



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 19, 2022

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RE: *Commonwealth v. Rodrigo Alonzo Vargas*, Case No. FE-2021-632

Dear Counsel:

This matter comes before the Court on the motion of the Commonwealth Attorney to have a facility dog accompany the complaining witness while she testifies. In this case, the dog's name is Rylynn. Rylynn is three years old and is part lab, part Golden Retriever.

For the reasons that follow, the motion is GRANTED.

FACTS

On October 18, 2021, a Grand Jury indicted Defendant Rodrigo Alonzo on one count of abduction with intent to defile, in violation of Virginia Code § 18.2-48, and two counts of aggravated sexual battery in violation of Virginia Code § 18.2-67.3. The indictment identifies the complaining witness, now eighteen years of age, as [REDACTED]

OPINION LETTER

The indictment stems from instances of alleged abuse during sleepovers at Vargas's home that █████ attended as a child with Vargas's stepdaughter █████. On March 4, 2022, this Court heard argument regarding the Commonwealth's motion to use a facility dog during witness testimony and took said motion under advisement.

On the morning of April 6, 2021, seventeen-year-old █████ and her mother, met with Detective Kim of the Fairfax County Police Department ("FCPD") to discuss a sexual assault complaint. █████ had experienced panic attacks and feelings of claustrophobia for about a year and a half, which led her to seek therapy. The Commonwealth Attorney submits that while participating in therapy, █████ accessed partial memories of an event that occurred when she was ten or eleven years old. Around 4:00 am the morning of April 6, █████ had successfully accessed the full memory of being sexually assaulted by the stepfather of a close friend, viz., Vargas, in his home in Fairfax County between 2014 and 2015.

On April 8, 2021, █████ participated in a forensic interview. She shared with the interviewer the process of trying to figure out what happened to her over the past year. █████ explained that she began having severe breakdowns that were comparable to "bigger versions of panic attacks" and that she had begun to self-harm. Her breakdowns eventually subsided but returned in her junior year of high school. █████ explained that video content that included sexual abuse triggered breakdowns and more self-harm. As more time passed, she accessed pieces of memories at random times and sometimes in association with sensations on her body. A week before her forensic interview, she was able to put together that Vargas was the person who had harmed her. █████ remembered specifically that the walls in the bedroom where she was abused were painted blue. After the forensic interview, Detective Levan of FCPD confirmed with █████'s mother, Elizabeth Vargas, and with the Defendant¹ that the walls in █████'s room were blue. Defendant denied █████'s allegations but stated that he could not sit there and say she was lying.

Ms. Samantha Carrico, LCSW, works in the Fairfax County Department of Family Services. She is a supervisor in the sexual abuse unit and is Rylynn's handler. Ms. Carrico testified that when █████ first came to the unit to be interviewed she was wearing a hoodie, her arms would be folded across her chest, she would not make eye contact, and answered questions with one word answers. After introducing Rylynn, however, █████ removed her sweatshirt and began engaging with Rylynn. After engaging with Rylynn, █████ eventually engaged with the team and began answering questions.

ANALYSIS

In this analysis, I will first discuss Virginia Code § 18.2-67.9:1, then address the Defendant's procedural objections, then finally explain how the national trend is to allow facility dogs assist in witness testimony.

¹ Detectives Levan and Roberts met with Vargas at the Greensville Correctional Center.

I. Virginia Code §18.2-67.9:1

It should not surprise even a casual observer of the law that dogs have worked their way into the legal process and the courtroom. No other species is so inextricably entwined with the human experience as the domestic dog—*canis lupus familiaris*. Generally considered to be descended from the wolf, the dog has become indispensable to his human companions. We see them everywhere. They willfully and cheerfully serve us in a variety of capacities. According to the American Veterinary Medical Association website, a 2017-2018 study showed that 48,255,413 American households (38.4%) own 76,811,305 dogs.²

References to dogs abound in the vernacular. A person known for a disagreeable disposition might be described as “meaner than a junkyard dog.” Those who should be advised not to pursue a certain course of action might be admonished to “let sleeping dogs lie”. Some people are known to “work like a dog.” The heat and humidity of August are known as the “dog days of summer.”³ A person who is living beyond what he is used to is said to be “running with the big dogs.” And, perhaps in a nod to the hypothesis of survival of the fittest, life sometimes is described as a “dog-eat-dog world.”

Dogs have been the stars of stage and screen for a long time. My generation grew up with the 1957 Disney movie, *Old Yeller*. We were distraught when, at the end, the dog had to be euthanized. The animated Universal Studios film *Balto* celebrates the achievement of Balto, who saved Nome, Alaska, from a diphtheria epidemic by delivering medicine via sled dog team to that town when the newer invention of the day—the airplane—could not make the trip in the harsh Alaskan winter.⁴ A Sunday night staple on television was *Lassie*, and Saturday morning television featured *The Adventures of Rin Tin Tin*.

