

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

Supreme Court No.

Court of Appeals No. 338629

Circuit Court No. 16-519-FH

DAKOTA LEE SHORTER,

Defendant-Appellee.

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**Motion for Leave to File Attached Amicus Curiae Brief in Support of
Appellant's Application for Leave to Appeal**

Proposed Amici, the Michigan Coalition to End Domestic & Sexual Violence and End Violent Encounters, Inc., state as follows in support of their request for leave to file amicus curiae brief in support of Appellant’s application for leave to appeal, pursuant to MCR 7.305(B)(3)¹:

1. The Michigan Coalition to End Domestic and Sexual Violence (“MCEDSV”) is a membership organization that supports nearly all of the agencies and nonprofit entities around Michigan serving victims of sexual or domestic violence. Members of MCEDSV work with victims throughout the period directly after victimization on their paths to healing and recovery.
2. End Violent Encounters, Inc. (“EVE Inc.”) is a non-profit organization that provides supportive services to victims of domestic abuse and sexual violence while empowering our community through education and awareness. Since its founding in 1977, the organization has provided supportive services for survivors and their families. EVE’s advocates and counselors regularly support victims who must testify against their assailants, witnessing first-hand the manner in which recalling a traumatic experience can affect them. EVE advocates and counselors have also witnessed the help of support animals in the lives of victims, during testimony and beyond.

¹ Michigan Supreme Court, *Processing of Cases & Administrative Matters*, COURTS.MI.GOV, <http://courts.mi.gov/Courts/MichiganSupremeCourt/Clerks/ClerksOfficeDocuments/MSC%20Case%20Processing.pdf> (accessed Aug 2, 2018) (stating “An amicus curiae brief is not only permitted at the application stage but, in practice, is encouraged.”).

3. The decision of the Court of Appeals purports to take away the discretion of lower court judges to make decisions about whether support animals can be used without the benefit of any analysis regarding crime victims' constitutional rights.
4. Further, the appellate court's decision lacks proper consideration of the most salient research regarding the neuro-biological effects of trauma on the brain and the attendant considerations for truth-seeking in Michigan courts. This is an area with which Amici are especially familiar.
5. Accordingly, Amici respectfully requests that this honorable Court grant their Motion to Submit the Attached Amicus Curiae Brief, a copy of which is included in this packet.

Respectfully submitted,

Aug. 3, 2018

Date

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Proposed Amicus Curiae Brief

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I. Introduction

The role that support animals may play in Michigan courtrooms deserves careful consideration. By flatly concluding that “a fully abled adult witness may not be accompanied by a support animal or support person while testifying,” *People v Shorter*, No. 338629, 2018 WL 2746384, at *6 (Mich Ct App June 7, 2018), the appellate court short-circuited Michigan judges’ ability to consider support animals on an individual basis, and instead adopted a one-size-fits-all rejection of this promising tool.² Amici urges that this Court reconsider the lower court’s decision to ensure that any decision promotes truth-seeking and honors crime victims’ constitutional right to dignity and access to the courts.

II. Statement of Amici Interest

The Michigan Coalition to End Domestic and Sexual Violence (“MCEDSV”) is a membership organization that supports nearly all of the agencies and nonprofit entities in Michigan serving victims of sexual or domestic violence. Members of MCEDSV work with victims throughout the period directly after victimization throughout their paths to healing and recovery. One such member organization is the second proposed Amicus, End Violent Encounters, Inc. (“EVE”). EVE’s advocates and counselors regularly support victims who must testify against their assailants, witnessing first-hand the manner in which recalling a traumatic experience can affect them. EVE advocates and counselors have also witnessed the help of support animals in the lives of victims, during testimony and beyond

² Amicus acknowledges that the appellate court’s language quoted above may be dicta. *Central Va Community College v Katz*, 546 US 356, 363 (2006) (“[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated”). This is particularly so with regard to the statement regarding support persons, which is why amicus frames its briefing with regard to support animals only. Nonetheless, Amicus would suggest that many lower courts may treat such a broad-sweeping instruction as binding without this Court’s intervention.

