



10-1-2015

Sit... Stay... Now Beg for Me: A Look at the Courthouse Dogs Program and the Legal Standard Pennsylvania Should Use to Determine Whether a Dog Can Accompany a Child on the Witness Stand

Matthew Kaiser

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Courts Commons](#)

Recommended Citation

Matthew Kaiser, *Sit... Stay... Now Beg for Me: A Look at the Courthouse Dogs Program and the Legal Standard Pennsylvania Should Use to Determine Whether a Dog Can Accompany a Child on the Witness Stand*, 60 Vill. L. Rev. 343 (2015).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol60/iss2/4>

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2015]

SIT . . . STAY . . . NOW BEG FOR ME: A LOOK AT THE
COURTHOUSE DOGS PROGRAM AND THE LEGAL STANDARD
PENNSYLVANIA SHOULD USE TO DETERMINE WHETHER A DOG
CAN ACCOMPANY A CHILD ON THE WITNESS STAND

MATTHEW KAISER*

I. THE PILLARS OF JUSTICE NOW HAVE FOUR LEGS ON WHICH TO STAND:
AN INTRODUCTION TO THE COURTHOUSE DOGS PROGRAM

Douglas Lare “felt ‘betrayed by all people,’” but when he took the stand to testify, Ellie, a “yellow Labrador-Golden Retriever mix,” sat right beside Douglas, comforting him through his emotional testimony.¹ Prosecutors in several states have begun to utilize facility “courthouse” dogs to assist emotionally fragile witnesses in testifying, particularly children and developmentally disabled individuals.² At the forefront of this movement,

* J.D./M.B.A. Candidate, 2016, Villanova University School of Law; *summa cum laude* graduate, 2013, The College of William and Mary. This Note is dedicated to my family, friends, and classmates who have supported and helped me throughout my life and with this publication. Most importantly, I could not have done it without my four-legged companion, Pudge, who has been my running partner for the last eleven years and has always been able to put a smile on my face.

1. Melanie D.G. Kaplan, *Court Tails: Gathering Testimony Gets Easier with Four Legs*, in NOMAD EDITIONS GOOD DOG, at 3 (July 13, 2011), available at http://www.melaniegkaplan.com/DOGS_articles_files/CourtTails.pdf (explaining calming presence of Ellie). Douglas Lare and Alesha Lair, Douglas’s neighbor, will be identified throughout this Note by their first names, in order to avoid confusion due to the similarity of their last names, just as the court did in *State v. Dye* (Dye II), 309 P.3d 1192, 1194 n.2 (Wash. 2013). Douglas, a Washington State resident, is a developmentally disabled individual with the mental competency of a six- to twelve-year old, though he is in his late fifties. See Kaplan, *supra*, at 3. Douglas was the victim of a scam and a stream of burglaries over a two-year span, starting in 2007 and culminating with the most recent burglary in 2008. See *Dye II*, 309 P.3d at 1194–95 (providing details of case).

2. See *Where Facility Dogs Are Working*, COURTHOUSE DOGS FOUND. (Jan. 29, 2015), http://www.courthousedogs.com/settings_where.html (listing courthouses in each state that utilize courthouse dogs); see also Casey Holder, Comment, *All Dogs Go to Court: The Impact of Court Facility Dogs as Comfort for Child Witnesses on a Defendant’s Right to a Fair Trial*, 50 Hous. L. Rev. 1155, 1157 (2013) (“analyz[ing] the benefits and challenges of incorporating dogs in traditional legal settings, like the courtroom”). Holder details the current laws in place to accommodate child witnesses on the stand, the present state of courthouse dog programs throughout the United States, and the legal support for implementing a courthouse dog program. See *id.*; see also Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 ANIMAL L. 171, 171 (2009) (explaining benefits of and legal support for permitting dogs to accompany adults and children to witness stand in order to provide them with emotional support). However, Dellinger also identifies potential practical problems with having dogs in the courthouse, including “allergies, fear, and delay of jury selection;” the appearance of a “gimmicky” effect;” and potential civil liability arising out of having a dog present. See *id.* at 188–89.

(343)

Pennsylvania was the first state on the East Coast to adopt a courthouse dogs program for victims entangled in the legal system.³ Pennsylvania's program will likely become increasingly active over the next several years, specifically for child abuse cases, because Pennsylvania lawmakers are adamant about changing the current child abuse reporting policies in the wake of the Jerry Sandusky child sex abuse scandal.⁴ Consequently, with more children potentially testifying in the future about their traumatizing experiences, these courthouse dogs might be the best way to alleviate their anxiety and help them testify against their abusers.⁵ The Pennsylvania Su-

3. See E-mail from Faith E. Schindler, Victim Witness Advocate, Centre Cnty., Pa. Dist. Attorney's Office, to Author (Aug. 26, 2014, 08:31 AM EST) (on file with author).

4. See Charles Thompson, *Bills Would Change Child Abuse Reporting Requirements in Pa., Defining Who Reports and How*, PENNLIVE (Apr. 4, 2014, 6:15 AM), http://www.pennlive.com/midstate/index.ssf/2014/04/bills_beeing_up_child_abuse_r.html ("Lawmakers have already modernized the definition of abuse, and approved measures that strengthen law enforcement and child welfare response."); see also *Child Protection Legislation Overview*, PA. H. REPUBLICAN CAUCUS, <http://www.pahousegop.com/ChildProtectionMeasures.aspx> (last visited Feb. 9, 2015). The Pennsylvania General Assembly has passed several laws in response to the Jerry Sandusky child sexual abuse scandal. See *id.* First, it has updated and strengthened the definition of "child abuse" by lowering "the injury threshold for what is considered physical abuse, allow[ing] certain grooming activities to be considered sexual abuse, and includ[ing] a variety of abusive behaviors that cannot be substantiated as 'child abuse' under current law." *Id.* Second, the Assembly has increased penalties for athletic coaches engaged in sexual activities with a "child-athlete." See *id.* Finally, it has improved "child abuse reporting" by "expedit[ing] appeals of indicated child abuse reports." *Id.* (citation omitted); see also James Boyle, *Corbett Signs Updates to Child Abuse Laws*, UPPER SOUTHAMPTON PATCH (Dec. 19, 2013, 12:14 PM), <http://patch.com/pennsylvania/uppersouthampton/corbett-signs-updates-to-child-abuse-laws-uppersouthampton> (reporting new child abuse legislation Governor Tom Corbett signed). In 2013, Governor Corbett signed into law several new "pieces of child abuse legislation" that will "help[] . . . transform [Pennsylvania] into a state with several of the stiffest penalties for child abuse in the nation." *Id.* (quoting then-Governor Tom Corbett). These new bills strengthen Pennsylvania's child abuse prevention laws by "[a]mend[ing] the definition of child abuse to lower the threshold from serious bodily injury to bodily injury," holding an individual liable for "failing to act when child abuse is being committed," and "[b]roaden[ing] the definition of perpetrator to include" more individuals who "have regular contact" with the child. *Id.*

5. See Holder, *supra* note 2, at 1155 (identifying benefits of facility dogs to child witnesses and judicial system); Noreal Weems, Note, *Real or Fake: Animals Can Make a Difference in Child Abuse Proceedings*, 2 MID-ATLANTIC J.L. & PUB. POL'Y 117, 123-30 (2013) (describing differences and similarities between using stuffed or real animals as well as case law assessing use of witness support items); see also Dellinger, *supra* note 2, at 171 ("analyz[ing] the legal foundations supporting the use of service dogs for emotional support of complaining witnesses in open court"). Dellinger also explains how dogs can relieve witnesses' anxiety: a dog's "presence helps divert [] participants' attention away from the negative forces that are consuming them." *Id.* at 178-79 (quoting Andrew Leaser, Note, *See Spot Mediate: Utilizing the Emotional and Psychological Benefits of "Dog Therapy" in Victim-Offender Mediation*, 20 OHIO ST. J. DIS. RES. 943, 955 (2005)) (internal quotation marks omitted); see also Lawrence Robinson & Jeanne Segal, *The Health Benefits of Pets*, HELPGUIDE.ORG (Dec. 2014), <http://www.helpguide.org/articles/emotional->

preme Court has yet to specifically address whether service dogs are permitted to accompany individuals to the witness stand, as the Washington Supreme Court recently did in *State v. Dye (Dye II)*.⁶

This Note assesses whether such accommodations would be permitted in Pennsylvania courts and recommends a standard for such accommodations.⁷ Part II examines the use of courthouse dogs in Pennsylvania and discusses the jurisdictions that have explicitly addressed the use of dogs as accommodations for witnesses.⁸ Part III analyzes the statutes that courts have used to permit dogs to accompany witnesses to the stand and subsequently compares these statutes to Pennsylvania's statutes to assess the admissibility of courthouse dogs in the Pennsylvania legal system.⁹ Part IV examines the legislative history of and amendments to Pennsylvania's child victims and witnesses statutes and finds further evidence that courthouse dogs would be an appropriate accommodation.¹⁰ Part V argues that the Washington Supreme Court's standard, as set forth in *Dye II*, is the standard Pennsylvania courts should adopt in determining whether a courthouse dog accommodation is permissible.¹¹ Part VI compares the use of courthouse dogs to the use of closed-circuit television, explains how the courthouse dogs program aligns with the policy of accommodating children in the legal system, and adds further support for the argument that Pennsylvania should adopt the Washington Supreme Court's legal standard.¹² Part VII concludes with a reiteration of the evidence supporting the appropriate legal standard that Pennsylvania courts should utilize

health/the-health-benefits-of-pets.htm (listing results from scientific studies related to owning a pet, specifically, humans having lower blood pressure in stressful situations, elevated "levels of serotonin and dopamine, which calm and relax," and increased self-confidence).

6. 309 P.3d 1192, 1200 (Wash. 2013) (holding facility dog was proper accommodation for witness, and trial court did not abuse its discretion by permitting dog to accompany witness during testimony).

7. For a determination of whether accommodation would be permitted, see *infra* notes 14–126 and accompanying text. For a recommendation of a legal standard for Pennsylvania courts, see *infra* notes 127–97 and accompanying text.

8. For a discussion of dogs in Pennsylvania courthouses and a description of jurisdictions permitting dogs as witness accommodations, see *infra* notes 14–73 and accompanying text.

9. For a comparison of Pennsylvania's statute to statutes of other states that have permitted courthouse dogs, see *infra* notes 74–112 and accompanying text.

10. For a discussion of Pennsylvania's child victims and witnesses statutes and evidence that dogs are an appropriate accommodation, see *infra* notes 113–26 and accompanying text.

11. For a discussion of Washington's standard, established in *Dye II*, see *infra* notes 127–70 and accompanying text.

12. For a comparison between courthouse dogs and closed-circuit television, see *infra* notes 171–91 and accompanying text.

when addressing the issue of accommodating a child witness with a courthouse dog.¹³

II. STAY, FIDO: A LOOK AT THE CURRENT STATE OF COURTHOUSE DOGS

Pennsylvania has already established a foundational courthouse dogs program in many of its counties; however, with little guidance from statutes and precedent, the proper legal standard for determining the admissibility of courthouse dogs remains unclear.¹⁴ The Washington Supreme Court, the highest court to explicitly address the admissibility of dogs in the courtroom, analyzed the various standards jurisdictions have used to assess the permissibility of special courtroom accommodations.¹⁵ Additionally, courts in New York and California have recently ruled on the use of dogs in the courthouse.¹⁶ The variety of standards implemented in these cases, combined with a breadth of sources and liberal statutory interpretation, demonstrate the options Pennsylvania courts have to make courthouse dogs a staple accommodation in the Commonwealth's legal system.¹⁷

A. *An Unknown Breed: Pennsylvania Has Yet to Establish a Specific Legal Standard for Courthouse Dogs*

On December 30, 2009, Princess joined Pennsylvania's Centre County District Attorney's Office.¹⁸ Faith Schindler, a Victim Witness Advocate in Centre County, and Judge Brad Lunsford are the pioneers for the program in Pennsylvania, which became the first state on the East Coast to

13. For a conclusion and summary of evidence supporting the adoption of the Washington standard in Pennsylvania, see *infra* notes 192–97 and accompanying text.

14. See *Where Facility Dogs Are Working*, *supra* note 2 (listing places where courthouse dogs are utilized in Pennsylvania); see also Dye II, 309 P.3d 1192, 1198 n.10 (Wash. 2013) (citing only one Pennsylvania case, from 1989, for use of support person, but noting no Pennsylvania case for use of comfort items); NAT'L DIST. ATTORNEYS ASS'N, NDAA COMFORT ITEMS COMPILATION 11 (July 2010), available at <http://www.ndaa.org/pdf/Comfort%20Items%20July%202010.pdf> (listing no codified statute for use of comfort items in court for Pennsylvania).

15. See Dye II, 309 P.3d at 1196–1200 (analyzing various standards); see also *infra* notes 46–57 and accompanying text (explaining current standards and Supreme Court of Washington's analysis).

16. See, e.g., *People v. Chenault*, 175 Cal. Rptr. 3d 1, 1 (Ct. App. 2014); *People v. Tohom*, 969 N.Y.S.2d 123, 123 (App. Div. 2013); *infra* notes 58–73 and accompanying text (analyzing New York and California cases addressing use of dogs in courthouses).

