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### State v. Nuss Appellant's Reply Brief Dckt. 45683

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 45683
	)	
v.	)	BONNER COUNTY NO. CR 2016-7553
	)	
ELIJAH Z. NUSS,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

\_\_\_\_\_  
**REPLY BRIEF OF APPELLANT**  
\_\_\_\_\_

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF BONNER**

\_\_\_\_\_  
**HONORABLE BARBARA BUCHANAN**  
District Judge  
\_\_\_\_\_

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## STATEMENT OF THE CASE

### Nature of the Case

Elijah Z. Nuss asserted on appeal that the district court abused its discretion during his jury trial, when it allowed a facility dog and its handler to accompany the alleged victim, L.W., during her testimony. The district court did not act consistently with the applicable legal standards, because under the circumstances of this case the district court should have made written findings that Mr. Nuss' constitutional right to a fair trial would be unduly prejudiced if the facility dog and its handler were allowed to sit with L.W. during her testimony. The presence of the facility dog and its handler was prejudicial, and the district court failed to follow the steps it had outlined to mitigate the prejudice.

In its Respondent's Brief, the State asserts Mr. Nuss has not demonstrated that the district court abused its discretion by allowing the facility dog and the dog's handler to sit near L.W. during her testimony. (*See* Resp. Br., pp.4-10.) This Reply Brief is necessary to show the State's arguments are unavailing, because the State's arguments fail to squarely address that Mr. Nuss objected to the presence of the facility dog *and* its handler. Moreover, the State has not met its burden of proving that the district court's abuse of discretion is harmless beyond a reasonable doubt.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Nuss' Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court abuse its discretion when it allowed the facility dog and its handler to accompany L.W. during her testimony?

## ARGUMENT

### The District Court Abused Its Discretion When It Allowed The Facility Dog And Its Handler To Accompany L.W. During Her Testimony

#### A. Introduction

Mr. Nuss asserts the district court abused its discretion when it allowed the facility dog and its handler to accompany L.W. during her testimony. The district court did not act consistently with the applicable legal standards, because under the circumstances of this case the district court should have made written findings that Mr. Nuss' constitutional right to a fair trial would be unduly prejudiced if the facility dog and its handler were allowed to sit with L.W. during her testimony. The State has not met its burden of proving that the district court's abuse of discretion is harmless beyond a reasonable doubt.

#### B. The District Court Did Not Act Consistently With The Applicable Legal Standards, Because The District Court Should Have Made Written Findings That Mr. Nuss' Constitutional Right To A Fair Trial Would Be Unduly Prejudiced

Mr. Nuss asserts the district court did not act consistently with the applicable legal standards, because under the circumstances of this case the district court should have made written findings that Mr. Nuss' constitutional right to a fair trial would be unduly prejudiced if the facility dog and its handler were allowed to sit with L.W. during her testimony. *See* I.C. § 19-3023(1). The presence of the facility dog and its handler was prejudicial, and the district court failed to follow the steps it had outlined to mitigate the prejudice.

The State's arguments to the contrary fail to squarely address that Mr. Nuss objected to the presence of the facility dog *and* its handler. While the State acknowledges Mr. Nuss objected to the presence of the facility dog and the dog's handler (*see* Resp. Br., p.6), the State's arguments focus on the presence of the facility dog taken alone. For example, the State contends

the district court “took the mitigating step of specifically instructing the jury that it was to disregard the presence of the dog and not draw any inferences from its presence.” (Resp. Br., p.7.) However, that jury instruction did not address the presence of the handler during L.W.’s testimony. (See Non-Confidential Exs., p.40; Tr., p.128, Ls.3-18.) Further, the district court did not explain the presence of the handler to the jury until the handler walked the facility dog out of the courtroom. (See Tr., p.206, Ls.17-21.)

The State also contends that, because Mr. Nuss did not allege any case-specific factor that would render the facility dog’s presence unconstitutional in the unique circumstances in this case, and no such factors are evident from the record, Mr. Nuss has not demonstrated that the district court erred. (See Resp. Br., p.8.) However, Mr. Nuss asserted before the district court that the presence of the facility dog and its handler would be prejudicial in this particular case. Mr. Nuss asserted the facility dog made L.W. “appear more vulnerable,” and was “prejudicial in the eyes of the jury” because it gave L.W.’s testimony “more credence and emotionality.” (See Tr., p.131, Ls.16-22.) With respect to the handler, Mr. Nuss reiterated his initial objection and asserted, “another person is prejudicial to the case.” (See Tr., p.140, Ls.11-13.)

The State also cites to cases from other jurisdictions, where “the courts have concluded that the trial court acted within its discretion to permit the facility dog and/or that the facility dog’s presence did not violate the defendant’s constitutional rights.” (See Resp. Br., pp.8-9.) But those cases from other jurisdictions, unlike the present case, largely do not appear to involve both a facility dog and its handler accompanying witnesses during their testimony. For example, in *People v. Johnson*, 889 N.W.2d 513 (Mich. Ct. App. 2016), in the defendant’s trial, “a black Labrador retriever named Mr. Weeber was permitted, without objection, to accompany the six-year-old victim and the victim’s 10-year-old brother on the witness stand while they testified.”