There are, of course, seeing eye dogs who assist their visually challenged human companions.⁵ There are dogs who assist physically disabled people by doing daily essential routine tasks that their companions find difficult or impossible.⁶ Some dogs can sense when their human companion is about to suffer a seizure and warn the companion so that precautionary steps can be taken.⁷

² *U.S. Pet Ownership Statistics*, AM. VETERINARY MED. ASS'N, <https://www.avma.org/resources-tools/reports-statistics/us-pet-ownership-statistics> (last visited August 18, 2022).

³ And the term dog days of summer originates from the fact that during this time the brightest star in the sky Sirius appears. Sirius is the main star in the constellation *Canis Major*, described by Ptolemy in the second century.

⁴ A discussion of the fact that Balto did not accomplish this super canine feat on his own is beyond the scope of this opinion.

⁵ See *The Seeing Eye*, <https://www.seeingeye.org>.

⁶ See *Paws with a Cause*, <https://pawswithacause.org>.

⁷ See *International Bureau of Epilepsy*, <https://epilepsy.org>.

“Dogs have given us their absolute all. We are the center of their universe. We are the focus of their love and faith and trust. They serve us in return for scraps. It is without a doubt the best deal man has ever made.”⁸

Small wonder, then, that the General Assembly of Virginia, as well as the legislatures of eighteen other states,⁹ have deemed it appropriate to grant these remarkable creatures a special place in the courtrooms of the land. Ironically, the majority of case law addressing, and approving, the use of facility dogs in trials comes from states that do not have a statute addressing the issue. To be sure, at least one court has disapproved the use of facility dogs, and reversed a conviction and remanded for a new trial in a trial where a facility dog was used.¹⁰

Virginia Code §18.2-67.9:1 states:

A. As used in this section, “certified facility dog” means a dog that (i) has completed training and been certified by a program accredited by Assistance Dogs International or by another assistance dog organization that is a member of an organization whose main purpose is to improve training, placement, and utilization of assistance dogs and (ii) is accompanied by a duly trained handler.

B. In any criminal proceeding, including preliminary hearings, the attorney for the Commonwealth or the defendant may apply for an order from the court allowing a certified facility dog to be present with a witness testifying before the court through in-person testimony or testimony televised by two-way closed-circuit television pursuant to §18.2-67.9.

C. The court may enter an order authorizing a dog to accompany a witness while testifying at a hearing in accordance with subsection B if the court finds by a preponderance of the evidence that:

1. The dog to be used qualifies as a certified facility dog;
2. The use of a certified facility dog will aid the witness in providing his testimony; and
3. The presence and use of the certified facility dog will not interfere with or distract from the testimony or proceedings.

⁸ Quote by Roger Caras, Past President, American Society for the Prevention of Cruelty to Animals. *Ropger Caras*, GOOD READS, <https://www.goodreads.com/quotes/37507-dogs-have-given-us-their-absolute-all-we-are-the> (last visited August 18, 2022).

⁹ These states include; Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Louisiana, Maryland, Michigan, Mississippi, Oklahoma, South Dakota, Texas, Virginia, and Washington.

¹⁰ *Michigan v. Shorter*, 922 N.W. 2d 628 (Mich. Ct. App. 2019). This case will be discussed *infra*.

D. The party seeking such order shall apply for the order at least 14 days before the preliminary hearing, trial date, or other hearing to which the order is to apply.

E. The court may make such orders as necessary to preserve the fairness of the proceeding, including imposing restrictions on and instructing the jury regarding the presence of the certified facility dog during the proceedings.

F. Nothing contained in this section shall prevent the court from providing any other accommodations to a witness as provided by law.

As we shall see, the Virginia statute is one of the most generous of all the facility dog statutes across the country. The witness does not have to be of a certain age, have a disability, or show a need for the dog.

II. Defendant's Procedural Objections

Initially, I will address the procedural objections the defendant made at the motion hearing. The defendant objected to the hearing because the Commonwealth had not given notice of her intent to use the dog in the motion hearing.

Virginia Code § 18.2-67.9:1 does not contain any notice requirement other than the requirement in subsection D that the party requesting the facility dog shall make such request at least fourteen days “before the preliminary hearing, trial date, or other hearing *to which the order is to apply.*” *Id.* (emphasis added). The motion to use the dog at the trial (which is this motion) clearly is neither the preliminary hearing nor the trial, nor is it the hearing to which the order is to apply. The dog was present at the hearing only as demonstrative evidence in order for the Court to observe the dog. In this situation the hearing *to which the order is to apply* is the trial. Clearly the Commonwealth has given notice more than fourteen days before trial.

Rylynn was not used at the hearing to assist any witness. If she had been, then subsection D would apply, and the Commonwealth would have been required to give notice at least fourteen days in advance to apply for an order to use the dog at the motion hearing.