17. For a discussion and analysis of Pennsylvania's options, see *infra* notes 127–70 and accompanying text.

18. See *Courthouse Dogs—Promoting Justice with Compassion*, NEWMAN, WILLIAMS, MISHKIN, CORVELEYN, WOLFE & FARERI, P.C. (Aug. 26, 2012), <http://www.newmanwilliams.com/blog/2012/08/courthouse-dogs—promoting-justice-with-compassion.shtml> (providing background on first courthouse dog program in Pennsylvania and related articles explaining courthouse dog programs generally).

utilize a courthouse dog with a child on the witness stand at trial.¹⁹ After seeing a news video about a district attorney's office in San Diego using a dog to accompany a child victim to court, Judge Lunsford and Ms. Schindler recognized the program's potential and believed both Pennsylvania's witnesses and judicial system would benefit tremendously from its use.²⁰ Subsequently, Ms. Schindler worked with Canine Partners for Life, an organization "dedicated to training service dogs . . . to assist individuals who have a wide range of physical and cognitive disabilities," to get a suitable dog; and, in late 2009, Princess officially became a member of the District Attorney's Office.²¹

Since joining Ms. Schindler's team, Princess has helped in a variety of settings, both inside and outside the courthouse, including visiting homes to assist children preparing for trial, lying beside children during pre-trial hearings, and accompanying children to the witness stand at jury trials.²² The program's success in Centre County has prompted others—including superior court judges and other victim advocates around the state and beyond—to ask Ms. Schindler for assistance in establishing their own pro-

19. See E-mail from Faith E. Schindler, *supra* note 3 (identifying early uses of courthouse dogs program in Pennsylvania).

20. See E-mail from Faith E. Schindler, Victim Witness Advocate, Centre Cnty., Pa. Dist. Attorney's Office, to Author (Oct. 3, 2014, 10:03 AM EST) (on file with author) (identifying event that prompted recognition of courthouse dogs program). Ms. Schindler subsequently contacted the founders of the courthouse dogs program to better understand the challenges and requirements for replicating the program in Pennsylvania and to ensure the program started off on the right paw. See *id.*

21. See *About Us: Mission and History*, CANINE PARTNERS FOR LIFE, <http://k94life.org/about/history/> (last visited Feb. 9, 2015) (providing description of organization). Located in Cochranville, Pennsylvania, Canine Partners for Life has been in existence for about twenty-five years. See *id.* Currently, it has "placed over 600 service and home companion dogs in 45 states." *Id.* The dogs at Canine Partners for Life are each taken through a "two-year, comprehensive and customized training program to meet the specific needs of its human partner." *About Us: Our Programs*, CANINE PARTNERS FOR LIFE, <http://k94life.org/about/programs/> (last visited Feb. 9, 2015) (describing training program for dogs). The specialized programs train dogs for a variety of uses—alerting seizure, cardiac, and diabetes patients, as well as to be residential companion dogs. See *id.* Ms. Schindler chose to work with Canine Partners for Life because of its status as an accredited organization with a thorough dog-training process. See E-mail from Faith E. Schindler, Victim Witness Advocate, Centre Cnty., Pa. Dist. Attorney's Office, to Author (Oct. 1, 2014, 08:23 AM EST) (on file with author). Ms. Schindler chose such a well-established organization because the courthouse dogs that assist in Centre County's courthouse "will have [to be] temperament tested and trained very thoroughly . . ." *Id.* Ms. Schindler further explained, "[t]o go with any dog would be a big mistake in regards to child safety and [] liability. . . . [But] the dogs from an accredited agency such as Canine Partners for Life are tested . . . and trained in many [] different environments," thus bolstering the dogs' versatility to handle any situation they might encounter inside the courthouse, which in turn, minimizes potential problems. *Id.*

22. See Telephone Interview with Faith E. Schindler, Victim Witness Advocate, Centre Cnty., Pa. Dist. Attorney's Office (Sept. 3, 2014) (explaining Princess's various responsibilities).

grams.²³ As evidence of the program's success in Pennsylvania, the Lancaster County and York County Courthouses have recently joined Pennsylvania's "dog pound."²⁴

23. See *id.* (stating others have requested help to establish their own courthouse dogs programs, even from other states, such as Connecticut, New Mexico, and Colorado); see also E-mail from Faith E. Schindler, Victim Witness Advocate, Centre Cnty., Pa. Dist. Attorney's Office, to Author (Dec. 21, 2014, 5:43 AM EST) (on file with author) (describing people who have asked Ms. Schindler for information about courthouse dogs program: superior court judge, victim advocates, child advocacy centers, and district attorneys).

24. See Emilie Lounsberry, *Dogs Helping Ease Children's Trauma of Testifying*, PHILA. INQUIRER (Aug. 14, 2011), http://articles.philly.com/2011-08-14/news/29886655_1_therapy-dogs-half-dozen-dogs-courthouses. Linda McCrillis and Bucks County Court of Common Pleas Judge Robert J. Mellon worked together to "develop[] a program using therapy dogs to calm the nerves of children summoned to court after being removed from parental custody . . ." *Id.* McCrillis has found it even more important to minimize the emotional trauma of those testifying in court because of the United States Supreme Court's ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), which "reaffirmed defendants' right to directly confront their accusers in court rather than through videotaped testimony or closed-circuit TV," and a 2011 "Pennsylvania Supreme Court ruling . . . [requiring] children who have been removed from parental custody [to] appear in court at least once a year so a judge can monitor their well-being." *Id.*; see also Liz Evans Scoloro, *York County's Newest Treatment Court Employee a Dogged Worker, If a Bit Furry*, YORK DISPATCH (June 18, 2013, 9:39 AM), http://www.yorkdispatch.com/ci_23479755/york-countys-newest-treatment-court-employee-dogged-worker (providing stories of other courthouse dogs). Buster, the first facility dog in York County, joined the York County justice system in mid-2013. See *id.*

Buster's primary role will be to work with adults and juveniles in the county's treatment courts, including drug court, mental-health court, DUI court and veterans court. Such dogs can help calm veterans with post-traumatic stress disorder and people with mental-health issues and addictions The dogs can [also] help ease depression and improve self-esteem

Id.

Andrew Franz, a former probation officer in York County, Pennsylvania, who worked as a Treatment Court Administrator, created the courthouse dogs program in York County and has explained how impactful these courthouse dogs can be on all stakeholders involved in the judicial system. See *id.*; E-mail from Andrew Franz, Dog Trainer for Susquehanna Serv. Dogs, to Author (Sept. 2, 2014, 1:06 PM EST) (on file with author). Before the courthouse dogs program began in York County, other methods were tested to help individuals in the courthouse relieve stress. See *id.* Mr. Franz said, "we tried a few group sessions where we introduced relaxing music [and] tried to get the participant to do something like[] guided meditation." *Id.* However, the methods proved unsuccessful, because "as probation officers, we never really did anything to help the person feel at ease. In fact, what I would hear is how the probation officer made [these individuals] feel . . . [subordinate] by belittling them, constantly threaten[ing] jail," and overall, not respecting them as people. *Id.* Unfortunately, "[t]his was [] typical. Very few probation officers really cared about [others'] feelings and emotion[s]." *Id.* Once the courthouse acquired a service dog, however, the atmosphere changed: "Having the dog . . . simply helped break barriers. It would place a smile on a face." *Id.* Though there were opponents of the courthouse dogs program, they quickly recognized the benefits of the program, changing their perspective on the role dogs could play in the judicial system. See *id.*

Though Princess only became part of the Centre County staff about five years ago, dogs have been utilized in the litigation process elsewhere for years.²⁵ Courthouse dogs' principal purpose is to assist "individuals with physical, psychological, or emotional trauma due to criminal conduct."²⁶ Consequently, these companions have helped in a variety of settings, including family court, probation court, criminal court, and forensic interviews.²⁷ But it is in the context of criminal cases that critics are ex-

Mr. Franz provided an example: "One of [the] biggest critics [who was] against getting [a] dog told me [] he did [not] care how his clients felt [because] they 'chose' . . . [their lifestyle and how they ended up in the courthouse.] After a few months of having the dog [though], he came to [Mr. Franz] and apologized for how he felt [] and completely understood the benefit of what the dog could bring to the probation setting. This was also after [Mr. Franz] caught him kneeling face to face with Buster, getting kisses from him." *Id.* Mr. Franz emphasized, "[w]hat I tell everyone when I speak about this is that having a dog is just another tool we can use. Just like group counseling, individual sessions, sanctions, [or] positive reinforcement . . . [i]t is another tool in our toolbox. From what I have experienced so far, there [have] been no negative outcomes, only positive, and this is still a work in progress. We are learning from what works [and what] doesn't work, [] continually refining it as more counties come on board." *Id.*; see also *There's a New Dog in Town at the Lancaster County Courthouse*, 3BL MEDIA (June 20, 2014, 4:30 PM), <http://3blmedia.com/News/Theres-New-Dog-Town-Lancaster-County-Courthouse> (reporting addition of the therapeutic dog to Lancaster County Courthouse). The Lancaster County Courthouse is the most recent Pennsylvania court to establish a facility dog program: SSD Hamlet, Lancaster County's first service dog, joined the team on June 26, 2014. See *id.* "SSD Hamlet . . . will be assisting in the Lancaster County Veterans, Mental Health, and Drug Treatment Courts to help reduce anxiety and tension for participants." *Id.* SSD Hamlet will accompany participants "during treatment court sessions and appointments with their probation officers." *Id.*

Finally, Ms. Schindler disclosed that Montgomery County, Pennsylvania, is in the process of getting a facility dog, which will make it the fourth program established in the Commonwealth. See Telephone Interview with Faith E. Schindler, *supra* note 22. Mr. Franz believes more counties, such as Dauphin County and Cumberland County, are also preparing for a courthouse dog. See E-mail from Andrew Franz, *supra*.

25. See *Evolution of Dogs Assisting in the Legal System*, COURTHOUSE DOGS FOUND. (2014), http://www.courthousedogs.com/about_history.html (describing history of dogs in legal system). The first noted use of a dog in the legal system occurred in 1989, when Sheba, a retired seeing-eye dog, "assisted child sexual-abuse victims in the Special Victims Bureau of the Queens, NY, District Attorney's Office." *Id.* The following year, Vachess was the first dog to make "a courtroom appearance . . . [during] a preliminary hearing" in Mississippi. *Id.* From 2003 to the present, dogs have nestled their way into the legal system on a more permanent basis; for example, in 2003, a dog named Jeeter "accompanied twin sisters into King County Superior Court [in Washington State] during competency hearings and trial testimony." *Id.* In 2011, a dog named Rosie accompanied a fifteen-year-old girl at the witness stand while she was testifying. *Id.* Then, in 2013, Ellie sat next to Douglas while he testified for the prosecution in the *Dye* matter. *Id.*

26. COURTHOUSE DOGS FOUND. (2014), <http://www.courthousedogs.com> (providing background about courthouse dogs program, case law and legal support for using facility dogs in courtrooms, and other educational information promoting program).

27. See *id.* (listing various settings where courthouse dogs have helped). Courthouse dogs can perform in a variety of environments, such as assisting treat-

pressing concerns about maintaining a fair legal process.²⁸ Without explicit guidance from the legislature or courts, the proper legal standard to assess the admissibility of dogs in Pennsylvania courtrooms remains open.²⁹

B. *A Genetically Engineered Breed: Washington Creates Its Own Legal Standard*

Douglas Lare is a developmentally disabled individual with a “mental age ranging from 6 to 12 years old,” who required Ellie’s assistance at the witness stand after the latest of a series of burglaries committed against him traumatized him.³⁰ In 2005, Douglas “became romantically involved with his neighbor Alesha Lair,” who Douglas did not know was also dating Timothy Dye, the defendant.³¹ In 2007, Alesha and several members of her family moved in with Douglas, at which point Alesha began to take further advantage of him: she opened credit cards in Douglas’s name, charging “them to their limits;” withdrew retirement funds from his personal account; and kept “a key to [Douglas’s] apartment with her.”³² With a key and access to Douglas’s funds, Alesha and Dye were able to take items and money worth thousands of dollars from Douglas.³³ Dye, in par-

ment court participants through their recovery, visiting “juveniles in detention facilities,” and greeting courthouse staff and jurors to “lift [their] spirits.” *Id.*

28. See *Defense Objections and Outline for Trial Brief*, COURTHOUSE DOGS FOUND. (2014), http://www.courthousedogs.com/legal_brief.html (providing outline of trial brief for making motion to permit facility dog to accompany witness while testifying). In addition, to better prepare the prosecution for argument, the foundation also lists the defense’s potential objections to the presence of a dog in court, such as “[t]he dog will distract the jury,” “[t]he child will be distracted by the dog,” “[j]urors that like dogs will like the witness more than the defendant,” and “[t]he presence of the dog bolsters the credibility of the witness.” *Id.*

29. See *supra* note 14 (illustrating dearth of clear legal support in Pennsylvania for determining admissibility of dogs inside courtrooms).

30. See *Dye II*, 309 P.3d 1192, 1194–95 (Wash. 2013) (describing facts of case in detail). The defense categorized Douglas’s mental capacity as being even younger than the prosecution did: the defense claimed that Douglas’s mental age was between that of a two-and-a-half- and eight-and-a-half-year old. See *id.* at 1194 n.1.; see also Kaplan, *supra* note 1, at 3 (describing experience of Douglas with courthouse dog). Douglas recounted his experience in the courtroom, “I was there with the judge and the person doing the crime.” *Id.* He told Kaplan that “[i]t was scary,” but Ellie was able to calm him down. *Id.*

31. *Dye II*, 309 P.3d at 1194. Douglas and Alesha’s “deceptive” relationship lasted for about two years. See Emily Friedman, *Washington Woman Accused of Luring Disabled Man into Relationship, Spending His Money*, ABC NEWS (Apr. 12, 2010), <http://abcnews.go.com/US/woman-drives-disabled-boyfriend-debt/story?id=10333855>.

