, absent finding of necessity); State v. Aponte, 249 Conn. 735, 745-47, 738 A.2d 117 (1999) (reversing where prosecutor gave child witness a Barney doll to hold during her testimony, as due process violation); State v. Gevrez, 61 Ariz. 296, 148 P.2d 829 (1944) (reversing where prosecutor arranged for child witness to hold mother's doll on witness stand). In Aponte, the Connecticut Supreme Court noted that had the witness simply brought a doll from home that was her personal property – rather than the doll being a gift from the prosecutor – there might have been no error. Aponte, 249 Conn. at 745.<sup>14</sup>

Even the cases relied upon by the Court of Appeals involved young children where a necessity finding was made by the trial court after weighing the impact of a “comfort object” -- which was always inanimate

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<sup>14</sup> A single case that was decided after Dye permitted a child victim of sex abuse to have a dog with her in the courtroom, but the court's analysis of the issue was fact-specific and driven by a state statute, as well as the harmlessness of any error given the defendant's confession. People v. Spence, 151 Cal Rptr.3d 374, 403-04 (Ca. Ct App. 2012) (review filed (Feb. 4, 2013)).

-- on the witness and on the jury. See, e.g., State v. Cliff, 116 Idaho 921, 924, 782 P.2d 44 (1989) (“In cases such as this, where it is necessary to receive testimony from young children, the court must strike a balance between the defendant’s right to a fair trial and the witness’s need for an environment in which he or she will not be intimidated into silence or to tears”); State v. Dickson, 337 S.W.3d 733, 743-44 (Mo. Ct. App. 2011) (court did not abuse discretion by allowing child victim to hold comfort item after performing balancing test); State v. Powell, 318 S.W.3d 297, 304 (Mo. Ct. App. 2010) (“trial courts must be cognizant of the possibility that comfort items or other accommodations for minors may unfairly engender sympathy for complaining witnesses”).

In Powell, the Missouri Court of Appeals clarified that its holding was extremely narrow, limited to child witnesses in sexual abuse cases. 318 S.W.3d at 303 (“non-standard procedures” may be permitted to assist “young children ... in recounting to juries the sordid details of their painful experience”). The Powell Court also made a specific finding that the child witnesses did not interact with the comfort item, a teddy bear, in the presence of the jury. 318 S.W.3d at 303-04.

This case is different from cases involving a child witness who carries a doll or teddy bear, since Mr. Lare clearly interacted with the “comfort item” -- a live dog -- while in view of the jury. Mr. Lare

introduced Ellie to the jury and fed her dog treats during his testimony. 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 type of interaction between the witness and the dog in the jury’s presence distinguishes this case from those involving dolls and teddy bears.

4. There was no foundation or showing of necessity for the State’s request for -- or the court’s accommodation of -- a dog to accompany this adult witness.

The State did not cite Mr. Lare’s developmental disability when requesting that he be able to testify with the dog. The only basis was his alleged need for “comfort” while testifying. 11/8/10 RP 27-28.

The deputy prosecutor admitted the request for the dog was “somewhat unusual,” and informed the court that Ellie did not belong to the complainant, but was, in fact, the property of the prosecutor’s office. 11/8/10 RP 27-28. The prosecutor explained that Mr. Lare “is a complete dog fan,” and that “Ellie has provided tremendous comfort for him in the two times that he’s been with her, and he has asked to have her present during his testimony.” *Id.* at 28.

Mr. Dye objected, arguing that the “prejudice” would be “extreme,” and that despite the complainant’s potential anxiety, Mr. Dye was still entitled to “a fair trial.” 11/18/10 RP 28, 30. The court ruled that “if we can accommodate somebody who has a developmental disability

when they're testifying in the courtroom I think it's appropriate to do so."

Id. at 29.

This ruling was erroneous, and, moreover, unrelated to the State's actual request, since the request had not been based upon accommodation of Mr. Lare's disability. 11/18/10 RP 27-29. Mr. Lare's disability did not necessitate the use of a service animal, nor did he request one for this purpose. Mr. Lare, according to his own testimony and that of his sister, had been living independently in his own home for over 20 years.

11/30/10 RP 18; 12/1/10 RP 11. Mr. Lare had a full-time job with the Veterans Administration Hospital for over 25 years. 12/1/10 RP 10. He did not use any type of service animal.

The State's application for the use of the dog should have failed for improper foundation, since being a "complete dog fan" and even finding "comfort" in an animal falls far short of showing necessity, as required under the limited case law involving so-called comfort items. Cf. Hakimi, 124 Wn. App. at 19 (finding no error where doll was owned by victim, and where court considered expert testimony that children of victim's age benefited from holding a toy while testifying); Dickson, 337 S.W.3d at 744 (no error where court performed balancing test); Powell, 318 S.W.3d at 304 (non-standard procedures may be used in child sex abuse proceedings, if no interaction between witness and comfort item).