The Commonwealth shared its plans to use Rylynn, a trained facility dog from the organization Assistance Dogs International (ADI). As required by statute, a handler, Samantha Carrico, LCSW will accompany Rylynn. Rylynn's facility dog certification is valid through November 2022. Defendant argues the Commonwealth did not include enough information about ADI and its training policies in her motion, but Virginia Code § 18.2-67.9:1(A) itself defines a legitimate facility dog as one that has been “certified by a program accredited by Assistance Dogs International or by another assistance dog organization.” Thus, Defendant's request for more information is unnecessary, as the statutory requirements already have been met.

According to the Commonwealth, Rylynn will assist ██████ in testifying about a traumatic experience of sexual abuse in a room full of strangers. Rylynn will provide comfort while ██████ recalls extremely traumatic information in front of the Defendant who allegedly violated her. As the Commonwealth states, the combination of ██████'s age, mental health history, and trauma certainly show that she will benefit from Rylynn's calming presence as she confronts both the Defendant and the jury while recalling such horrific events.

Defendant raises additional concerns about Rylynn's behavior during trial, claiming that she may bark, shake her collar, or make noise by wagging her tail. As explained in the next section, however, many courts that have utilized facility dogs have crafted clear jury instructions relating to the animal's behavior during testimony. By crafting appropriate jury instructions, any potential prejudice to the Defendant caused by Rylynn's unexpected movement can be overcome.¹¹ This Court also has the power, in its discretion, to limit Rylynn's presence in front of the jury. As explained further below, many jurisdictions have limited the dog's visibility to jurors, as well as emphasizing to jurors that the facility dog is a trained animal performing its job instead of the witness's personal pet.

III. National Trend of State Courts Permitting Facility Dogs

As the country becomes more mindful of mental health, state courts are doing what they can to acknowledge the challenges associated with testifying about traumatic events. Eighteen states have codified the right of particular victims to have access to a facility dog in the courtroom.¹² In the absence of a statute several states have relied on the inherent authority of the trial court to determine if a victim is entitled to the use of a facility dog and how the dog shall be presented to the jury.

The usual objections to the use of the dog can be summarized into three general categories: 1) the witness does not "need" the assistance; 2) the use of the dog denies the defendant the Constitutional right to confrontation; and 3) the use of the dog will cause the jury to be more sympathetic to the witness. Courts overwhelmingly have rejected these objections.

a. States Without a Statute That Agreed To Use A Facility Dog

i. Washington

In *Washington v. Dye*, 309 P.3d 1192 (Wash. 2013), the Supreme Court of Washington approved the use of a facility dog, even though there existed no statutory authority to do so. Instead, the Court relied on the inherent authority of the trial court.

¹¹ Additionally, facility dogs certified by ADI undergo intense training to ensure they will not create "a public nuisance that could have an adverse impact on the proceedings." Assistance Dogs International, <https://assistancedogsinternational.org/resources/adi-terms-definitions/> (last visited June 15, 2022); see also *Tennessee v. Davis*, No. M2017-00293-CCA-R3, 2018 WL 1468819, at *3 (Tenn. Ct. App. Mar. 26, 2018) (stating that, although the facility dog made noise during the proceedings, it did not impact the jury).

¹² See Animal and Legal and Historic Center, Facility Dogs/Courthouse Dogs, MICH. ST. UNIV. COLL. L., <https://www.animallaw.info/content/facility-dogscourthouse-support-dogs> (2022) (last visited August 18, 2022).

The victim, one Douglas Lare, was 56 years old. He had cerebral palsy, Kallman Syndrome, and an intellectual disability. But he had lived independently and had worked for the Veteran's Hospital for 25 years. His apartment had been broken into and several items stolen.

Investigation led the police to Defendant Dye. The State charged Dye with burglary and alleged as an aggravating factor that Lare was a vulnerable victim.

A facility dog, a Golden Retriever named Ellie, accompanied Lare at his "defense interview."¹³ Ellie was used by the King County Prosecuting Attorney's Office to comfort children. She had been trained by, and lived with the prosecutor. Lare requested that Ellie accompany him at trial.

Defense counsel stated that she did not object "if [Defendant] gets to hold his baby while he is testifying" arguing that "the prejudice is extreme, allowing the alleged victim in this case to pet the dog." *Dye*, 309 P.3d at 1195. The trial court disagreed and noted that Lare was a developmentally disabled individual suffering from significant emotional trauma. *Id.* at 1195.