32. *Dye II*, 309 P.3d at 1194. With Douglas’s money, Alesha “furnish[ed] her new apartment” and bought “herself and her family clothing, shoes, computers, beer, cigarettes, a DVD [] player, and cell phones.” *Id.*

33. See *id.* at 1194–95 & n.3 (stating Alesha “pleaded guilty to theft in the first degree with the aggravating circumstance that [Douglas] was a particularly vulnerable victim,” and in total, she “borrowed approximately \$42,000 against the credit

ticular, burglarized Douglas's apartment several times.³⁴ Thus, over a two year span, Dye and Alesha ultimately swindled Douglas out of about \$100,000.³⁵

After Douglas reported this latest burglary to the police, the State charged Dye for residential burglary, and Douglas's testimony against Dye would be important to convict Dye.³⁶ Douglas was significantly anxious "regarding his upcoming testimony," so "[t]he State moved to allow Ellie to accompany [Douglas] during his testimony," arguing that Douglas's diminished mental capacity and distraught state supported the need for Ellie's assistance.³⁷ Rejecting the defendant's objections of extreme prejudice, the Washington trial court permitted Ellie to sit next to Douglas while he testified because the judge believed courts should try to accommodate developmentally disabled individuals when possible.³⁸ The judge "found that Ellie would be 'very unobtrusive, [and would] just simply be next to the individual, not [] lying in his lap . . .'"³⁹ With Ellie by his side, Douglas testified, ultimately leading to Dye's conviction.⁴⁰

After Washington's Court of Appeals affirmed the conviction, the Supreme Court of Washington granted review and was asked to determine "whether a court may allow a witness to be accompanied by a comfort animal, here a dog, when testifying during trial."⁴¹ After identifying abuse

cards" she created under Douglas's name and "withdrew \$59,000 from [Douglas's] retirement account").

34. *See id.* at 1195 (explaining extent of Dye's transgressions against Douglas). With Douglas's key, Dye entered Douglas's apartment and, over two days, took numerous items such as DVDs, "a shelving unit," a "television, VCR, DVD player, microwave, and a collectible knife . . ." *Id.*

35. *See Kaplan, supra* note 1 (totaling value of things stolen from Douglas by defendants). Dye admitted, in a telephone interview with a police detective, to pawing Douglas's "DVD player but claimed that [Douglas] had voluntarily offered it to him," and "[a]fter the detective stopped the recording, Dye told [the detective] that '[Dye] didn't have anything to worry about because his name wasn't on any of the pawn slips and so there was no way to pin it on him.'" *Dye II*, 309 P.3d at 1195.

36. *See State v. Dye (Dye I)*, 283 P.3d 1130, 1131 (Wash. Ct. App. 2012) (explaining charge against Dye).

37. *Dye II*, 309 P.3d at 1195. The prosecution also informed the judge that Douglas "was a 'complete dog fan' and that Ellie had provided [Douglas] 'tremendous comfort' during the previous interview." *Id.*

38. *Id.* ("[I]f we can accommodate somebody who has a developmental disability when they're testifying in the courtroom I think it's appropriate to do so." (quoting trial court)).

39. *Id.* at 1199 (third alteration in original) (quoting trial court and providing its reasoning).

40. *See id.* at 1196 (stating outcome of case). Though Dye was convicted of residential burglary, the jury "did not find that [Douglas] was a vulnerable victim." *Id.*

41. *Id.* at 1194. The Court of Appeals held "that [Ellie's] presence did not compromise Dye's right of cross-examination, . . . that the trial court properly balanced [Douglas's] special needs against the possibility of prejudice, and that there was no prejudice in the first instance." *Id.* at 1196.

of discretion as the proper standard of review, the court analyzed the applicable legal standard for determining whether a dog could accompany a testifying witness to the stand.⁴² Because this was an issue of first impression, the court examined applicable cases from other jurisdictions, as well as Washington's precedent for permitting child witnesses to hold a comfort item or to be accompanied by an individual while on the stand.⁴³ The Washington Supreme Court found almost all of the courts that actually permitted "a child witness to use a comfort item or support person" required the presence of "highly egregious facts" and evaluated the permissibility of the accommodation using an "abuse of discretion standard."⁴⁴ However, the court noted that, in these types of cases, jurisdictions "are split on whether the prosecution must prove that the special measure is necessary to secure the witness's testimony."⁴⁵

The Washington Supreme Court found three distinct legal standards that courts have used to determine the appropriateness of special measures for testifying victims.⁴⁶ First, courts "have declined to require that the prosecution make a showing of necessity, instead putting the onus on the defendant to prove prejudice or impropriety."⁴⁷ Second, two states,

42. *See id.* ("We have consistently reviewed courtroom procedures—allegedly prejudicial or not—for abuse of discretion standard, and Dye presents no reason for us to depart from that standard now.")

43. *See id.* at 1197. The Washington Supreme Court cited a New York case and a California case directly addressing the use of courthouse dogs to assist a testifying victim of a crime. *See id.* at 1196–97 (citing *People v. Tohom*, 969 N.Y.S.2d 123 (App. Div. 2014); *People v. Spence*, 151 Cal. Rptr. 3d 374 (Ct. App. 2012)). As jurisdictional support for permitting the use of comfort items during testimony, the Washington Supreme Court cited *State v. Hakimi*, 98 P.3d 809, 811 (Wash. Ct. App. 2004). In *Hakimi*, "the two witnesses were young girls who had been allegedly molested by their babysitter, Morteza Hakimi." *Dye II*, 309 P.3d at 1197. The children brought dolls with them "while testifying at their child hearsay hearings." *Hakimi*, 98 P.3d at 811. The trial court denied Hakimi's motion to prohibit the children from holding the dolls while they testified in front of a jury after weighing "the interests of the witnesses against the potential prejudice to Hakimi" because "[c]hildren do present different issues and different considerations in terms of being witnesses in different cases. They have a peculiar need to find some security in an otherwise insecure setting I don't think the doll unduly prejudices, to the extent it prejudices anyone at all" *Dye II*, 309 P.3d at 1197 (quoting *Hakimi*, 98 P.3d at 811).

44. *Dye II*, 309 P.3d at 1198 (noting requirement of "highly egregious facts"); *Hakimi*, 98 P.3d at 811 (applying abuse of discretion standard).

45. *Dye II*, 309 P.3d at 1198 (noting division in other jurisdictions and classifying jurisdictions' analyses into three main legal standards).

46. *See id.* (identifying legal standards analyzed by Washington Supreme Court). For a description and analysis of the three classes of standards, see *infra* notes 47–49 and accompanying text.

47. *Dye II*, 309 P.3d at 1198 (describing burden on defendant). The first group of cases the Supreme Court of Washington cited were those where courts required defendants to prove that the special accommodations granted for child witnesses are prejudicial and therefore affecting defendants' right to a fair trial. In one, the defendant was convicted of kidnapping, raping, and sodomizing a seven-year-old child. *See State v. Dickinson*, 337 S.W.3d 733, 744 (Mo. Ct. App. 2011). At trial, the judge permitted the child to hold a teddy bear while testifying. *See id.*

Delaware and Hawaii, have “explicitly require[d] the prosecution to show that a special measure is necessary to facilitate the witness’s testimony.”⁴⁸

Although the prosecution did not show that the teddy bear was necessary for the child to be able to testify, on appeal, the Missouri Court of Appeals found “there was nothing to suggest that the toys were used to engender the sympathy of the jurors,” or that the teddy bear prejudiced the client in any other fashion. *Id.* at 743. The court also found “[t]he trial court balanced the benefit the comfort item would provide [the child] . . . against any potential prejudice it might cause [the] [d]efendant.” *Id.* at 744. Therefore, on appeal, the court ruled against the defendant’s argument that the trial court abused its discretion. *Id.* at 746; *see also* *State v. Powell*, 318 S.W.3d 297, 304 (Mo. Ct. App. 2010) (holding trial court did not abuse its discretion by permitting eleven and sixteen-year-olds to carry teddy bears with them to witness stand).

The Court of Appeals of Texas similarly denied a defendant’s arguments that the “trial court committed error in allowing the child-victim ‘to testify before the jury while holding a teddy bear, not her own’” *Sperling v. State*, 924 S.W.2d 722, 725 (Tex. Ct. App. 1996). The only mention of the teddy bear in the trial court’s record was when the prosecutor briefly talked to the child about it while she was on the stand. *See id.* The Court of Appeals held, “[w]ith nothing more in the record, we cannot conclude that the teddy bear constituted demonstrative evidence which engendered sympathy in the minds and hearts of the jury, validated the child-victim’s unimpeached credibility, or deprived appellant of his constitutional right of confrontation.” *Id.* at 726. The Court of Appeals held that the use of the teddy bear was reasonable “in an effort to minimize the psychological, emotional and physical trauma to the child-victim caused by her participation in the prosecution, including her face-to-face confrontation with appellant.” *Id.* However, the appellate court refused to address whether the trial court had to “make a finding of necessity for allowing the child-victim to cuddle a teddy bear while testifying” because the defendant did not raise the complaint with the trial court. *Id.* Four years later, the Texas Court of Appeals addressed this issue, finding “article 38.071, section 10 does not require the trial court to make such a finding [of necessity].” *In re D.T.C.*, 30 S.W.3d 43, 47 (Tex. Ct. App. 2000).

48. *Dye II*, 309 P.3d at 1198 (noting standard used in other jurisdictions). The Washington Supreme Court cited precedent from Delaware and Hawaii to demonstrate how some jurisdictions have required a finding that the child witness has a “compelling necessity” for the “special measure,” such as holding a teddy bear. *See id.*

In one case, an uncle was convicted of raping his niece when she was five-years-old. *See Gomez v. State*, 25 A.3d 786, 787 (Del. 2011). At the time of the trial, the niece was nine-years-old. *Id.* at 792. Considering the victim’s age and her testimony’s subject matter, the prosecutor moved to “allow the [child’s] mother” to accompany the girl while testifying on the witness stand. *Id.* at 788. In addition to permitting the mother to sit with the child, the trial judge also allowed the child “to hold a teddy bear while she testified.” *Id.*

On appeal, the defendant claimed the trial court abused its discretion and “committed plain error in permitting [the child] to hold a teddy bear during her testimony.” *Id.* at 798–99. The Supreme Court of Delaware first examined the policy behind Delaware’s “Child Victims and Witnesses” statutes. *See id.* at 799. Section 5131, under title 11 of Delaware’s Code, stated that child victims and witnesses are different than adults, and thus, should be provided “‘with additional consideration and different treatment than that usually required for adults.’” *Id.* (quoting DEL. CODE ANN., tit. 11, § 5151). To assess the statute’s legislative intent for permitting special accommodations to child witnesses, the Supreme Court of Delaware cited its previous analysis. *See id.* (citing *Czech v. State*, 945 A.2d 1088 (Del. 2008)). Based on its analysis in *Czech*, the Delaware Supreme Court reaffirmed its “substantial need” standard: “In the absence of extraordinary circum-

Third, other states have demanded “a record that clearly indicate[s] that the witness would have difficulty testifying in the absence of the comfort item or support person.”⁴⁹

stances . . . , a trial judge should not make special accommodations *sua sponte*. We hold that such special accommodations should only be made if it has been determined, upon motion, that the requesting party has demonstrated a ‘substantial need’ for their implementation.” *Id.* at 799 (alteration in original) (quoting *Czech*, 945 A.2d at 1094). Using this standard, the prosecutor properly “demonstrated a substantial need” for the child’s mother to be present at the witness stand; however, the court found the trial judge did not “require[] the prosecutor to demonstrate a substantial need for the additional special accommodation of the teddy bear.” *Id.* Consequently, because the court had already reversed and remanded the case on other grounds, it cautioned the trial judge to require the prosecutor to demonstrate a substantial need for the teddy bear’s use. *See id.*

A similar “substantial need” standard was articulated in Hawaii. *See State v. Palabay*, 844 P.2d 1, 2 (Haw. Ct. App. 1992). There, the Intermediate Court of Appeals of Hawaii found that the prosecution had not provided a “compelling necessity” for permitting the child witness to hold a teddy bear while testifying. *See id.* at 7. In *Palabay*, the defendant was convicted of sexually assaulting his neighbor’s eleven-year-old daughter. *Id.* at 5. A year later, at trial, the daughter testified while holding a teddy bear without consent from the trial judge. *See id.* On appeal, the defendant argued the teddy bear was prejudicial and a “blatant prosecutorial ploy to make the child even more appealing and attractive” *Id.* Because the use of inanimate comfort objects was an issue of first impression, the Intermediate Court of Appeals stretched its “compelling necessity” standard for accommodating special measures to include inanimate objects such as the teddy bear. *Id.* at 7. Though the Intermediate Court found that the trial court erred for allowing the child to “testify while holding a teddy bear,” because the prosecutor never proved there was a compelling need for such accommodation, the Intermediate Court affirmed the conviction because the court found that the “jury’s verdict was [not] swayed by the brief presence of the stuffed animal.” *Id.* at 10–11.

49. *See Dye II*, 309 P.3d at 1198 (articulating standard that requires record to show witness would have difficulty testifying without comfort item). The last standard the Washington Supreme Court examined came from jurisdictions that never explicitly required the prosecution to show necessity “but nevertheless relied on a record that clearly indicated that the witness would have difficulty testifying in the absence of the comfort item or support person.” *Id.*

In one such case, a child-victim carried a doll with her to the witness stand. *See State v. Cliff*, 782 P.2d 44, 46 (Idaho Ct. App. 1989). The trial judge called a hearing, and the prosecution presented evidence that the child needed the doll. *See id.* “The court-appointed guardian ad litem for the child testified that during the preliminary hearing the victim started to have dry heaves while on the stand” *Id.* The victim wrung her hands and chewed on her nails when she got upset, so the guardian believed “that being able to hold the doll would give the child something to do with her hands.” *Id.* The trial court “concluded that the benefit of having coherent testimony from the witness outweighed any possible prejudice to the defendant,” and the Court of Appeals of Idaho subsequently deferred to the trial court’s decision to permit the child’s use of a teddy bear. *See id.* at 47.