Amici are interested in this case because of the impact it may have on Michigan jurisprudence in general and specifically on the ability of victims to meaningfully access the courts, exercise their constitutional right to be treated with dignity, and participate in a process that is dedicated to seeking the truth. Amici are in a unique position to be able to convey to this Court the experience of victims who are testifying in court and the current research on that topic.

III. This case involves matters important to Michigan jurisprudence.

This Court should grant leave because of its abiding interest in promoting the truth-seeking process as well as victim dignity and access to the courts. MCR 7.305(B)(3); Const 1963 art 1, § 24. “Promoting the truth-seeking process is one of the judiciary’s primary goals” *People v Anstey*, 476 Mich 436, 456, 719 NW2d 579, 592 (2006). As Justice Markman observed, “[t]he discovery of the truth is essential to the successful operation of the system’s mechanisms for controlling crime and mitigating its consequences.” *Id.* (quoting Markman, *Special issue: Foreward: The “truth in criminal justice” series*, 22 U MICH J L REFORM 425, 428 (1989)). Calm witnesses can benefit all parties to any proceeding and facilitate the truth-seeking process in general. Trial judges are best situated to make determinations about how to facilitated measured testimony that is likely to promote justice in their courtrooms.

Although the use of support animals could potentially support truth-seeking in both defendant- and victim-witness testimony, reconsideration is particularly important for victim witnesses, to whom the State of Michigan has promised dignity throughout the criminal justice process. Const 1963 art 1, § 24. Victim-witnesses also have the right of meaningful access to courts. See, eg, *Mayor of Lansing v Knights of the Ku Klux Klan (After*

Remand), 222 MichApp 637, 647, 564 NW2d 177 (1997); *Gillette Commercial Operations N. Am. & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 878 NW2d 891, 917 (2015). Dignity is not defined in the Constitution or statute, but is defined in the dictionary as the “quality or state of being worthy, honored, or esteemed.”³ The legislature has applied the concept of respecting victims’ dignity in various ways, for example, victims may designate another person to deliver their victim impact statement if it would be emotionally taxing to do it themselves and that the prosecutor must confer with the victim at various junctures. MCL 780.765; MCL 780.756; MCL 780.760. These specifics illustrate that victim dignity is achieved through the opportunity to meaningfully participate and have a significant voice in the process.

Support animals are among the most recently developed tools to assist victims in exercising their rights while minimizing the secondary harm that frequently comes with testifying. It bears mentioning that using such tools to protect victims’ rights has never been incompatible with the proper functioning of the criminal justice system; to the contrary, the truth-seeking functions of the justice system work best when victims are afforded their rights. See, *eg*, *Strickler v Greene*, 527 US 263, 281(1999) (observing that, in a criminal proceeding, the government’s interest is “not that it shall win a case, but that justice shall be done”). The appellate court’s approach fails to demonstrate esteem for victims and their worthiness of humane treatment—the basic building blocks of dignity.

³ “Dignity” Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/dignity> (accessed July 30, 2018).

IV. The lower court’s opinion injects uncertainty and purports to take away the circuit courts’ crucial discretion.

The lower court’s ruling is subject to at least two possible interpretations, either of which requires clarification from this Court. At the outset, it must be underscored that humiliation and emotional distress are not an indispensable element of justice. To be sure, testifying in a criminal proceeding is always going to be stressful, but this does not mean that a victim who testifies in court and accesses justice *must* incur emotional harm or disproportionately high levels of stress in order for confrontation to be constitutionally effective. See, *eg*, *Maryland v Craig*, 497 US 836, 857 (1990) (observing that emotional distress may in fact disserve the truth-seeking function of confrontation). A court’s goal in considering the potential role of a support animal, as in all logistical considerations, should be to harmonize the overlapping and sometimes competing interests and rights of the defendant, victim, and People. *State v Dye*, 309 P3d 1192 (Wash 2013). The lower court’s opinion attempts to replace that process of weighing the interests for its own, unsupported contention that adults should be deprived of support mechanisms.