5. The jury instruction was inadequate to cure the prejudice.

In its closing instructions to the jury, the court told them they should not “draw any conclusions based on the presence of this service dog.” CP 53. This instruction was inadequate and came far too late to mitigate the prejudice created by the dog’s presence, which had altered the jurors’ perceptions of the integrity and veracity of the complaining witness. CP 53.<sup>15</sup>

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 at 843-45. 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.

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<sup>15</sup> The court ultimately instructed the jury that Ellie was a “service dog,” rather than a therapy or “facility dog,” CP 53. A recent training article advises prosecutors to use the term “courtroom facility dog” to avoid possible “mistrials,” or to avoid creating an “issue on appeal by implying to the jury that the witness is a victim, or [which might] be interpreted as a comment on the evidence.” Courthouse Dogs: Using a Courthouse Facility Dog in the Courtroom, available at [www.courthousedogs.com/settings\\_courtroom.html](http://www.courthousedogs.com/settings_courtroom.html) (last accessed April 5, 2013) (quoted in Sandoval, Gabriela N., Court Facility Dogs – Easing the Apprehensive Witness, 39 Apr. Co. Law. 4, at 21 (2010).

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 somehow 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. Either possibility – both improper – suggests the guilt of the accused, undermining the presumption of innocence, and the court's instruction in failed to ameliorate this problem. See id.

In addition, the jury instruction was premised on a factual inaccuracy – that Ellie was, in fact, a “service dog.” CP 53. There was no testimony or other indicia in the record of Ellie's training or other qualifications; indeed, the State concedes that Ellie is not a service dog at all, but was only provided for the witness's “comfort.” CP 104. By telling the jury that the dog was a “service dog,” the court's instruction implied an official, judicial finding of the complaining witness's disability as well as his vulnerability, in a case where Mr. Lare's perceptions and cognitive abilities were central factual questions for the jury. Art. IV, § 16. The failure of the jury to unanimously find Mr. Lare particularly vulnerable for purposes of the aggravating factor demonstrates the weakness of the State's case, and shows the reason that the

State sought to paint the complainant as less capable than he actually was, in order to bolster the case against Mr. Dye. The jury instruction mentioning the presence of the service dog did not cure the due process violation caused by the interjection of the dog at Mr. Dye's trial.

6. The error was prejudicial.

Even if the use of a comfort dog were ever permissible, the trial court failed to make the requisite findings to support the State's use of the dog in this case. The court further failed to balance the rights of Mr. Dye against the witness's need for the dog, and the jury instruction was inadequate to protect Mr. Dye's right to a fair trial.<sup>16</sup>

The Court of Appeals presumed that the trial court made the necessary findings "implicitly," even though the court did not do so on the record. Dye, 170 Wn. App. at 347. This assumption is misguided since there is no evidence the court understood or applied the correct legal standard. Furthermore, on-the-record analysis should be mandatory when weighing the various factors at issue 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

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<sup>16</sup> Some jurists have expressed discomfort with the courtroom dog program. King County Superior Court Judge Julie Spector, in an interview on the topic, expressed her concern "about the unintended signal emitted by a dog supporting a complaining witness in the presence of a jury, as this may help sway jurors." Dellinger, Marianne, Using Dogs for Emotional Support of Testifying Victims of Crime, 15 Animal Law 2, 16 (2009).

630, 642, 41 P.3d 1159 (2002) (requiring on-the-record balancing and finding by preponderance of the evidence for admission of 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 404(b) context).

The use of the dog in this way violated Mr. Dye's confrontation rights by interfering with meaningful cross-examination. The presence of the comfort dog also presupposed the victimhood of the complainant, an error which invaded the province of the jury, and impacted the fundamental fairness of the proceedings.

A constitutional error is presumed prejudicial unless the State demonstrates beyond a reasonable doubt that the violation did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Even if this Court does not find a violation of Mr. Dye's rights to due process and confrontation, this Court should find the trial court abused its discretion by allowing the dog on the witness stand. A court abuses its discretion when it departs from clear precedent. State v. Quismundo, 164 Wn.2d 499, 504-06, 192 P.3d 342 (2008) ("A discretionary decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts

unsupported in the record *or was reached by applying the wrong legal standard.*") (internal quotations omitted; emphasis in original).

In a case where there was little factual evidence against Mr. Dye, the trial court's erroneous decision to permit the State's dog in the courtroom greatly affected the outcome of the trial. Alesha Lair orchestrated a theft against Mr. Lare, pled guilty, and was punished for the scheme. While Alesha Lair's criminal culpability was clear, Mr. Dye's involvement was controverted. With little evidence other than the complaining witness's testimony, the court's error cannot be considered harmless; therefore, reversal and dismissal are required.

D. 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 8<sup>th</sup> day of April, 2013.

Respectfully submitted,

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

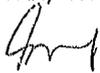
STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. ) NO. 87929-0  
 )  
 TIMOTHY DYE, )  
 )  
 Petitioner. )

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**Petitioner's Supplemental Brief**

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