Oregon is another jurisdiction following this third standard. *See State v. Dompier*, 764 P.2d 979 (Or. Ct. App. 1988). The Court of Appeals of Oregon did not explicitly require the prosecution to show necessity, but relied, instead, on the circumstances to determine if special accommodation was needed. *See id.* During trial, the child-victim could only answer a few basic questions while she was on the stand before she started to cry and became unresponsive. *See id.* at 980. The trial court ordered a recess and asked the child to take the stand alone again once the court reconvened. *See id.* After the child became upset and was unable to answer

The Washington Supreme Court declined to follow any of these three standards, opting instead to establish its own standard in *Dye II*.⁵⁰ In breaking from the traditional approach, the court cited *State v. Foster*,⁵¹ where the Supreme Court of Washington adopted both the reasoning and

questions the second time, “the prosecutor indicated that [the child] had a physical fear of her father which made testi[fying] difficult for her . . . [and] renewed his suggestion that the child be allowed to sit with her foster mother” on the stand. *Id.* The trial court permitted the seven-year-old girl to sit on her mother’s lap while she testified. *See id.* To minimize the potential biased image, the judge “gave the jury the standard instruction not to allow bias, sympathy or prejudice any place in their deliberations.” *Id.* The Court of Appeals of Oregon affirmed the defendant’s conviction and did not assess the required necessity of a special accommodation; instead, the court deferred to the trial court’s “discretion to control the examination of witnesses.” *Id.*

50. *See Dye II*, 309 P.3d at 1199 (finding “confrontation clause analysis” and “fair-trial analysis” from Washington case law suggest different legal standard for assessing permissibility of special accommodations for testifying witnesses).

51. 957 P.2d 712 (Wash. 1998) (en banc). In *Foster*, the defendant was convicted of molesting a six-year-old girl after the girl testified via one-way closed-circuit television. *See id.* at 714–17. In order to assess whether the child was competent to testify, the trial court held two competency hearings. *See id.* at 714. During the first hearing, the child had trouble answering questions satisfactorily because when she was asked “whether she would tell the truth about what happened,” she only responded with “I might’ and ‘I don’t know.’” *Id.* at 714–15. Consequentially, the trial court determined the child was not competent. *See id.* at 715. At the second hearing, the child was permitted to testify by one-way closed-circuit television. *See id.* Because she could not see the defendant, she was much more responsive and asserted that she was able to tell the truth. *See id.* at 715–16. Following the second hearing, the trial court determined that the child was competent to testify and permitted her to testify via closed-circuit television because she would “suffer serious emotional or mental distress that would prevent her from reasonably communicating at trial” if she were forced to testify in the defendant’s presence. *Id.* at 716.

The defendant subsequently appealed his conviction, objecting to the constitutionality of the closed-circuit statute. *See id.* at 717. To determine whether the statute permitting testimony via closed-circuit television was constitutional, the Washington Supreme Court assessed what guarantees were provided to the defendant under Washington’s Constitution. *See id.* at 719. As part of its analysis, the Washington Supreme Court examined case law and the relevant United States Supreme Court decision. *See id.* at 719–24 (citing *Maryland v. Craig*, 497 U.S. 836 (1990)) (explaining *Craig* Court’s confrontation clause analysis and comparing protection afforded defendants under Washington’s Constitution with that offered under federal Constitution). The Washington Supreme Court found, similar to the *Craig* Court, that “the right to confront accusing witnesses face to face under the Washington constitution has not been interpreted to be absolute,” particularly for “cases involving young children alleged to have been the victims of sexual abuse.” *Id.* at 725. The Washington Supreme Court consequently held that Washington’s statute permitting, under specific circumstances, a child to testify via one-way closed-circuit television did not “violate [the] defendant’s right to confront the witnesses against him or her” *Id.* at 727. Based on the child’s reaction and statements during the first hearing, the Washington Supreme Court held there was sufficient evidence showing that the “child would be traumatized, not by the courtroom generally, but by the presence of the defendant,” meaning the trial court properly permitted the child to utilize the closed-circuit statute. *Id.* at 721. The Washington Supreme Court affirmed the defendant’s conviction. *See id.* at 729.

rule from the United States Supreme Court's decision in *Maryland v. Craig*.⁵² The rule from *Foster* required "the trial court [to] hear evidence and 'find that the child witness would be traumatized, not by the court-

52. 497 U.S. 836, 840, 849 (1990). The issue presented to the United States Supreme Court in *Maryland v. Craig* was "whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television." *Id.* at 840. This issue arose when the Maryland trial court permitted a six-year-old girl, who was the victim of several sexual offenses, as well as several other child witnesses, to testify via one-way closed-circuit television because there was sufficient evidence that they would suffer "serious emotional distress" such that each of these children would be "unable to 'reasonably communicate'" if required to testify in front of the defendant. *Id.* at 841.

The majority found that the Confrontation Clause has never guaranteed "criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Id.* at 844. However, it listed three other guarantees under the Confrontation Clause, apart from a "personal examination," specifically: a guarantee that the witness will testify under oath, the defendant will be able to cross-examine the witness, and the jury retains the ability to "observe the demeanor of the witness," while the witness is testifying. *Id.* at 845-46. In total, the majority found these four elements serve "the purposes of the Confrontation Clause" because they ensure "that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing . . ." *Id.* at 846. "Thus, in certain narrow circumstances, 'competing interests, if closely examined, may warrant dispensing with confrontation at trial.'" *Id.* at 848 (quoting *Ohio v. Roberts*, 448 U.S. 56, 64 (1980)). Recognizing that "the Confrontation Clause reflects [only] a *preference* for face-to-face confrontation at trial," the majority explained that this preference "must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849 (quoting *Roberts*, 448 U.S. at 63; *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

The majority recognized that states had a compelling interest in protecting "minor victims of sex crimes from further trauma and embarrassment" and in assuring "the physical and psychological well-being" of child abuse victims. *Id.* at 852-53 (quoting *Globe Newspapers Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982)). However, the Court did hold that each case is fact-specific: "[s]o long as a trial court makes [] a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case." *Id.* at 860. *But see Crawford v. Washington*, 541 U.S. 36, 53-54, 69 (2004) (finding "the Framers [of the Constitution] would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination;" and subsequently holding out-of-court tape-recorded testimonial statements against defendant violated Sixth Amendment Confrontation Clause because witness was available to testify and defendant did not have opportunity to cross-examine witness).

However, according to the National District Attorney's Association, "the Confrontation issue addressed in *Craig* is distinct from the issue addressed in *Crawford v. Washington*, and survives the *Crawford* analysis." NAT'L DIST. ATTORNEYS ASS'N, CLOSED-CIRCUIT TELEVISION STATUTES 1 (Aug. 2012), available at [http://www.ndaa.org/pdf/CCTV%20\(2012\).pdf](http://www.ndaa.org/pdf/CCTV%20(2012).pdf) (citation omitted); see also *Commonwealth v. Williams*, 84 A.3d 680, 696 & n.1 (Pa. 2014) (Saylor, J., dissenting) (acknowledging existing debate over *Crawford*'s impact on *Craig*, but opining "the Supreme Court ultimately will not overrule *Craig*," however, recognizing "that *Craig*-based decisions to override constitutionally favored face-to-face confrontation are important, high-stakes determinations").

room generally, but by the presence of the defendant.’”⁵³ Using *Craig* as support, combined with Washington’s “confrontation clause” and “fair-trial” analyses, the Washington Supreme Court concluded that the other standards were inadequate because the onus should be on the prosecution to prove the need for a special accommodation, but neither *Craig* nor Washington case law suggested a “compelling need” requirement.⁵⁴ Consequently, the court developed a new legal standard: “it is not the defendant’s burden to prove that he or she has been prejudiced, but the prosecution’s burden to prove that a special dispensation for a vulnerable witness is necessary. . . . However, we do not require a showing of ‘substantial need’ or ‘compelling necessity’. . . .”⁵⁵

Under this new legal standard, the Washington Supreme Court held that the trial court did not abuse its discretion and acted under the appropriate legal standard.⁵⁶ Because the trial court found “Ellie’s presence would be helpful in reducing [Douglas’s] anxiety and eliciting his testimony,” and because the trial court limited any potential bias the dog could cause through appropriate jury instructions, the Washington Supreme Court found the defendant’s rights were not violated and that the trial court had proper authority to grant this special accommodation.⁵⁷

C. *The Mutts: New York and California’s Approaches Permitting Courthouse Dogs*

While the Supreme Court of Washington relied primarily on precedent to decide both the permissibility of courthouse dogs and the related legal standard, other courts have cited specific statutes addressing accommodations for child witnesses.⁵⁸ In *People v. Tohom*,⁵⁹ the New York Supreme Court relied on both state law and case precedent to permit the use

53. *Dye II*, 309 P.3d at 1198–99 (quoting *Craig*, 497 U.S. at 856) (agreeing explicitly with *Foster* court’s “reasoning in full”).

54. *See id.* at 1199 (citing *State v. Finch*, 975 P.2d 967 (Wash. 1999); *Foster*, 957 P.2d at 712).

55. *Id.* (articulating new standard).

56. *See id.* at 1200 (finding *Dye* “failed to establish that his fair trial rights were violated,” and trial court was within its power to permit courthouse dog to accompany Douglas because “[b]oth the general trend of courts to allow special procedural accommodations for child witnesses and the deference built into the abuse of discretion standard require [the state’s Supreme Court] to respect the trial court’s decision in how to structure its own proceedings”).

57. *See id.* (affirming trial court ruling). The Supreme Court of Washington did caution, however, that “a facility dog may incur undue sympathy,” so the trial court must, as it did in this case, balance “the benefits and the prejudice involved” *Id.* at 1200–01.

58. *See, e.g., People v. Chenault*, 175 Cal. Rptr. 3d 1 (Ct. App. 2014) (finding statutory evidence to confirm use of dogs in courtroom); *People v. Tohom*, 969 N.Y.S.2d 123 (App. Div. 2013) (citing statutory guidelines permitting accommodations for child witnesses).

59. 969 N.Y.S.2d 123 (App. Div. 2013).

of a courthouse dog.⁶⁰ New York Executive Law section 642-a “‘directs the Judge presiding . . . to be sensitive to the psychological and emotional stress a child witness may undergo when testifying.’”⁶¹ Consequently, the New York Supreme Court’s Appellate Division found that live animals, not just inanimate comfort items, fell under this statute’s purview.⁶²

Though *Tohom* was decided before *Dye II*, the New York court, like the Washington Supreme Court, required the prosecution to prove a need for the accommodation.⁶³ Similar to the *Dye II* court, the New York court rejected the compelling need standard but found that the prosecutor must show “that such animal can ameliorate the psychological and emo-

60. See *id.* at 131–32 (analyzing N.Y. EXEC. LAW § 642-a(4)) (citing *People v. Gutkaiss*, 614 N.Y.S.2d 599 (App. Div. 1994) (holding Executive Law § 642-a(4) permits “a child witness to hold a ‘comfort item’”). In *Tohom*, the defendant was convicted of “predatory sexual assault against a child and endangering the welfare of a child” based on evidence he “engaged in multiple acts of sexual misconduct . . . with his daughter . . . who was under the age of 18 years.” *Id.* at 128. The defendant impregnated her twice and had her abort the child both times. See *id.* The prosecution motioned to allow Rose, a therapy assistance animal, to accompany the minor, then fifteen-years-old, on the witness stand. See *id.* at 126. According to a licensed social worker, who testified to the child’s fragile emotional state, the minor was experiencing post-traumatic stress disorder from the sexual abuse. See *id.* The social worker noted that when Rose was with the child “during at least three 30–45 minute therapy sessions ‘[The child was] a lot more verbal’” *Id.*

The trial court found that having the dog sit by the child during her testimony would be less prejudicial than having a support person because “‘there’s a far greater chance that a person can be deemed to be influencing the child’s testimony than the dog, who can’t speak, who can’t speak to the child, [and] the child can’t speak back to the dog.’” *Id.* at 127 (alteration in original) (quoting trial court). Applying the relevant New York statute, the trial court granted the prosecution’s motion “to permit Rose to accompany [the child]” during her testimony. *Id.* (citing N.Y. EXEC. LAW § 642-a (McKinney 2012)). After the trial judge provided jury instructions to minimize the potential prejudice, the jury convicted the defendant. See *id.* at 128.

The defendant appealed his conviction, arguing that the New York statute does not permit a courthouse dog to accompany a child witness to the stand and that the dog’s presence “impaired his right to confront witnesses against him.” *Id.* at 129. After analyzing the purpose of the relevant law, and other jurisdictions’ case law regarding the use of dogs in the courtroom, the appellate court upheld the defendant’s conviction, finding that the trial court properly balanced the child’s needs with the defendant’s rights and that Rose did not interfere with the proceeding or appear to prejudice the defendant in front of the jury. See *id.* at 131–38.

61. *Id.* at 132 (quoting *Gutkaiss*, 614 N.Y.S.2d at 631).

62. See *id.* (finding “no rational reason why, as per the broad dictate of Executive Law § 642-a(4), a court’s exercise of sensitivity should not be extended to allow the use of a comfort dog”).