One particularly troubling possible interpretation of the appellate court’s ruling is that it purports to wipe away circuit court discretion completely, such that no court could allow virtually any adult to testify with a support animal. Specifically, the court insisted that putting the victim on display as they re-live their trauma is a requirement of the process, stating the “jury is entitled to evaluate her emotional state uninfluenced by outside support . . .” *Shorter*, 2018 WL 2746384 *5. But the truth-seeking process is not served by a victim’s profound re-traumatization. See, *eg*, *Craig*, 497 US at 857. The purpose of testimony is evidence—not exhibition. The misperception that justice cannot be achieved unless a victim

is put on display in the depth of his or her emotional turmoil is unnecessary, unhelpful, and undignified.

Even if the lower court's opinion is read to leave room for someone other than a "fully abled" adult to benefit from a support animal, then the result is still offensive to victim dignity and access to the courts. The lower court's use of term "fully abled adult" is unexplained and has no apparent meaning. Without clarification from this Court, the lower courts will fumble in search of what "less-than-fully abled" should mean. Any such process promises to be demeaning. Victims may have to produce their own, otherwise privileged medical records to justify the use of a support animal. The result would be a public record indicating that a victim's natural reaction to trauma renders them somehow less-than-fully-abled—detering most adults from seeking such help. This outcome would be wholly incompatible with the right to dignity and access to the courts.

It is helpful to compare the approach in the Michigan Court Rules when a party is in need of a foreign language interpreter. To ensure access to the courts, an interpreter shall be appointed if "a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate" MCR 1.111(B)(1). As discussed in more detail below, current neuroscience teaches that trauma can be nearly as intrusive to effective communication as a language barrier. Both the scientific developments demonstrating the impact of trauma and principles of judicial deference favor a process for support animals that is as flexible as Rule 1.111 and its application in Michigan courts.

As the Washington Supreme Court determined when faced with the issue at hand, trial courts “have a unique perspective on the actual witness” and are “in the best position” to analyze the need for a “special dispensation” *State v Dye*, 309 P3d 1192, 1199 (Wash 2013). The balance struck in *Dye* is emblematic of appellate restraint and respect for a careful harmonization of the many competing interests at hand. Other state appellate courts have similarly shown restraint and deference to the trial courts. See, e.g., *People v Tohom*, 109 AD3d 253 (NY 2013) (New York Supreme Court observed that trial court judges are “empowered to control the proceedings in whatever manner may be consistent with the demands of decorum and due process.”); *State v Devon D*, 138 A3d 849, 857 (2016) (holding the trial judge has discretion and should weigh the need for the animal versus any potential prejudice).

Such a balance in Michigan courts would allow circuit courts to utilize courtroom supports where necessary to aid the truth-seeking process, and to give full meaning to witnesses’ right to access courts and crime victims’ right to dignity. This is particularly so when understood in light of current neuroscience research.

V. The lower court’s opinion failed to consider the impact of trauma.

A growing body of research supports what amici have observed first-hand for decades: First, any person discussing traumatic experiences may have neuro-biological responses to those statements that are both natural and impossible to control.⁴ Second, a support person or animal is often helpful to individuals experiencing those normal trauma

⁴ See *infra*, note 7.

responses.⁵ Given what is known about trauma, many witnesses—defendants, victims, police officers, and eye witnesses alike—may give more cogent testimony with the help of a support animal, which enhances the truth-seeking process.

A. A “fully abled adult” may still have a strong reaction to trauma.

The science referred to as neurobiology of trauma is often discussed when recalling experiences of veterans returning from war, but research extends to encompass all types of trauma. See, *eg*, Rachel Yehuda, et al., *Primer: Post-Traumatic Stress Disorder*, NATURE REV., No. 15057 (Oct. 8, 2015)⁶ To briefly summarize the relevant research, a person does not merely remember a traumatic event, they re-experience it.⁷ When individuals re-experience their trauma as the discuss an event, their brain responds as though it is currently reacting to a live threat.⁸ This means the executive function of the brain—which sorts out what happened when and what is important to relay—cannot fully function.⁹ In turn, people reliving a traumatic experience may not be able to remember details that would seem important to an outside observer.¹⁰ Similarly, their minds may be dominated by details that would not seem important to someone else.¹¹ They may become overwhelmed by emotions while re-experiencing the trauma, or they may respond by dissociating from the events and tell their

⁵ See *infra*, note 14.