*Id.* at 521. Similarly, in *People v. Tohom*, 109 A.D.3d 253 (N.Y. App. Div. 2013), a “comfort dog” accompanied the alleged victim during her testimony. *See id.* at 258-59.

Neither *Johnson* nor *Tohom* mention the presence of a handler alongside the facility dog while the witnesses in those respective cases were testifying. *See Johnson*, 889 N.W.2d at 521; *Tohom*, 109 A.D.3d at 258-59. Similarly, most of the other cases from other jurisdictions cited by the State do not indicate a handler was present with the facility dogs at issue. *See State v. Devon D.*, 138 A.3d 849, 863-64 (Conn. 2016) (the facility dog sat near the witness while she testified); *State v. Dye*, 309 P.3d 1192, 1195-96 (Wash. 2013) (the facility dog sat with the witness during his testimony); *State v. Reyes*, 505 S.W.3d 890, 896 (Tenn. Crim. App. 2016) (the facility dog was at the witness’s feet during his testimony); *State v. Hasenyager*, 67 N.E.3d 132, 135 (Ohio Ct. App. 2016) (the facility dog accompanied the witness on the witness stand during her testimony). Even in *People v. Chenault*, 227 Cal. App. 4<sup>th</sup> 1503 (Ct. App. 2014), which discussed the facility dog’s handler the most out of the cases cited by the State, the handler was to sit in a chair near the back door of the courtroom, not with the facility dog and the witness. *See id.* at 1512-13.

Unlike in the cases cited by the State, in the present case both the facility dog and its handler accompanied L.W. during her testimony, which prejudiced Mr. Nuss’ right to a fair trial. Allowing the handler to accompany L.W. with the facility dog increased the prejudice to Mr. Nuss. As explained in a passage from *Tohom* quoted by the State (*see Resp. Br.*, p.9), “An adult, especially one who can understand the entirety of the case, including its legal underpinnings, may be seen by a jury to add credibility to the arguments of the plaintiff’s witness.” *See Tohom*, 109 A.D.3d at 272-73 (quoting Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 Animal L. 171, 186 (2009)). Because the

cases from other jurisdictions cited by the State do not involve the presence of both a facility dog and its handler, they ultimately do not support the State's position with respect to this case.

The State's arguments, because they fail to squarely address that Mr. Nuss objected to the presence of the facility dog *and* its handler, are unavailing. The presence of the facility dog and its handler was prejudicial, and the district court failed to follow the steps it had outlined to mitigate the prejudice. Thus, the district court did not act consistently with the applicable legal standards, because under the circumstances of this case the district court should have made written findings that Mr. Nuss' constitutional right to a fair trial would be unduly prejudiced if the facility dog and its handler were allowed to sit with L.W. during her testimony.

C. The State Has Not Met Its Burden Of Proving That The District Court's Abuse Of Discretion Is Harmless Beyond A Reasonable Doubt

Mr. Nuss asserts the State has not met its burden of proving that the district court's abuse of discretion in allowing the facility dog and its handler to accompany L.W. during her testimony, is harmless beyond a reasonable doubt. *See State v. Perry*, 150 Idaho 209, 227 (2010).

The State argues: "In this case, the touchstone issue for the jury was L.W.'s credibility. The mere presence of a facility dog and dog handler with L.W. during her trial testimony did not inform her credibility, or [Mr.] Nuss's guilt or innocence. Therefore, any error was harmless." (Resp. Br., p.10.)

The State's cursory argument does not establish, beyond a reasonable doubt, that there was no reasonable possibility that the district court's abuse of discretion contributed to the conviction. *See State v. Sharp*, 101 Idaho 498, 507 (1980) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Rather, considering the overall weakness of the State's case (*see App.*

Br., p.13), there was a reasonable possibility that allowing the facility dog and its handler to accompany L.W. during her testimony contributed to the conviction. The district court's failure to follow its steps to mitigate the prejudice meant the district court's jury instruction did not cover what actually happened with the facility dog. (*See* Tr., p.128, Ls.3-18, p.206, Ls.17-21.) Moreover, the jury instruction did not address the presence of the handler, who was sitting behind L.W. throughout her testimony. (*See* Non-Confidential Exs. p.40; Tr., p.128, Ls.3-18.) As suggested by *Tohom*, the handler could have been seen by the jury as adding to the credibility of L.W.'s testimony. *See Tohom*, 109 A.D.3d at 272-73.

There is a reasonable possibility that having the facility dog and its handler sit with L.W. during her testimony contributed to the conviction. The State has not met its burden of proving that the district court's abuse of discretion is harmless beyond a reasonable doubt. *See Perry*, 150 Idaho at 227. Mr. Nuss' judgment of conviction should be vacated, and the matter should be remanded to the district court for further proceedings.

#### CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Nuss respectfully requests that this Court vacate his judgment of conviction, and remand this matter to the district court for further proceedings.

DATED this 26<sup>th</sup> day of October, 2018.

/s/ Ben P. McGreevy  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26<sup>th</sup> day of October, 2018, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith  
\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BPM/eas