63. See *id.* (stating court can exercise sensitivity towards child and permit comfort dog to accompany child “where it has *been shown* that such animal can ameliorate the psychological and emotional stress of the testifying child witness” (emphasis added)). Here, the appellate court found that the social worker’s testimony “provided ample evidence that Rose’s presence alleviated [the child’s] anxiety and allowed her to more easily discuss the conduct which was perpetrated against her” *Id.* at 133.

tional stress of the testifying child witness.”⁶⁴ Even then, the trial court must balance “‘the right of the accused to a fair trial and the need to mitigate the intimidating environment for some child witnesses.’”⁶⁵

In *People v. Chenault*,⁶⁶ the California Court of Appeal relied on California Evidence Code section 765 to allow child witnesses to have a “therapy or support dog” by their side while they testify.⁶⁷ The Court of Appeal found that the statute granted courts discretion to “control the [courtroom] proceedings,” specifically in regards to accommodating child witnesses.⁶⁸ The court stated that, as part of the determination process, it must balance “the defendant’s constitutional rights to a fair trial and to

64. *Id.* (“Executive Law § 642-a(4) does not set forth any ‘necessity’ criterion for a court to adopt measures intended to address the stress which a child witness may experience on the witness stand.”).

65. *Id.* (quoting *State v. Brick*, 163 Wash. App. 1029, n.5 (Ct. App. 2011)) (concluding trial court properly balanced child’s need for Rose with potential prejudice that might arise against defendant).

66. 175 Cal. Rptr. 3d 1 (Ct. App. 2014).

67. *See id.* at 9 (citing Evidence Code section 765 as legal support for permitting use of support dog). A jury convicted Chenault “on 13 counts of lewd acts on a child under 14 years of age and two counts of forcible lewd acts on a child under 14 years of age.” *Id.* at 3 (footnote omitted) (citations omitted). He then appealed his conviction, contending that “the trial court abused its discretion by allowing a support dog to be present during the testimony of two child witnesses without individualized showings of necessity” and that the dog’s presence violated his right to confront the witnesses. *Id.* at 3–4 (footnote omitted).

The California Court of Appeal held that “a trial court has authority under Evidence Code section 765 to allow the presence of a therapy or support dog during a witness’s testimony,” and a trial court did not need to find individualized necessity in order to retain the services of a support dog. *Id.* at 9. In addition, the appellate court rejected the defendant’s argument that California should adopt the legal standard the Washington Supreme Court created in *Dye II* and also declined to accept “the standard that requires the prosecution to show a ‘need’ or ‘necessity’ for the presence of the support dog.” *Id.* at 11 & n.8. Instead, the Court of Appeal followed the third category of legal standards, which allowed the trial court to determine, based on the circumstances, whether permitting the dog to accompany the child witness “would assist or enable that witness to testify without undue harassment or embarrassment and provide complete and truthful testimony.” *Id.* at 11. Because the trial court made implicit findings that the dog, Asta, “would assist or enable [the child witnesses] to testify completely and truthfully without undue harassment or embarrassment,” the Court of Appeal upheld the defendant’s conviction and found that the trial court did not abuse its discretion. *Id.* at 14, 17.

68. *Id.* at 9. (“A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice.”). Evidence Code section 765 reads, in pertinent part:

(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.

CAL. EVID. CODE § 765 (West 2014).

confront witnesses” with the likelihood that the dog’s presence will “enable the individual witness to give complete and truthful testimony”⁶⁹ With this consideration in mind, the Court of Appeal chose to follow the standard that permitted the court to assess, based on both the circumstances of the case and observation of the child witness, whether the dog’s presence will ease the child’s emotional distress associated with testifying.⁷⁰ Consequently, the court upheld the defendant’s conviction for two reasons: first, the “trial court made implicit findings that the presence of [] the support dog[] would assist [the child witnesses] to testify completely and truthfully;” and second, the trial court properly weighed the benefits the dog gave the children against the potential that the dog would prejudice the defendant and affect his right to a fair trial.⁷¹

As both the New York and California courts have demonstrated, statutory law is just as important as precedential case law when determining whether special accommodations should be permitted.⁷² Therefore, to bolster support for courthouse dogs in Pennsylvania, a comparison between Pennsylvania’s child victims and witnesses statutes and the statutory provisions relied upon in the above Washington, California, and New York cases is instructive.⁷³

III. STATUTES, SOME COURTS’ BEST FRIENDS

As demonstrated above, statutes have been integral to granting trial courts discretion to permit the use of courthouse dogs.⁷⁴ Compared to

69. *Chenault*, 175 Cal. Rptr. 3d at 12 (noting that if prejudice against defendant “cannot be eliminated, or at least reduced to a level that does not infringe on the defendant’s constitutional rights . . . the court generally should . . . deny[] the request for the presence of a support dog”).

70. *See id.* at 11, 15 (rejecting both compelling need and Washington Supreme Court’s legal standards and permitting court to decide whether dog’s presence will help child’s testimony).

71. *Id.* at 14 (holding defendant did not prove trial court abused its discretion under Evidence Code section 765).

72. *See, e.g., id.* at 9 (holding presence of support dog did not prejudice defendant after finding trial court had “authority under Evidence Code section 765 to allow the presence of a therapy or support dog during a witness’s testimony”); *People v. Tohom*, 969 N.Y.S.2d 123, 133, 138 (App. Div. 2013) (affirming defendant’s conviction after finding Executive Law section 642-a permits child witnesses to use comfort dogs during trial).

73. For a comparison between Pennsylvania’s child victims and witnesses statutes and the statutory provisions used in the Washington, California, and New York cases described in Part II, see *infra* notes 74–112 and accompanying text.

74. *See, e.g., Chenault*, 175 Cal. Rptr. 3d at 9 (citing Evidence Code section 765); *People v. Spence*, 151 Cal. Rptr. 3d. 374, 402 (Ct. App. 2012) (citing Evidence Code section 765 and California Penal Code section 868.5 to uphold defendant’s conviction and trial court’s discretion to permit courthouse dog to accompany child witness on stand); *Tohom*, 969 N.Y.S.2d at 132 (citing Executive Law section 642-a); *cf. Dye II*, 309 P.3d 1192, 1199 (Wash. 2013) (citing primarily case law, but granting court discretion under Evidence Rule 611). *But cf. State v. Devon D.*, 90 A.3d 383, 398–99, 401–02 (Conn. App. Ct. 2014) (reversing defendant’s conviction and holding trial court abused its discretion by allowing court-

other states that have addressed the issue of courthouse dogs, Pennsylvania has scant statutory support for the use of special accommodations such as comfort items and support persons during testimony.⁷⁵ However, some of Pennsylvania's current laws are similar to laws in other states that support the use of courthouse dogs as a viable accommodation for child witnesses.⁷⁶

In *Dye II*, the Washington Supreme Court relied on Rule 611 of Washington's Rules of Evidence as the sole statutory support for permitting a mentally disabled victim to testify with a courthouse dog present.⁷⁷ Pennsylvania has an almost identical rule that provides the same authority to courts: Pennsylvania Rule of Evidence 611.⁷⁸ In order to protect witnesses from harassment and emotional distress while testifying, and to ensure that the truth is elicited, both states' rules give courts broad discretion to manage the examination process.⁷⁹ Thus, because both Washington and Pennsylvania's rules of evidence are designed to protect those who testify, and because the Washington Supreme Court permitted the trial court (under Rule of Evidence 611) to allow a dog to accompany a witness at the stand, Pennsylvania courts should likewise be permitted to use courthouse dogs when needed.⁸⁰

house dog to accompany child on witness stand after finding trial court had general discretionary authority to control courtroom proceedings based on case law and not under Connecticut's General Statutes section 54-86g).

75. See *supra* note 14 (demonstrating dearth of statutory support in Pennsylvania for special accommodations).

76. For a discussion of Pennsylvania statutes and rules that are similar to laws in other states that support the use of courthouse dogs, see *infra* notes 77–112 and accompanying text.

77. See *Dye II*, 309 P.3d at 1196 (finding trial court has broad discretion to determine appropriate “mode and order of interrogating witnesses and presenting evidence” (quoting WASH. R. EVID. 611(a))). Washington Rule of Evidence 611(a) states the following:

Control by Court. 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 the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

WASH. R. EVID. 611(a).

78. Pennsylvania's Rule of Evidence 611(a) states the following:

Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

PA. R. EVID. 611(a).

79. See *id.*; see also WASH. R. EVID. 611.

80. See *Dye II*, 309 P.3d at 1201 (holding trial court did not abuse its discretion by permitting dog to accompany witness as part of protecting witness); *c.f.* Commonwealth v. Conde, 822 A.2d 45, 48–50 (Pa. Super. Ct. 2003) (affirming trial court's decision to remove spectators for “making faces and inappropriate gestures at the witnesses and jurors” because trial court has discretion to control its court-

Similarly, in *Tohom*, the Appellate Division of the New York Supreme Court held that Executive Law section 642-a gave the trial court discretion over its proceedings, specifically to accommodate child victims and child witnesses.⁸¹ Executive Law section 642-a directs “the Judge presiding at a trial . . . to be sensitive to the psychological and emotional stress a child witness may undergo when testifying.”⁸² Moreover, the statute’s “clear mandate . . . is to render the judicial process less threatening to child victims who necessarily become engaged in that process.”⁸³ Although the statute does not directly address comfort items or dogs, the court found “precedent for interpreting Executive Law [section] 642-a(4) to permit a child witness to hold a ‘comfort item,’ such as a teddy bear, while testifying in order to alleviate the child’s psychological and emotional stress.”⁸⁴ In addition, the court found “no rational reason” for excluding courthouse dogs under this section, as long as “it has been shown that such animal can ameliorate the psychological and emotional stress of the testifying child witness.”⁸⁵

Although no Pennsylvania statute directly addresses the use of dogs in the courtroom, there are provisions in some Pennsylvania laws that are nearly identical to several subsections of New York Executive Law section 642-a.⁸⁶ For example, Executive Law sections 642-a(5)–(7) describe specific ways the court can relieve a child’s anxiety and trauma while the child testifies in court.⁸⁷ In particular, New York courts can permit child wit-

room to maintain “dignity, order and decorum”); *Commonwealth v. Pankraz*, 554 A.2d 974, 980 (Pa. Super. Ct. 1989) (holding trial court did not abuse its discretion by permitting child to sit on grandmother’s lap while child testified).

81. *See* *People v. Tohom*, 969 N.Y.S.2d 123, 132–33 (App. Div. 2013) (determining that language of Executive Law section 642-a(4) “is so general that it can only be interpreted as authorizing a trial judge to utilize his or her discretion in fashioning an appropriate measure to address a testifying child witness’s emotional or psychological stress, based upon the particular needs of that child”).

82. *See id.* at 132 (quoting *People v. Gutkaiss*, 614 N.Y.S.2d 599, 631 (App. Div. 1994)) (finding, pursuant to Executive Law section 642-a(4), trial court appropriately permitted child victim to hold teddy bear while testifying).

83. *Id.* (determining Executive Law section 642-a(4) is “catch-all” provision, suggesting court is not limited to providing only accommodations listed in that section).

84. *Id.* at 131 (holding trial court did not abuse its discretion by allowing child victim to hold teddy bear while testifying).

85. *Id.* at 132 (declaring such broad reading of Executive Law section 642-a(4) “does not usurp the province of the Legislature”).

86. *Compare* N.Y. EXEC. LAW § 642-a(5), (7) (McKinney 2013) (addressing use of closed-circuit television and anatomically correct dolls, respectively), *with* 42 PA. CONS. STAT. ANN. §§ 5985, 5987 (2014) (describing same accommodations, respectively).

87. *See* N.Y. EXEC. LAW § 642-a(5)–(7) (permitting child witness “to testify via live, two-way closed-circuit television;” to have a “person supportive of the ‘child witness’ . . . present and accessible to a child witness at all times;” and “to use anatomically correct dolls and drawings”).

nesses to testify through closed-circuit television, to be accompanied by a support person, and to use anatomically correct dolls or drawings.⁸⁸

Pennsylvania has enacted statutes that similarly seek to reduce a child witness's emotional distress.⁸⁹ Just like New York Executive Law sections 642-a(5), (7)—which permit closed-circuit television testimony and anatomically correct dolls, respectively—Pennsylvania Consolidated Statutes sections 5985 and 5987 provide for the same accommodations.⁹⁰ In fact, with regard to section 5987—which permits child witnesses to use anatomically correct dolls—the Pennsylvania law is phrased in a way that benefits the witness more significantly than New York's section 642-a(7).⁹¹ Pennsylvania's section 5987 dictates that “the court *shall* permit the use of” the doll, whereas New York's law leaves use of the doll to “the *discretion* of the court.”⁹²

As both New York and Pennsylvania's statutes illustrate, courts are expected to make accommodations for testifying child witnesses—assuming such assistance is necessary.⁹³ Moreover, Pennsylvania courts should permit an expansive reading of these sections because the policy articulated in section 5981 does not have any limiting language—just like the relevant statute in *Tohom*.⁹⁴ Consequently, in light of the Pennsylvania courts' broad discretion to control courtroom procedure and the similarity between New York and Pennsylvania's legislation involving child witnesses,

88. See *Tohom*, 969 N.Y.S.2d at 132 (describing “specific ways” statute accomplishes its purpose of assisting child witnesses while testifying).

89. See, e.g., 42 PA. CONS. STAT. ANN. §§ 5985, 5987 (permitting child witness who is experiencing serious emotional distress to testify outside of courtroom and to use anatomically correct dolls to help explain child's injury).