⁶ See also, *eg*, David Finkel, *The Return: The Traumatized Veterans of Iraq & Afghanistan*, THE NEW YORKER, Sept 9, 2013, (available at <https://www.newyorker.com/magazine/2013/09/09/the-return-9>).

⁷ See generally, *eg*, Rachel Yehuda, et al., *Primer: Post-Traumatic Stress Disorder*, NATURE REV., No. 15057 (Oct. 8, 2015) (hereinafter Yehuda PTSD Primer) available at http://lightfighter.org/docs/PTSD_Primer.pdf (last visited Aug 2, 2018). A helpful summary of the research set forth in these and other articles is Russell W. Strand, *The Forensic Experiential Trauma Interview*, UNITED STATES ARMY MILITARY POLICE SCHOOL, <http://www.mncasa.org/assets/PDFs/FETI%20-%20Public%20Description.pdf> (accessed Aug 2, 2018) (hereinafter, Strand FETI Summary).

⁸ See generally, Yehuda PTSD Primer; Strand FETI Summary.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

story in a way that sounds clinical or cold to someone hearing it for the first time.¹² All of these are normal responses to trauma, which is defined in the research as any event that is “outside the range of usual human experience.”¹³

With this knowledge, it is not surprising that many witnesses—from professionals who suffer from vicarious trauma in their work to defendants and victims who are recounting one of the most challenging experiences of their lives would benefit from a calming support while testifying. Many of these individuals could fall into the unexplained term used by the lower court, a “fully abled adult,” which is why trial courts’ discretion is so important.

B. Support animals help some victims and other witnesses navigate re-traumatizing experiences.

MCEDSV’s member agencies regularly watch support animals transform victims’ experiences so that they can meaningfully access the courts. Research demonstrates that dogs can reduce stress in humans.¹⁴ Support animals play an increasingly active role in rape crisis and other victim support agencies throughout the state.¹⁵ Indeed, where a witness’s natural, neurobiological responses to trauma make it nearly impossible to parse the details of their experience, a support animal could be compared to a crutch that allows the witness to

¹² *Id.*

¹³ *Id.*

¹⁴ See, e.g., Andrea Beetz, Kerstin Uvnäs-Moberg, Henri Julius & Kurt Kotrschal, *Psychological and Psychophysiological Effects of Human-Animal Interactions: The Possible Role of Oxytocin*, 3 FRONTIERS IN PSYCHOLOGY 234 (2012) (reviewing scholarship analyzing human-animal interactions) available at https://pub.epsilon.slu.se/10563/1/uvnas_moberg_etal_130625.pdf. A helpful article in layperson terms collecting examples of this research and its appropriate application in the courtroom is available at Nat’l Crime Victim Law Inst, *Facility Dogs: Helping Victims Access Justice & Access Their Rights*, LAW.LCLARK.EDU (2013) <https://law.lclark.edu/live/files/21750-facility-dogshelping-victims-access-justice-and> (accessed Aug 2, 2018).

¹⁵ See, e.g., *Therapy Dogs Help Sexual Assault Victims*, WILX.COM, Oct 31, 2017, <http://www.wilx.com/content/news/Therapy-dogs-help-sex-assault-victims-454369673.html>.

physically approach the witness stand or an interpreter who allows them to communicate effectively in English. See MCR 1.111. Using this tool could enhance the truth-seeking process and reduce harm to victims and other witnesses. When used appropriately, this can be achieved in a discrete manner that will not prejudice any other party, and in fact has been used to help witnesses for defense and prosecution alike.¹⁶