The Washington Supreme Court analyzed the decision of the trial court to allow Lare to testify with Ellie present using an abuse of discretion standard. *Id.* at 1196. The Court then noted that there was no controlling authority in Washington regarding the use of a facility dog to accompany a witness. *Id.* at 1197. Therefore, the Court looked to other jurisdictions that had addressed the issue, and noted that those cases generally use an abuse of discretion standard in determining whether a facility dog can be used by a witness. *Id.* at 1198. Using that standard, the Court held that the Defendant had failed to prove that his right to a fair trial was violated. *Id.* at 1200. The Court noted that the trial court had avoided any subconscious bias by specifying in the court's jury instruction that the jury was "not to make any assumptions or draw any conclusions based on the presence of this service dog." *Id.* at 1200. This Court shall remain mindful of this admonition for this trial.

ii. *New York*

The use of a dog to assist a witness in at trial was a matter of first impression for the court in *New York v. Tohom*, 969 N.Y.S.2d 123 (N.Y. App. Div. 2013). A jury convicted Tohom of a felony, predatory sexual assault, and a misdemeanor, endangering the welfare of a child. Over a period of more than four years, Tohom engaged in several acts of sexual misconduct, including intercourse, with his daughter, J.

Before trial, the prosecution moved to allow a Golden Retriever named Rose to accompany J to the witness stand when she testified. Rose had been with J during her interviews

¹³ Wash. Rev. Code § 7.69.030, *Rights of victims, survivors, and witnesses*, describes several rights for the enumerated categories. Wash. Rev. Code § 7.69.030 does not list facility dogs, but it does state that a victim is entitled to have a crime victim advocate from a crime witness program, "or any other person of the victim's choosing present at any prosecutorial or defense interviews with the victim and at any judicial proceedings related to criminal acts against the victim." *Id.* (emphasis added.)

and her therapy sessions because Rose made J feel more at ease. J had expressed anxiety about her court appearance. J's therapist believed that Rose's presence would help with J's anxiety as well as the psychological and emotional trauma that might result from testifying.

Acknowledging that there was neither statutory authority nor case precedent that provided for a facility dog, the prosecution analogized a dog to a comfort item such as a teddy bear. Relying on N.Y. Exec. Law § 642-a, which allows for a "supportive person" of a "special witness" to be "present and accessible" while testifying, the prosecution argued that J was a "special witness" who qualified for a "supportive person" and § 642-a authorized Rose's presence. *Id.* at 126.

The defense objected, arguing that the presence of the dog would convey to the jury that the witness is under stress and the stress resulted from "telling the truth." *Id.* at 126. The defense also argued that Rose's presence would cause the jury to be more sympathetic to J and, because the cases "overwhelmingly" involve preteen witnesses and since J was 16, she did not qualify for a dog. *Id.* at 126.

At a pretrial hearing, J's therapist testified that during her sessions J had been anxious and reluctant to talk. *Id.* During the sessions when Rose was present, Rose would put her head on J's lap, J would pet her and then would open up and express her belief that she would feel safer if Rose was in the courtroom. *Id.*

Relying on statutory authority and a trial court's inherent authority to control the proceedings before it, the Court affirmed Tohom's conviction and the use of the facility dog to assist the witness.

iii. *Connecticut*

In *Connecticut v. Devon D.*, 90 A.3d 383 (Conn. App. Ct. 2014) [hereafter *Devon I*] the Appellate Court of Connecticut held that the trial court abused its discretion by allowing a dog to assist a witness without requiring the state to prove that it was necessary for the witness. *Id.* at 399.

A jury convicted Devon D. of eleven different sexual offenses involving three minor victims. *Id.* at 386. One of the victims was not concerned about testifying in front of the defendant, but the presence of other people did concern her. *Id.* at 400. The prosecution moved, pursuant to Conn. Gen. Stat. § 54-86g(b)¹⁴, to permit the use of a therapy dog.¹⁵ *Id.* at 400. The defense objected, arguing that § 54-86g(b) does not specifically permit the use of a dog. *Id.*

¹⁴ Conn. Gen. Stat. § 54-86g(b) is titled *Testimony of victim of child abuse*. It states that the Court may order testimony taken outside court. *Id.*

¹⁵ "We recognize that there is a differentiation between service dogs, therapy dogs, and facility dogs. Although some of this and other nomenclature frequently is used interchangeably to describe specially trained dogs, as occurred in the present case, those dogs served different functions and generally have different training." ... The preferred term for a dog used in a courthouse setting to provide comfort to a witness is 'facility dog'..." *Id.* at 399 n.10. Moreover, the Virginia General Assembly used the term facility dog in Va. Code § 18.2-67.9:1.

Using a dog, the defense argued, would make the witness appear even more sympathetic and vulnerable to the jury, and that the prosecution had not demonstrated a need to use the dog. *Id.*

The trial court interpreted § 54-86g(b) to include the use of a dog within the court's discretion. *Id.* at 400. The trial court also stated that any potential prejudice would be alleviated by a jury instruction. *Id.* at 400. The Connecticut Appellate Court disagreed and reversed the trial court's decision to allow the use of a facility dog.¹⁶ Specifically, the Court said that "the court did not make any finding that *there was a need for this special procedure* to be implemented . . . and that the use of such special procedure would not deny the defendant a fair trial." *Id.* at 406 (emphasis in the original). The Court did, however, note that while § 54-86g does not give a trial court to allow the presence of a dog while a child witness testified, the inherent discretion of the court does support the use of a comfort tool to assist a witness. *Id.* It appears that the Court included facility dogs as a comfort tool. *See id.* The Court reversed the trial court *not* because the trial court allowed a comfort dog, but because the trial court did not find a *demonstrated need* to use the dog. *Id.* Had the trial court found demonstrated need to use the dog, the appellate court probably would have affirmed the use of a facility dog as falling within the ambit of the inherent authority of a trial court.