90. For a comparison between N.Y. EXEC. LAW § 642-a and PA. CONS. STAT. ANN. §§ 5985, 5987, see *supra* note 86.

91. For a comparison of the statutes' text, see *infra* note 92 and accompanying text.

92. See 42 PA. CONS. STAT. ANN. § 5987 (emphasis added); N.Y. EXEC. LAW. § 642-a(7) (emphasis added).

93. See, e.g., 42 PA. CONS. STAT. ANN. § 5985(a.1) (“Before the court orders the child victim . . . to testify by a contemporaneous alternative method, the court must determine . . . that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant's presence will result in the child victim . . . suffering serious emotional distress that would substantially impair the child victim's . . . ability to reasonably communicate.”); *Tohom*, 969 N.Y.S.2d at 133 (rejecting requirement to find “compelling-need” but also holding that trial courts must balance rights of defendant and needs of child witness in order to elicit truthful and coherent testimony).

94. See *Tohom*, 969 N.Y.S.2d at 132 (concluding that specific measures listed in Executive Law section 642-a were not intended to be “sole means by which the court could accommodate a child witness”). Pennsylvania's section 5981 reads:

In order to promote the best interests of the residents of this Commonwealth who are under 18 years of age, especially those who are material witnesses to or victims of crimes, the General Assembly declares its intent, in this subchapter, to provide, where necessity is shown, procedures which will protect them during their involvement with the criminal justice system.

42 PA. CONS. STAT. ANN. § 5981.

courts in Pennsylvania can make the logical step to include courthouse dogs as another accommodation for child witnesses and victims while they testify in court.⁹⁵

Finally, in *Chenault*, California's Court of Appeal cited Evidence Code section 765 to support a trial court's authority "to allow the presence of a therapy or support dog during a witness's testimony."⁹⁶ Similar to New York's statute, the language of section 765 explicitly requires courts to "take special care to protect [the child witness] from undue harassment or embarrassment"⁹⁷ The *Chenault* court, like the New York court in *Tohom*, required evidence to show the courthouse dog would be useful to the children.⁹⁸

In addition to section 765, to further accommodate the witness, California Penal Code section 868.5 states that a prosecuting witness, including a child, "shall be entitled, for support," to two people of the witness's choice, one of which "may accompany the witness to the witness stand."⁹⁹ The *Chenault* court reaffirmed the court's decision in *People v. Spence*,¹⁰⁰ holding that section 868.5 did not apply to courthouse dogs—meaning a dog could accompany a child on the stand, along with a support person.¹⁰¹ Although the statute itself was not applicable to dogs, the court applied the statute's policy of permitting support persons to accommodate

95. For a discussion on Pennsylvania courts' broad discretion regarding courtroom procedure, see *supra* notes 77–80 and accompanying text. For a discussion of the similarities between Pennsylvania and New York's statutes relating to child witness accommodations, see *supra* notes 81–94 and accompanying text.

96. See *People v. Chenault*, 175 Cal. Rptr. 3d 1, 9 (Ct. App. 2014) (citing *People v. Spence*, 151 Cal. Rptr. 3d 374, 404 (Ct. App. 2012)).

97. See CAL. EVID. CODE § 765 (West 2014).

98. See *Chenault*, 175 Cal. Rptr. 3d at 14 (upholding trial court's implicit finding that courthouse dog "would assist or enable [the child witnesses] to testify completely and truthfully").

99. CAL. PENAL CODE § 868.5(a) (West 2014). Regarding a witness of a crime involving a sexual offense, section 868.5(a) states the following:

[They] shall be entitled, for support, to the attendance of up to two persons of his or her own choosing, one of whom may be a witness, at the preliminary hearing and at the trial, or at a juvenile court proceeding, during the testimony of the prosecuting witness. Only one of those support persons may accompany the witness to the witness stand, although the other may remain in the courtroom during the witness' testimony.

Id.

100. 151 Cal. Rptr. 3d 374, 406 (Ct. App. 2012) (affirming defendant's conviction after finding defendant was not prejudiced by presence of therapy dog accompanying child on witness stand).

101. See *Chenault*, 175 Cal. Rptr. 3d at 9 (citing *Spence*, 151 Cal. Rptr. 3d at 404–05); see also *Spence*, 151 Cal. Rptr. 3d at 404–05 (concluding that because "subdivision (b) of section 868.5 refers to the court's duty to give admonitions . . . that the advocate must not sway or influence the witness, we cannot imagine that the Legislature intended that a therapy dog be so admonished, nor could any dog be sworn as a witness in this context"). The *Spence* court also stated, "it is easy to conclude that therapy dogs are not 'persons' within the meaning of section 868.5, setting limitations on the number of 'persons' who may accompany a witness to the witness stand." *Id.* at 405.

child witnesses to courthouse dogs. The court ultimately held that the dog's presence was similar to the presence of a support person, and thus not "inherently prejudicial" to the defendant.¹⁰² Therefore, both California laws illustrate the extent to which courts can accommodate children on the witness stand.¹⁰³

Though not mentioned in *Chenault*, there are other California statutes that are directed at assisting child witnesses.¹⁰⁴ One example is California Penal Code section 1347.¹⁰⁵ This statute explicitly grants courts the "discretion to employ alternative court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process."¹⁰⁶ Just as the *Chenault* court required the trial court to weigh the benefits and prejudices of having a dog accompany the child witness to the stand, section 1347 similarly requires a balancing assessment to determine whether the use of closed-circuit television, an alternative court procedure, is appropriate during a child witness's testimony.¹⁰⁷

Pennsylvania's child victims and witnesses statutes are similar to the California statutes mentioned above, which further supports the admissibility of courthouse dogs in the Pennsylvania court system.¹⁰⁸ First, both states' statutes direct the courts to weigh the proposed accommodation's harms and benefits to both parties.¹⁰⁹ Additionally, statutes in both states provide the courts with broad discretion to accommodate children in the

102. See *Chenault*, 175 Cal. Rptr. 3d at 10 (comparing presence of support person with presence of dog and concluding courthouse dog is "not inherently prejudicial and does not, as a matter of law, violate a criminal defendant's federal constitutional rights to a fair trial and to confront witnesses against him or her").

103. See *Spence*, 151 Cal. Rptr. 3d at 405–06 (holding policies in Penal Code section 868.5, in conjunction with broad discretion granted under Evidence Code section 765, permitted trial court to allow courthouse dog to accompany child witness while testifying).

104. See, e.g., CAL. PENAL CODE § 1347 (permitting use of alternative court procedures for child witnesses and explaining specific findings court must make to allow such accommodations).

105. See *id.*

106. *Id.* (permitting court to use closed-circuit television and video recording for testifying child witness upon determining child's need for alternative procedures).

107. See *Chenault*, 175 Cal. Rptr. 3d at 12 (requiring court to determine whether prejudice to defendant can be eliminated when addressing issue of courthouse dog accommodation); see also CAL. PENAL CODE § 1347 ("[T]he court necessarily will be required to balance the rights of the defendant or defendants against the need to protect a child witness and to preserve the integrity of the court's truthfinding function.").

108. For an analysis of the similarities between Pennsylvania's child victims and witnesses statutes and California Penal Code sections 765, 868.5, and 1347, see *infra* notes 109–12 and accompanying text.

109. See 42 PA. CONS. STAT. ANN. § 5981 (2014) ("[T]he General Assembly declares its intent, in this subchapter, to provide, where necessity is shown, procedures which will protect them during their involvement with the criminal justice system."); see also CAL. PENAL CODE § 1347 (stating courts must balance parties' rights to determine whether to employ alternative courtroom procedure).

courtroom, such as by the use of alternative methods of testifying.¹¹⁰ However, unlike California, Pennsylvania does not have a statute that explicitly allows a support person to accompany a child on the witness stand, but precedent exists in Pennsylvania for this type of accommodation and there are statutes that let a support person accompany a child who testifies outside of the courtroom.¹¹¹ Therefore, because Pennsylvania—like California—grants its courts broad discretion to manage courtroom procedures, allows children to testify by using alternative methods, and permits support persons to accommodate child witnesses, allowing courthouse dogs would be a permissible accommodation for child witnesses when necessary.¹¹²

IV. FETCH ME SOME SUPPORT: ADDITIONAL EVIDENCE WHY COURTHOUSE DOGS SHOULD BE ALLOWED IN PENNSYLVANIA

Are the similarities between Pennsylvania law and the law in jurisdictions that allow courthouse dogs enough to get Pennsylvania courts to roll over?¹¹³ As mentioned previously, section 5981 of Pennsylvania's Consolidated Statutes describes the policy behind special accommodations and procedures for child victims and child witnesses.¹¹⁴ The General Assembly wants to protect these vulnerable individuals "during their involvement with the criminal justice system."¹¹⁵ However, section 5981 emphasizes that such protection should only be granted when "necessity is shown."¹¹⁶

110. See PA. R. EVID. 611(a) (granting court "reasonable control over the mode and order of examining witnesses and presenting evidence"); see also CAL. EVID. CODE § 765 ("The court shall exercise reasonable control over the mode of interrogation of a witness . . ."); CAL. PENAL CODE § 1347(b) ("[T]he court . . . may order that the testimony of a minor . . . be taken by contemporaneous examination and cross-examination in another place [other than the courtroom] by means of closed-circuit television" (emphasis added)); 42 PA. CONS. STAT. ANN. § 5985 ("[T]he court may order that the testimony of the child victim or child material witness be taken under oath . . . in a room other than the courtroom" (emphasis added)).

111. See *Commonwealth v. Pankraz*, 554 A.2d 974, 980 (Pa. Super. Ct. 1989) (holding trial court did not abuse its discretion by letting child sit on grandmother's lap while child testified); see also 42 PA. CONS. STAT. ANN. § 5985 ("[A]ny person whose presence would contribute to the welfare and well-being of the child victim or child material witness . . . may be present in the room with the child during his testimony."); *id.* § 5984.1 (same, but relating to recording child victim's or child material witness's testimony for presentation in court).

112. For evidence supporting the permissibility of courthouse dogs in Pennsylvania courtrooms, because of the similarities between Pennsylvania's laws and other states' laws that have allowed this accommodation, see *supra* notes 80, 89–95, 108–11 and accompanying text.

113. For further evidence supporting the permissibility of courthouse dogs in Pennsylvania courtrooms, see *infra* notes 114–26 and accompanying text.

114. See 42 PA. CONS. STAT. ANN. § 5981 (explaining policy behind sections 5985 and 5987).

115. *Id.* (describing purpose of Pennsylvania's child victims and witnesses statutes).

116. See *id.* (qualifying when accommodations are permissible).

Therefore, courts are required to balance the interests of both parties before allowing any divergent procedure or accommodation.¹¹⁷ However, the legislative history for sections 5981, 5985, and 5987, and their subsequent amendments, provide insight into the General Assembly's deep concern for child witnesses.¹¹⁸

Act 1986-14 amended title 42 of the Pennsylvania Consolidated Statutes to include Pennsylvania's child victims and witnesses statutes.¹¹⁹ During a session of the Pennsylvania House of Representatives in 1986, weeks before Act 1986-14 was passed, Representative David Sweet countered Representative Allen Kukovich's suggestion to narrow the qualifications of those who could be child advocates, which would have limited the type of individuals who could have made a motion for the child to testify via closed-circuit television and who could have accompanied the child during closed-circuit testimony.¹²⁰ Representative Sweet stated that "drawing a job description" for a qualified child advocate would "only allow[] a certain number of professionals to serve in this capacity," which would run counter to the statute's purpose of having someone there to serve "as the child's friend [and] advocate . . ."¹²¹ The House of Representatives

117. *See id.* Section 5981 also cautions "the news media to use significant restraint" when dealing with child witnesses and victims and "urges" that the media withhold publishing information about the child's name or address in order to better protect the child from the emotional distress associated with the justice system. *See id.*

118. For a discussion of the legislative history of sections 5981, 5985, and 5987, see *infra* notes 119–22 and accompanying text. For a discussion of amendments to these sections, see *infra* notes 123–25 and accompanying text.

119. *See* 1986 Pa. Laws 41–44.

120. *See* H.R. GEN. ASSEMB. LEGIS. J., 170-176, 8th Sess., at 138–41 (Pa. 1986). For a discussion of the details of this debate, see *infra* note 121 and accompanying text.

121. *See id.* at 140. Mr. Kukovich proffered an amendment to Senate Bill 176, which provided certain rights and accommodations for child victims and witnesses. He narrowed the type of people who could assist the child witnesses, primarily leaving the responsibility to qualified child advocates. The amendment inserted the following lines, specifying who may accompany a child witness, into the proposed act:

[P]ersons certified by the court as having commensurate experience and training in child advocacy and victim witness assistance or possessing education, experience and training in child and sexual abuse and a basic understanding of the criminal justice system. By virtue of their mandatory training program, sexual assault counselors shall have the preference of appointment in cases of rape or other sexual offenses.

Id. at 138. In addition, Kukovich explained to the General Assembly what the amendment was intended to address in the following statement:

What this amendment does is address the issue of the qualifications of the child advocate. The way the bill is now drafted, it is intentionally left a little ambiguous and open to try to reach out, I guess, to the broadest amount of people who might serve as child advocate. After my consultations with the Pennsylvania Coalition Against Rape, they had decided that they would like the definition more narrowly drawn. That is what [this amendment] does, to make the restrictions on who the trial judge would appoint as child advocate more narrow so those who are acting as child

agreed with Representative Sweet and rejected Representative Kukovich's proposed amendment to the bill.¹²²

The 2004 Amendment to the Act also illustrates the Legislature's desire to support child witnesses.¹²³ In 2004, when the most recent amendment to Pennsylvania's child victims and witnesses statutes was enacted, the legislature changed the term "closed-circuit" to "contemporaneous alternative method."¹²⁴ This change expands the potential accommodations available to traumatized children, demonstrating the Legislature's intent to further alleviate children's anxieties associated with testifying.¹²⁵ Thus, all these abovementioned pieces of legislative history further suggest that courthouse dogs could easily fit within this chapter of title 42 as an appropriate tool for prosecutors to use in order to assist child witnesses in testifying.¹²⁶

advocates would have more training experience and more consistency in who acts as child advocate.