C. Testimony can be especially difficult for rape victims, and is sometimes experienced as a “second rape.”

This case is particularly concerning because the appellate court failed to seriously consider the context of the victim-witness’s testimony: a trial regarding her rape. Rape results in many mental and physical health consequences. According to the Center for Disease Control, rape survivors experience both immediate and long term mental health consequences, including depression, post-traumatic stress disorder, and attempted or completed suicide. Center for Disease Control, *Sexual Violence Consequences*.¹⁷ Social factors, such as isolation or ostracism from family and community and strained family relationships often compound these factors. *Id.*

Rape holds the dubious distinction of being the most underreported crime in America. Dean G. Kilpatrick, *Rape and Sexual Violence*, National Violence Against Women Prevention Research Center (2000).¹⁸ Out of every 1,000 rapes, only 310 are ever reported to police. Bureau of Justice Stats, *National Crime Victimization Survey, 2010-2014* (2015). The most common reason that female rape victims choose not to report is because they fear

¹⁶Courthouse Dogs Foundation, *A Dog is for Everybody*, <https://courthousedogs.org/legal/a-dog-is-for-everybody/> (accessed Aug 2, 2018).

¹⁷<https://www.cdc.gov/violenceprevention/sexualviolence/consequences.html> (last visited July 31, 2018).

¹⁸Available at: <http://www.soc.iastate.edu/sapp/rape1.pdf>.

retaliation from their rapist. Bureau of Justice Stats, *Female Victims of Sexual Violence*, 1994-2010 (2013). This underreporting is particularly crucial as the Court considers the importance of support animals to the truth-seeking process.

The rapist is rarely the only one who harms a rape victim. Indeed, the phrase “second rape” has emerged to describe the ubiquitous experience of sexual assault survivors who do not receive proper protection and support from their communities and governmental systems, leaving them feeling “blamed, doubted, and re-victimized.”¹⁹ Research indicates victims’ negative experiences when they turn to various systems, institutions, and agencies for assistance following an assault results in secondary trauma and “further[s] the rape event.” *Id.* Against this backdrop, it is plain to see why trial courts may wish to use support animals in the context of a rape trial to promote truth seeking.

VI. Conclusion & Request for Relief

If this Court chooses not to act, then the lower courts will either be arbitrarily deprived of promising tools that can promote truth seeking or will be left to fumble for a proper standard to apply. The fallout will be many victims who will suffer countless

¹⁹ See, e.g., Rebecca Campbell, *et al.*, *Preventing the “Second Rape” Rape Survivors’ Experiences With Community Service Providers*, J. INTERPERSONAL VIOLENCE at 1240. (Dec 1, 2001) available at <https://doi.org/10.1177/088626001016012002>; Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 J. OF TRAUMATIC STRESS 182, 183 (2010) available at <https://onlinelibrary.wiley.com/doi/abs/10.1002/jts.20505> (observing that some studies indicate that “contact with the justice system can lead to a ‘secondary victimization,’” and that the experience may “exacerbate the initial trauma,” “leave victims feeling embittered and disappointed,” and cause anxiety); Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. OF TRAUMATIC STRESS 159, 160- 61 (2003) (discussing the potential benefits of participating in the justice system); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOCIAL JUSTICE RESEARCH 313, 314 (2002) (noting that “secondary victimization” by the criminal justice system can negatively influence victims’ “self-esteem, faith in the future, trust in the legal system, and faith in a just world”); Pamela Tontodonato & Edna Erez, *et al.*, *Crime, Punishment, and Victim Distress*, 3 INT’L R. OF VICTIMOLOGY 33, 34 (1994) (observing that secondary victimization can cause victims to feel frustrated with and alienated from the criminal justice system).

indignities—or be deprived of access to the courts altogether. Wherefore, the Amici respectfully request that this honorable Court grant leave to appeal so that the important issues to Michigan jurisprudence may be properly addressed.

Respectfully submitted,

Aug. 3, 2018

Date

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Proof of Service

On this 3rd day of August, 2018, I served copies of the foregoing papers by first-class mail on the Appellant at the address of record for the Ingham County Prosecutor, as well as:

Donald J. Baranski
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I declare that the statements above are true to the best of my knowledge, information, and belief.

Aug. 3, 2018

Date

/s/ Elinor R. Jordan

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