However, the Connecticut appellate system had not finished with the issue. In *Connecticut v. Devon D.*, 138 A.3d 849 (Conn. 2016), (hereafter *Devon II*), the Connecticut Supreme Court reversed the intermediate appellate court, both as to the joinder issue, *see id.* at 865 n.13, and as to the facility dog issue. The Supreme Court agreed with the trial court that the dog issue was one of first impression. *Id.* at 864.

First, the Supreme Court of Connecticut agreed with the Appellate Court that § 54-86g does not authorize use of a facility dog. *Id.* at 864. Second, the Supreme Court agreed with the Appellate Court that "the trial court has inherent discretionary authority, separate and apart from the statute, to order special procedures or accommodations to assist a witness in testifying. *Id.* at 864.

However, the Supreme court disagreed "with the Appellate Court's conclusion that the trial court was required to make an express finding that *there was a need for this special procedure* to be implemented for the witness, and that use of such special procedure would not deny the defendant a fair trial." *Id.* at 866 (Emphasis in original). The Supreme Court of Connecticut instead concluded that "the pivotal issue is not whether the special procedure is necessary but whether it will aid the witness in testifying truthfully and reliably." *Id.*

The Connecticut Supreme Court's holding that the issue is whether the use of the dog will aid the witness is remarkably similar to Va. Code § 18.2-67.9:1(C)(2) which states, "The use of a certified facility dog will aid the witness in providing his testimony." The determinative

¹⁶ The Court also reversed the conviction because of improper joinder, not solely because a dog was used to comfort a witness.

issue of whether to allow a facility dog is not need, but rather, will the dog aid the witness. The Code section is broad and gives the trial court a great deal of discretion.

iv. California

In *California v. Chenault*, 175 Cal. Rptr. 3d 1 (Cal. Ct. App. 2014), the appellant was convicted of thirteen counts of lewd acts on a child under fourteen years old, and two counts of forcible lewd acts on a child under fourteen years old. *Id.* at 3.

Chenault's appeal was based on two arguments, both of which addressed the use of a facility dog: 1) that the use of a support¹⁷ dog was an abuse of discretion because there was no individualized showing of necessity and 2) that the use of a support dog was inherently prejudicial. *Id.* at 3.

The court noted that California Penal Code § 868.5 provides for the presence of two or more support persons for witnesses in some circumstances but does not apply to therapy or support dogs. *Id.* at 9. However, the Court relied on California Evidence Code § 765, *Id.* at 9. Interestingly, Evidence Code section 765 does not even *mention* dogs. California Evidence Code § 765 provides:

(a) The Court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth as may be, and to protect the witness from undue harassment or embarrassment.

(b) *With a witness under the age of 14 or a dependent person with a substantial cognitive impairment, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions...* *Id.* at 9 (emphasis in original).

Notwithstanding the fact that California Evidence Code § 765 does not mention dogs, the court found that the section does, in fact, authorize the use of a dog to assist a witness. The Court said:

Instead of requiring a case-specific finding that an individual witness needs the presence of a support dog, we conclude that in exercising its discretion under *Evidence Code section 765*, a trial court should consider the particular facts of the case and the circumstances of each individual witness and determine whether the presence of a support dog would assist or enable that witness to testify without undue harassment or embarrassment and provide complete and truthful testimony. In so doing, the court should focus on whether the presence of the specific support

¹⁷ The Court adopted the term "support dog" but did not decide what term is best when a dog is used to assist a witness. *Id.* at 3 n.2. As I already have written, facility dog is the better term and is the term used by the Virginia General Assembly. *See supra*, n.15.

dog would likely assist or enable the individual witness to give complete and truthful testimony by reducing the stress or trauma the witness may experience while testifying in court or otherwise minimizing undue harassment or embarrassment. If the trial court finds the presence of a support dog would likely assist or enable the individual witness to give complete and truthful testimony and the record supports that finding, the court generally will act within its discretion under *Evidence Code section 765* by granting a request for the presence of the support dog when that witness testifies. *Id.* at 11-12.

That lengthy analysis is similar to the concise statement promulgated by the Virginia General Assembly in § 18.2-67.9:1(2): “*The use of a certified facility dog will aid the witness in providing his testimony.*” The Virginia statute makes no mention of individualized need. All it requires is that the dog will aid the witness, which, I submit, is essentially what the California Appellate Court said in *Chenault*.

Next the Court addressed *Chenault*’s argument that the use of a dog to assist a witness is inherently prejudicial.