Id. at 140. Despite Mr. Kukovich's defense of the amendment, there were still those who opposed it. *See id.*

Representative Michael Bortner spoke out against Mr. Kukovich's amendment. *See id.* Speaking in agreement with Representative Sweet, and others who opposed the amendment, Mr. Bortner made the following statement:

I think a court can best determine, under the circumstances of each case, who is going to be the most appropriate person to provide the counseling. If the counseling requires a better understanding of the legal proceedings and the legal nature of the case, maybe that is a lawyer. If it concerns the psychological aspects of the victim, maybe that should be a psychologist; perhaps it should be a sexual assault counselor, but I think in each case that ought to be determined based on the facts of that particular case, and the judge is going to be in the best position to determine that.

Id.

122. *See id.* (stating House rejected amendment by vote of 169–21).

123. *See* 42 PA. CONS. STAT. ANN. §§ 5981–87 (2014) (amending sections to further benefit child witnesses and victims).

124. *Id.* The legislative history demonstrates an effort to give judges more discretion as how best to accommodate a child witness.

125. *See* H.R. GEN. ASSEMB. LEGIS. J., 188, 50th Sess. (Pa. 2004). In a statement supporting the 2004 Amendment, Representative Blaum argued that, "[t]his legislation allows children in the most horrible of cases to testify outside of the courtroom setting via closed-circuit television, be it whatever system the judge may direct." *Id.* Senator Greenleaf spoke in front of the state senate about the bill as well, stating that "[he urged] an affirmative vote [on the amendment] so the Pennsylvania courts can finally provide child witnesses and victims who need it with an opportunity to testify free from fear and intimidation." S. GEN. ASSEMB. LEGIS. J., 188-979, 48th Sess. (Pa. 2004).

126. For a discussion of how courthouse dogs are much more beneficial to the legal system as compared to closed-circuit television, see *infra* notes 172–83 and accompanying text.

V. “COPY CAT?” NO, MORE LIKE “COPY DOG”: PENNSYLVANIA SHOULD BORROW THE WASHINGTON SUPREME COURT’S LEGAL STANDARD WHEN ASSESSING ACCOMMODATIONS FOR CHILD WITNESSES

The proper legal standard for Pennsylvania trial courts to follow to determine whether a courthouse dog may accompany a child witness to the stand should be the one the Washington Supreme Court created in *Dye II*: the prosecution should have the “burden [of proving] that a special dispensation for a vulnerable witness is necessary. . . . However . . . a showing of ‘substantial need’ or ‘compelling necessity’” should not be required.¹²⁷ Four factors support the use of this standard: Pennsylvania courts’ commitment to protecting defendants’ rights; Pennsylvania’s precedent involving accommodations for testifying child witnesses; amendments to Act 1986-14; and case law subsequent to the enactment of Act 1986-14.¹²⁸

A. *A Defendant’s Best Friend Is Still the Court: Pennsylvania’s Protection of Defendants’ Rights*

In Pennsylvania, both the Legislature and the courts have sought to protect defendants’ constitutional rights—especially their right to confront their accuser.¹²⁹ A year before Act 1986-14 was enacted, Senator James Kelley addressed the Pennsylvania Senate and said he had concerns that the Act contradicted article 1, section 9 of the Pennsylvania Constitution, because permitting a child witness to testify through videotaping (section 5984, later repealed) would prevent the defendant from meeting the witness face-to-face—a specific guarantee in section 9.¹³⁰ His concern

127. See *Dye II*, 309 P.3d 1192, 1199 (Wash. 2013) (stating legal standard used to determine whether courthouse dog may be permitted).

128. For a discussion on Pennsylvania courts’ commitment to protecting defendants’ rights, see *infra* notes 129–41 and accompanying text. For a discussion of Pennsylvania’s precedent involving accommodations for testifying child witnesses, see *infra* notes 142–53 and accompanying text. For an examination of the amendments to Act 1986-14, see *infra* notes 154–62 and accompanying text. And for a discussion of the case law subsequent to the enactment of Act 1986-14, see *infra* notes 163–70 and accompanying text.

129. See, e.g., *Bergdoll v. Commonwealth*, 858 A.2d 185, 195 (Pa. Commw. Ct. 2004) (upholding constitutionality of amendment to Pennsylvania Constitution and recognizing that defendants’ rights are still sufficiently protected), *aff’d*, 874 A.2d 1148 (Pa. 2005).

130. See S. GEN. ASSEMB. LEGIS. J., 9-176, 169th Sess. (Pa. 1985). On February 6, 1985, Senator Kelley addressed the state senate and expressed his concern that Act 1986-14 contradicted article I, section 9 of the Constitution of Pennsylvania. See *id.* at 136. Senator Kelley quoted the Commonwealth’s Constitution and expressed his concerns:

Mr. President, the concern I have about [the bill] is not the objective of the bill at all. I share and concur in the objective of the bill, but I am very concerned about the language and what this bill purports to do in our criminal process in relationship to the Constitution of this Commonwealth. [The Constitution of the Commonwealth] talks about the rights of an accused and specifically it says, ‘In all criminal prosecutions the

was not shared by a majority of the senate, however, and the bill was passed, over his lone dissenting vote.¹³¹

The courts have similarly been concerned with protecting a defendant's rights.¹³² Before the Pennsylvania Constitution was amended in 2004, article I, section 9 of the Commonwealth's Constitution stated, "In all criminal prosecutions the accused hath a right to . . . meet the witnesses face to face . . ." ¹³³ Because of this language, the Pennsylvania Supreme Court had struck down many of the laws permitting children to testify outside the physical presence of the accused for violating article 1, section 9's "face to face" clause—the exact claim Senator Kelley had made years earlier.¹³⁴

The 2004 Amendment replaced "meet the witnesses face to face" with "be confronted with the witnesses against him."¹³⁵ The Legislature's principal reason for proposing this amendment was that, unlike the Penn-

accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face. . . . I think what is purported in [the bill] is a direct contravention of that constitutional guarantee where we are permitting video taping of the witness, the child.

Id. (third alteration in original).

131. Senator Kelley's concerns did not dissuade the state senate, however, as it voted to pass that version of the Act by a vote of forty-seven to one, Senator Kelley being the lone "nay" vote. *Id.*

132. *See supra* note 129 (describing Pennsylvania case addressing protection of defendants' right to confront their accusers).

133. PA. CONST. art. 1, § 9 (amended 2003).

134. *See, e.g.,* Commonwealth v. Louden, 638 A.2d 953, 957 (Pa. 1994) (holding unconstitutional sections 5984 and 5985 of title 42 of Pennsylvania's Consolidated Statutes); Commonwealth v. Lohman, 594 A.2d 291, 292 (Pa. 1991) (holding that testifying via closed-circuit television is contrary to defendants' rights under confrontation clause because it deprives opportunity to confront witnesses); Commonwealth v. Ludwig, 594 A.2d 281, 284–85 (Pa. 1991) (holding that testifying via closed-circuit television is contrary to defendants' rights under confrontation clause because it deprives opportunity to confront witnesses).

135. *See* PA. CONST. art. 1, § 9. "Pennsylvania Amendment 1, also known as Amending the Right of Persons Accused of a Crime to Meet the Witness Against them Face to Face, was on the November 4, 2003 election ballot in Pennsylvania as a legislatively-referred constitutional amendment where it was approved." *Pennsylvania Amendment 1, Right of Criminal Defendants to Confront Witnesses (2003)*, BALLOTPEdia, [http://ballotpedia.org/Pennsylvania_Amendment_1_Right_of_Criminal_Defendants_to_Confront_Witnesses_\(2003\)](http://ballotpedia.org/Pennsylvania_Amendment_1_Right_of_Criminal_Defendants_to_Confront_Witnesses_(2003)) (last visited Feb. 11, 2015). This amendment passed with 68.2% of the popular vote and was subsequently enacted. *Id.*

In anticipation of the amendment, and desiring to protect children in the criminal justice system, the General Assembly passed Senate Bill 979, which was signed into law on July 31, 2004. *See* Gov.'s Message, 188th Gen. Assemb., 2004 Reg. Sess. (Pa. July 31, 2004). The amendment added to the declaration of policy, replaced the term "closed-circuit television" with "contemporaneous alternative method," and repealed "provisions relating to videotaped depositions by a child victim or child material witness" because they were struck down as unconstitutional in *Louden*. *See id.* The bill passed unanimously through both the state house and senate. *Id.*

sylvania Supreme Court, the United States Supreme Court had upheld “laws permitting children to testify in criminal proceedings outside the physical presence of the accused” via closed-circuit television.¹³⁶ Thus,

136. *Bergdoll v. Commonwealth*, 858 A.2d 185, 190 (Pa. Commw. Ct. 2004) (quoting PLAIN ENGLISH STATEMENT OF THE ATTORNEY GENERAL OF PENNSYLVANIA, BALLOT QUESTION 1 (2003)). Compare *Louden*, 638 A.2d at 957 (holding sections 5984 and 5985 of title 42 of Pennsylvania’s Consolidated Statutes are, “on their face[,] repugnant to our state constitution and therefore are invalid”), and *Lohman*, 594 A.2d at 292 (“[T]he confrontation clause of the Pennsylvania Constitution does not permit the use of closed-circuit television testimony by an alleged child abuse victim because it infringe[s] upon a defendant’s constitutional rights to meet a witness face-to-face.”), and *Ludwig*, 594 A.2d at 282 (“The use of closed circuit television to transmit the testimony of the witness in this case violates the constitutional protection given to the defendant under Article I, § 9 of the Pennsylvania Constitution.”), with *Maryland v. Craig*, 497 U.S. 836, 860 (1990) (holding Confrontation Clause does not prohibit use of one-way closed-circuit television procedure as long as “trial court makes [] a case-specific finding of necessity”).

In *Ludwig*, the defendant was convicted of rape, incest, endangering the welfare of children, and other sexual offenses against his five-year-old daughter. See *Ludwig*, 594 A.2d at 282. During the preliminary hearing, the child became “unresponsive to further questioning.” *Id.* After the State presented a psychologist to testify regarding the child’s fragile emotional and psychological state, the court granted the State’s petition to allow “the child to testify by way of closed circuit television” for both the second preliminary hearing and the actual trial. See *id.* The Supreme Court of Pennsylvania emphasized the fact that the Pennsylvania Constitution “guarantee[d] an accused the right to meet his accusers,” highlighting in the constitution that, “‘the accused hath a right . . . to meet the witnesses face to face . . .’” *Id.* (quoting PA. CONST. art. 1, § 9). The court further cited and agreed with Justice Scalia’s dissent in *Maryland v. Craig*, which argued against a child using closed-circuit television while testifying, and rejected the *Craig* majority’s “balancing analysis” to find such accommodation was permissible. See *id.* at 283. Finding the trial court erred in permitting the child to testify via closed-circuit television solely on the basis of “subjective fears,” the Supreme Court of Pennsylvania stated, “[w]e are cognizant of society’s interest in protecting victims of sexual abuse. However, that interest cannot be preeminent over the accused’s constitutional right to confront the witnesses against him face to face.” *Id.* at 285. Consequently, the court reversed the defendant’s conviction. See *id.*

In *Louden*, the Supreme Court of Pennsylvania “address[ed] the issue left unresolved in [its] recent decisions of” *Ludwig* and *Lohman*, “the constitutionality of 42 Pa.C.S. §§ 5984 or 5985(a) since both sections were adopted subsequent to the trials in *Ludwig* and *Lohman*.” *Louden*, 638 A.2d at 953–54. The defendants, who were owners of a daycare center, were convicted for “endangering the welfare of a child.” *Id.* at 955. Upon finding “good cause,” the trial court permitted the three child-victims to have their testimony videotaped outside the courtroom. See *id.* The defendants “were not present” in the room with the children but “could observe the child witness and the events from a closed circuit television.” *Id.* “The videotapes were then shown to the jury during the Commonwealth’s case in chief.” *Id.* Relying on the analysis and precedent established in *Ludwig*, the court held: “Because we find that §§ 5984 and 5985(a) fail to limit the use of video tape in closed circuit television to those instances in which the accused’s right to face to face confrontation has been otherwise satisfied, we must hold both provisions unconstitutional.” *Id.* at 954.