Chenault argued that “...the presence of a universally beloved animal distracts the jury from a dispassionate review of the evidence and unfairly bolsters the prosecution’s case by aligning witnesses with a powerful symbol of trustworthiness and vouching for their credibility as victims.” *Id.* at 3. The Court acknowledged the possibility that a support dog might distract the jury from a dispassionate review but concluded that such a scenario “...will not necessarily, and likely will only rarely, result when a dog is used to comfort a testifying witness.” *Id.* at 3.

Note that *Chenault*’s inherently prejudicial argument had two components: (1) that the jury would be distracted and (2) that the dog unfairly bolsters the witnesses’ testimony by its very presence. As far as distracting the jury, the Court noted that the trial court went to great lengths to ensure that the jury did not assess undue weight to the presence of the dog. As to the unfair bolstering of the witnesses’ testimony, the Court said,

Chenault does not persuade us the jury would have found their testimony to be not credible had they not been accompanied by the support dog. He presumes that there was “emotion evoked by the presence of a support dog,” but there is nothing in the record, albeit the ‘cold record’ before us, that shows any emotion, much less improper emotion, was evoked by the dog’s presence. *Id.* at 16.

v. *Ohio*

In *Ohio v. Hasenyager*, 67 N.E.3d 132 (Ohio 2016), a jury convicted the appellant of rape and gross sexual imposition. The trial court allowed a facility dog¹⁸ to accompany the witness who was eleven years old at the time of the offenses and thirteen at the time of the trial. On

¹⁸ The Court used the term facility dog.

appeal, Hasenyager asserted that the trial court abused its discretion by allowing the witness to have a facility dog and thus denied Hasenyager a constitutionally fair trial. *Id.* at 134.

As in *Chenault*, Hasenyager argued not only that the dog unfairly bolstered the complaining witness's testimony but also vilified his trial counsel.

The Court addressed the abuse of discretion standard on a statutory basis. The Court quoted Ohio Evid. R. 611(A): "The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth; (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." *Id.* at 134.

In applying this rule, the Court said that trial courts should "recognize that the protection of child victims of sexual abuse forms an important policy goal in this state and across the nation." *Id.* (citation omitted.).

Considering the broad nature of the Virginia statute I think it would be error to hold that a facility dog can be used only by a child witness, *viz.* a child who has not reached the age of majority. The societal goals of protecting child victims applies, I submit, just as much when the victim is eighteen as when the victim was eleven.

As to the argument that the facility dog had vilified the defense counsel, the Ohio Court relied on the record. That record, said the court, does not reflect any agitation on the part of the dog or that the defense counsel objected to the dog's continued presence. *Id.* at 135. However, this argument, while unavailing to Hasenyager, does alert this Court and counsel to be mindful that Rylynn does not become disruptive.

vi. Tennessee

In *Tennessee v. Reyes*, 505 S.W.3d 890 (Tenn. Crim. App. 2016), a jury convicted the appellant of rape of a child. A facility dog accompanied the ten-year-old victim when he testified. At trial Reyes argued that the use of the dog would be "overly prejudicial" and that if the trial court did allow the facility dog to accompany the victim, then the dog should be made available to all witnesses including the defendant, if he should elect to testify."¹⁹ *Id.* at 895.

The Court's analysis began, "While the cases involving the use of facility dog during a trial are not plentiful, it is clear that the evolving law permits their use." *Id.* at 896. The Court then turned to case law from other jurisdictions including two cases already cited herein—*Dye* and *Chenault*, both *supra*.

¹⁹ This objection and the request were made in motions *in limine*. The Court overruled the objection and granted the request that the dog could be used by any witness. The Court noted that the record did not show if the dog was used by other witnesses. *Id.* at 896.

After discussing those two cases and another one from New York, the Tennessee Court of Criminal Appeals simply stated, “This assignment is without merit.” *Id.* at 898. The Court did not even touch upon the issue of the witness’s need for the dog other than to say that the dog’s presence would “ease his ability to testify.” *Id.* at 897.

vii. *Arizona*

The use of a facility dog at trial presented an issue of first impression in Arizona in *Arizona v. Millis*, 391 P.3d 1225 (Ariz. Ct. App. 2017). A jury convicted Millis of one count of child abuse under circumstances likely to result in death or serious physical injury and one count of first-degree murder, both committed against a victim less than fifteen years old.

The victim in the case was █████, the eight-month-old son of S.F. S.F. and Millis began dating in 2012 and after a few months began sharing an apartment. Shortly thereafter, the relationship ended but the couple remained on good terms. In fact, Millis agreed to watch S.F.’s two young sons—one of whom was the victim, █████—one day a week.

The prosecution used a facility dog named Blake for S.F. when she testified. Unlike the other cases we have seen, Blake did not accompany S.F. to the witness stand, but sat in the gallery when she did testify.

Blake had accompanied S.F. during various pretrial hearings. Millis moved *in limine* to preclude Blake’s presence at trial. Again, there was a two-part argument in support of excluding the dog: 1) the Arizona crime-victim law gives a victim the right to be accompanied by a support person, not a dog, and 2) the dog would unfairly prejudice him by inviting the jury to rely on emotion or sympathy. *Id.* at 1233.

The trial court denied the motion, finding that the presence of the dog would not unfairly prejudice Millis. Ironically, the trial judge expressed a personal preference that Blake not be present but saw no “legal basis” to exclude Blake. The trial judge denied a motion to reconsider.

The Court agreed with Millis that the Arizona statute did not address the use of a facility dog. The Court noted that there was no Arizona case law on the subject.

Millis argued that the use of a facility dog is “presumptively prejudicial” and jeopardizes a fair trial in every case, and “presents a non-evidentiary message” to the jury that the witness is an innocent victim. *Id.* at 1234.

The Court noted that other courts, specifically citing *Chenault*, had rejected these arguments. The Arizona court likewise rejected the arguments.

The Court went on to note that since Millis’ trial, the Arizona legislature had endorsed the use of facility dogs in certain circumstances. The statute even gives the trial court authority

to allow a facility dog to accompany an adult victim. This Court believes the broad language of Va. Code § 18.2-67.9:1(B) also allows an adult witness to have a facility dog accompany him or her to the witness stand. The statute did not exist at the time of Millis' trial but does show "the policy of the State of Arizona to accommodate crime victims' use of a dog." *Id.* at 1234.

b. States With a Statute That Allow the Use A Facility Dog

i. *Idaho*

A different twist on the facility dog appeared in *Idaho v. Nuss*, 446 P.3d 458 (Idaho Ct. App. 2019). Not only had the Idaho legislature addressed the issue, but in the *Nuss* trial, the dog **and** the dog's handler accompanied the witness to the witness stand.

The State charged Nuss with one count of committing a lewd act on a fourteen-year-old child. The victim was sixteen when the case came to trial. Pursuant to Idaho Code §19-3023 the trial court announced to the parties its intention to allow a facility dog to accompany the witness.

Nuss objected. He claimed that the "mere presence' or 'knowledge' of the dog would be prejudicial and would make the victim appear 'more vulnerable' and would give her testimony 'more credence and emotionality.'" *Id.* at 459.

Idaho Code § 19-3023 controls the presence of a facility dog in the courtroom. *Id.* at 460. The Idaho legislature amended the statute in 2017 to include a facility dog as support for a child witness.

Nuss pointed out that the statute made no provision for the dog's handler. But, the Court said that "to assume that a facility dog (albeit very well-trained) could perform its function without the aid of its handler is unreasonable."²⁰ *Id.* at 461. The Court concluded that the statute requires the trial court to allow the presence not only of the dog but also of the dog's handler during the child's testimony, unless the trial court makes written findings of undue prejudice. *Id.*

ii. *Colorado*

The defendant in *Colorado v. Collins*, 491 P.3d 438 (Colo. App. 2021) took a slightly different tack than the other cases seen thus far, although Collins did make the argument that the prosecution had not shown the necessity for a facility dog. The result, however, was the same.

A jury convicted Collins of sexual assault on a child and sexual assault by one in a position of trust.²¹ *Id.* at 442. The primary witness against Collins was ██████, who was six years old at the time of the first trial. She was found competent to testify then and again at the second trial.

²⁰ In this case Rylynn's handler testified that she will not be at the witness stand but will be in the courtroom. The witness, will, in effect, become Rylynn's handler while she testifies.

²¹ The conviction happened at a second trial. The first trial ended in a mistrial.

It appears that the prosecution did not use the facility dog at the first trial. The Court wrote that “before the second trial, the prosecution requested that a court facility dog be allowed to sit at [REDACTED]’s feet while she testified because she was anxious about testifying.” *Id.* at 445. Collins objected “arguing, in part, that the use of a facility dog violated his right to confrontation because ‘the process of confrontation necessarily requires a certain level of subtle emotional and psychological tension between the accused and the witness.’” *Id.* at 445-446.

“The right of confrontation generally requires that a witness testify under oath, in open court, and face-to-face with the defendant.” *Id.* (citing *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990)). It also requires that a witness be subject to cross-examination by defense counsel and that the jury can observe the witness’s demeanor while testifying. *Id.*

Collins cited *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) for the proposition that the use of the facility dog violated his right to confrontation because the witness did not feel the ‘degree of discomfort’ a testifying accuser should be subject to.” *Id.* The argument failed to convince the Court.

Coy, the Court said,

Doesn’t stand for the proposition that crime victims must endure stress while testifying to satisfy the right to confrontation. While satisfying a defendant’s right to confront his or her accuser may impose an unavoidable level of discomfort for the accusing witness, the right doesn’t carry with it a prohibition on mitigating discomfort nor a right to impose discomfort. Put simply, easing a testifying witness’s discomfort doesn’t violate a defendant’s confrontation rights. *Id.* at 447.

Collins could see [REDACTED] when she testified. The trial court took care to assist a young victim while testifying. The procedures employed by the trial court did not violate Collins’ right to confrontation.

As to the necessity argument, the Court noted that Colorado did not have a facility dog statute at the time of the trial and there were no Colorado cases addressing the issue of necessity. While noting that there was a split of authority on whether the prosecution must show necessity for specific support or a comfort item over defense objection, most courts in other jurisdictions have concluded that a showing of necessity is not required. *Id.* The Court decided that the cases not requiring necessity were more persuasive and concluded that the trial court did not abuse its discretion when it allowed the use of a facility dog during the trial.

c. States That Did Not Allow Facility Dogs

There is no question that the use of a facility dog to assist a witness has been approved by several appellate courts. The trend, however, has not been unanimous.

As already noted, the use of a facility dog was rejected in *Devon I*. The Connecticut Supreme Court reversed that decision in *Devon II*.

In *Michigan v. Shorter*, 922 N.W.2d 628 (Mich. Ct. App. 2018), a jury had convicted Shorter of third-degree sexual assault (incapacitated complainant) and fourth-degree sexual conduct (incapacitated complainant).²² The Court of Appeals of Michigan held that the trial court erred when it allowed the use of a dog to assist the adult complaining witness when she testified.

Whereas the Virginia Code § 18.2-67.9:1(D) requires 14 days' notice, Michigan had no similar requirement. In fact, the prosecution first raised the issue about a dog assisting the witness in *voir dire*. *Id.* at 632. The next day, following *voir dire*, the prosecution mentioned that the dog's handler would need to stand next to the witness to hold the dog's lease. *Id.* It was then that the trial judge inquired about the "necessity for that support animal." *Id.* The defense objected, pointing out that the witness in the case was an adult woman.

The trial court relied on *Michigan v. Johnson*, 889 N.W.2d 513 (Mich. Ct. App. 2016). In that case the trial court had ruled that a support dog could be used for a six-year-old witness, because to do so is within the authority of the trial court and is not "inherently prejudicial." *Id.* at 633.

The Michigan Court of Appeals specifically held that *Johnson's* holding "was tied to the facts presented, i.e., the use of a support animal during a *child's* testimony." *Id.* at 633 (emphasis in original). The Court noted that the use of the dog with the handler likely affected the jury. *Id.* at 635. The Court said:

A juror can readily accept that a child might need support simply to be in a courtroom to be able to answer questions. With a fully abled adult, a juror is far more likely to conclude that the reason for the support animal or support person is because the complainant was traumatized by the actions for which the defendant is charged. *Id.*

Obviously, the holding of a Michigan court is not controlling to this Court. I believe the concern noted above that a jury is more likely to conclude that the witness was traumatized by the events at trial is speculative at best. And, as noted earlier, Virginia Code § 18.2-67.9:1 does

²² It appears from the Court's recitation of the facts was that the complaining witness, an adult, was asleep when the conduct began, thus supporting an allegation that the complaining witness was incapacitated. Mich. Comp. Laws § 750.520d(1)(c) defines criminal sexual assault in the third degree as sexual penetration if any of the following circumstances exist . . . the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. Mich. Comp. Laws § 750.520e(1)(c) defines criminal sexual assault in the fourth degree as sexual contact with another person if any of the following circumstances exist . . . the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. I can find no other mention of any disability in the opinion that would support a finding of incapacitation other than the fact that she was asleep when the conduct began.

not distinguish between adult and minor witnesses. It is clear that the legislative intent of § 18.2-67:9.1 is to provide for facility dog assistance to any witness.

CONCLUSION

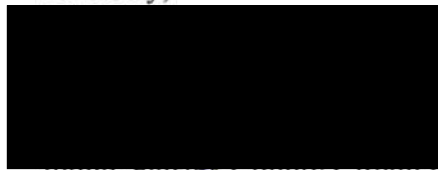
Cases from across the country overwhelmingly conclude that the use of a facility dog does not deprive the defendant of the Constitutional right to confront the witness against him, that the use of a facility dog does not unduly influence the jurors, and the use of a facility dog falls within the inherent authority of a trial court of manage the proceedings before it. None of the cited cases analyzed a statute as broadly written as Virginia Code § 18.2-67.9:1.

I find that the Commonwealth has established that Rylynn qualifies as a facility dog, that her use will aid the witness in providing her testimony, and that the use of Rylynn will neither interfere with nor distract from the testimony or the proceedings.

The motion of the Commonwealth to use Rylynn to assist the witness at trial is GRANTED. An order is attached hereto.

The mechanics of how to use Rylynn at the trial will be determined at a hearing to be conducted later. Counsel should contact my clerk, Ms. Gartin, to schedule that hearing.

Sincerely,

A large black rectangular redaction box covering the signature of the judge.

Judge, Fairfax County Circuit Court