Finally, both *Lohman* and *Ludwig* address the same issue: “whether a child sex abuse victim, without appearing in the courtroom, may testify against a defendant via closed-circuit television without violating the confrontation clauses of the United States Constitution and the Pennsylvania Constitution.” *Lohman*, 594 A.2d

because the amended section 9 is identical to the Sixth Amendment of the United States Constitution, it should permit the Pennsylvania General Assembly to enact laws and allow the Pennsylvania Supreme Court to institute rules permitting alternative methods of testimony for children.¹³⁷

In *Bergdoll v. Commonwealth*,¹³⁸ the constitutionality of this amendment was contested.¹³⁹ The Commonwealth Court of Pennsylvania cited *Craig* in support of the amendment:

“[A]lthough face-to-face confrontation forms ‘the core of the values furthered by the Confrontation Clause,’ we nevertheless recognized that it is not the *sine qua non* of the confrontation right.” Hence, the removal of the ‘face to face’ language from our State Constitution per se does not result in an infringement of federally protected rights.¹⁴⁰

at 291. In *Lohman*, the defendant was charged with raping his fourteen-year-old stepdaughter, as well as committing other sexual offenses against his fourteen-year-old son. *Id.* In two separate trials, both the son and daughter testified via closed-circuit television while both the jury and defendant watched from other rooms. *Id.* at 291–92. As part of the accommodation, the defendant was in a separate room with a telephone line directly connected to his counsel. *Id.* The majority, based on its prior holding in *Ludwig*, reversed the defendant’s conviction and held that the testimony presented through closed-circuit television violated the defendant’s rights under the Pennsylvania Constitution’s Confrontation Clause. *See id.* at 292. Repeating its reasoning in *Ludwig*, the court recognized the state’s interest in protecting children involved with sexual abuse but found that it was not a compelling enough interest to permissibly abridge the defendant’s “‘right to confront the witnesses against him face to face.’” *Id.* (quoting *Ludwig*, 594 A.2d at 285).

137. *See Bergdoll*, 858 A.2d at 191 (removing face-to-face confrontation requirement in some circumstances). The General Assembly’s explanation for seeking to change the Confrontation Clause in the Pennsylvania Constitution was described in a supplement to the ballot. *See id.* at 190. Besides the Confrontation Clause question, there was a second ballot question asking voters if the Pennsylvania Constitution should be amended to enable the General Assembly to “‘enact laws regarding the manner by which children may testify in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television’” because only the Pennsylvania Supreme Court, under the state’s constitution, was authorized “‘to make rules governing practice and procedure in the Pennsylvania courts.’” *Id.* at 191–92 (quoting, respectively, BALLOT QUESTION 2 (Pa. 2003); PLAIN ENGLISH STATEMENT OF THE ATTORNEY GENERAL OF PENNSYLVANIA, BALLOT QUESTION 2 (Pa. 2003)). The second question similarly passed and was subsequently added to article V, section 10(c). *See id.* at 189–90. These two questions, and their approval, illustrate that the Pennsylvania Legislature and Pennsylvania’s citizens wanted to protect children involved in the legal system, especially those who experience sexual abuse and other emotionally unnerving incidents.

138. 858 A.2d 185 (Pa. Commw. Ct. 2004), *aff’d*, 874 A.2d 1148 (Pa. 2005) (per curiam).

139. *See id.* at 202 (upholding constitutionality of amendment to Constitution of Pennsylvania, stating “the removal of the ‘face to face’ language from our State Constitution per se does not result in an infringement of federally protected rights”).

140. *Id.* at 202 (quoting *Craig*, 497 U.S. at 847) (explaining that defendants’ rights are still protected after removal of face-to-face clause).

As the Pennsylvania Supreme Court's affirmation of the trial court's analysis illustrates, the amendment still provides defendants with the constitutional right to confront accusers, but it balances this right against the public policy of accommodating children in the judicial system.¹⁴¹

B. *New Dog Learning Old Tricks: Pennsylvania Precedent for Court Accommodations*

There are numerous Pennsylvania cases in which a child was permitted to testify out of court; however, there are very few Pennsylvania cases that have addressed a testifying child's use of comfort items or support persons while on the witness stand.¹⁴² One such case is *Commonwealth v. Pankraz*.¹⁴³ In *Pankraz*, the defendant was found guilty of corruption of a minor, endangering the welfare of a child, and other offenses, after he sexually abused his daughter repeatedly.¹⁴⁴ At the time of trial, the daughter was four-years-old and was permitted "to give testimony while sitting in the lap of" her grandmother.¹⁴⁵ Because this was an issue of first impression, the Superior Court of Pennsylvania examined case law from other jurisdictions to evaluate the permissibility of this action.¹⁴⁶

In terms of the standards articulated in *Dye II*, the Pennsylvania Superior Court followed the first type, namely, requiring the defendant to prove prejudice.¹⁴⁷ Similar to the cases that the *Dye II* court cited and categorized under the first legal standard, the Pennsylvania Superior Court found no prejudice in allowing the girl to sit on her grandmother's lap.¹⁴⁸ The *Pankraz* court neither discussed the prosecutor's evidence for

141. *See id.* (finding protection of children favors removal of face-to-face clause).

142. *See Commonwealth v. Pankraz*, 554 A.2d 974, 979 (Pa. Super. Ct. 1989) ("Moreover, while our research has disclosed no case law in this Commonwealth which passes upon the propriety of allowing a child witness to give testimony while sitting in the lap of an adult, the courts of other jurisdictions have said that in cases involving a child witness, 'an attendant may be permitted to sit upon the witness stand near the witness, where the attendant is admonished that he [or she] is not permitted to make suggestions to the witness.'" (alteration in original) (quoting LAURA DIETZ ET AL., 81 AM. JUR. 2D, Witnesses § 416)).

143. 554 A.2d 974 (Pa. Super. Ct. 1989) (permitting child to sit on grandmother's lap while testifying).

144. *See id.* at 975 (noting defendant was sentenced to two and a half to five years in prison for his crimes). The defendant was also found guilty of "simple assault, indecent assault . . . [and] recklessly endangering another person . . ." *Id.* (footnotes omitted).

145. *See id.* at 979 (upholding conviction because no evidence that grandmother influenced child's testimony).

146. *See id.* (examining case law from other jurisdictions, including Nebraska, Texas, Utah, and Indiana).

147. *See id.* at 980 n.6 ("[T]he record fails to disclose that [defendant] was prejudiced or that the witness' testimony was influenced by the presence of the grandmother.").

148. *See id.*; *see also Spierling v. State*, 924 S.W.2d 722, 726 (Tex. Ct. App. 1996) (finding child holding teddy bear did not deprive defendant of his constitutional

requesting the child to sit with her grandmother nor examined the record for clear evidence of need.¹⁴⁹ Instead, the court reached its determination because the defendant failed to prove that any of his rights were violated.¹⁵⁰ Thus, due to the child's young age, the court's broad discretion, and the difficulty of the topic at issue, the Superior Court held that the trial court did not abuse its discretion in permitting the child to sit on her grandmother's lap while the child testified.¹⁵¹ However, the Superior Court cautioned that even though it did not find an abuse of discretion, this did not mean that a child would always be permitted to sit on an adult's lap in the future.¹⁵² Thus, in *Pankraz*, it was the defendant's burden to prove that such special accommodation prejudiced him.¹⁵³

C. *A New Breed: Amendments to Act 1986-14 and Subsequent Case Law Bolster Support for Child Witnesses*

Even though *Pankraz* suggests Pennsylvania places the onus on defendants in witness accommodation situations, three events suggest a different standard: (1) the 1996 Amendment to Act 1986-14; (2) the 2004 amendment to the Pennsylvania Constitution; and (3) subsequent case law upholding the Pennsylvania Constitution's 2004 amendment and denying an absolute right to face-to-face confrontation.¹⁵⁴

1. *Amendments to Act 1986-14 and the Pennsylvania Constitution*

In 1996, the Pennsylvania General Assembly amended several of Act 1986-14's sections, suggesting a shift of burden from the defendant to the prosecution.¹⁵⁵ In particular, section 5981, which describes the policy be-

right of confrontation because "nothing . . . in the record" illustrated teddy bear had any effect on "minds and hearts of the jury").

149. *See Pankraz*, 554 A.2d at 979 (finding child's testimony was uninfluenced by grandmother's presence).

150. *See supra* note 147 (describing defendant's rights were not violated).

151. *See Pankraz*, 554 A.2d at 979-80 (relying on fact that "[t]he child at all times was visible to the Court, the jury and the defendant, and at no time did the grandmother speak to the child").

152. *See id.* at 980 n.6 ("[W]e do not thereby place this Court's imprimatur on a general practice which permits children to testify while sitting in the lap of an adult. Such a practice is fraught with danger and is not to be encouraged.").

153. *See id.* at 980 (noting burden was not met because "[n]o rights of the defendant were infringed upon").

154. *Pankraz* was decided in 1989, the year before *Craig* and just three years after Pennsylvania's child victims and witnesses statutes were enacted. Thus, with the advent of the *Craig* court's analysis, which developed a more "practical" balancing test to determine the permissibility of special accommodations, the Pennsylvania Legislature's movement to protect child witnesses, and the Act's associated amendments, one can see the "shedding" of prior reasoning for analysis more in line with the *Dye II* court's reasoning. *See Commonwealth v. Williams*, 84 A.3d 680, 695 (Pa. 2014) (comparing Supreme Court's analysis in *Craig* and *Crawford* and describing approach used in *Craig* as "more pragmatic" and "balancing-based").

155. *See Child Victims and Witnesses Act*, S.B. 1322, 1996 Pa. Legis. Serv. Act 1996-161 (West) (adding both a "necessity" prerequisite to be proven before spe-

hind the section in the child victims and witnesses statutes, was amended to include a “necessity” prerequisite—the court could only allow special procedures to protect testifying children when “necessity [was] shown.”¹⁵⁶ To prove this necessity element under the amended act, the prosecution had to present evidence that the child witness was suffering from serious emotional distress.¹⁵⁷

Then, in 2004, the Pennsylvania Constitution was amended to replace the face-to-face clause with the federal-equivalent “confronted with the witnesses” clause.¹⁵⁸ With subsequent cases, such as *Commonwealth v. Charlton*¹⁵⁹ and *Commonwealth v. Williams*,¹⁶⁰ the Pennsylvania courts have shifted the burden from the defendant, as apparent in *Pankraz*, to the prosecution.¹⁶¹ However, just like the Washington Supreme Court, the

cial accommodation could be granted and “determination” section to help courts decide if necessity prerequisite is met).

156. *See id.* § 5981 (West amended 2004) (“[T]he General Assembly declares its intent . . . to provide [children who are material witnesses to or victims of crimes], where necessity is shown, procedures which will protect them during their involvement with the criminal justice system.”).

157. *See id.* § 5985(a.1) (describing process to determine if child will suffer serious emotional distress when testifying in courtroom).

158. For a further discussion of the 2004 Amendment, see *supra* notes 135–41 and accompanying text.

159. 902 A.2d 554 (Pa. Super. Ct. 2006) (allowing child to testify via closed-circuit television). The defendant in *Charlton* was arrested and subsequently found guilty of several sexual offenses against his daughter over approximately a three-year span. *See id.* at 559. The court held a pre-trial hearing to determine whether the child “should be permitted to testify via a contemporaneous alternative method.” *Id.* To prove the emotional distress the child would experience if required to testify in open court, “the Commonwealth presented the expert testimony” from a psychotherapist who had interacted with the child previously. *Id.* The psychotherapist testified that the child “suffered from depression, suicidal thoughts, and post-traumatic stress disorder which likely would impact her ability to testify effectively” and having her testify in front of the defendant “pose[d] a significant risk for her emotional wellbeing.” *Id.* The Superior Court held that the evidence was sufficient to prove the “closed circuit television testimony was both necessary and a reasonable alternative.” *Id.* (quoting trial court opinion).

160. 84 A.3d 680 (Pa. 2014).

161. *See id.* at 691 (finding child testimony via closed-circuit television to be appropriate for preliminary hearing). In *Williams*, the Commonwealth charged the defendant with several sexual offenses for his alleged actions upon an eight-year-old girl. *See id.* at 682. The child “indicated that she would be too afraid of [the defendant] to talk about what had happened to her if he were present in the courtroom,” so the Commonwealth moved to permit the child to testify by closed-circuit television. *Id.* at 682–83. At the preliminary hearing, the trial court requested, and the prosecution presented, a licensed psychologist to proffer her opinion about the girl’s emotional state. *See id.* at 683. Based on the conversations the psychologist had with the child, the psychologist “opined that the child would not be able to testify in the presence of [the defendant] . . .” *Id.* The defense wanted to confirm the child’s emotional distress with his own expert. *See id.* The Commonwealth argued that section 5985 did not give the defendant a right to present evidence “to rebut the Commonwealth’s evidence in support of its motion . . . to allow a child witness to testify in a room separate from courtroom

Pennsylvania courts have not imposed a “substantial need” hurdle for witness accommodations.¹⁶²

2. Commonwealth v. Williams

Subsequent to the changes in article 1 of the Pennsylvania Constitution, and keeping the United States Supreme Court’s *Craig* analysis in mind, Pennsylvania courts began permitting child witnesses to testify through closed-circuit television.¹⁶³ Recently, in *Williams*, the Supreme Court of Pennsylvania thoroughly examined section 5985 and described both the policy behind the section and the proper procedure for deter-

proceedings[.]” *Id.* at 684 (quoting *Commonwealth v. Williams*, 47 A.3d 1173, 1173 (Pa. 2012) (per curiam) (granting allowance of appeal)).

The Supreme Court of Pennsylvania analyzed section 5895, Pennsylvania case law, and the United States Supreme Court’s decision in *Craig* to determine the rights a defendant had under the Pennsylvania Constitution. *See id.* at 684–87. Once again, the Pennsylvania Supreme Court applied the *Craig* Court’s interpretation of the Confrontation Clause to the Pennsylvania Constitution, specifically reaffirming that important public policy considerations can supersede the defendant’s right to face-to-face confrontation, demonstrating the Pennsylvania Supreme Court’s acceptance of alternative methods of testimony when adequate need is shown. *See id.* at 684–85. Thus, addressing the issue at hand, the Pennsylvania Supreme Court determined that the defendant’s “right to be confronted at the preliminary hearing by the minor victim would not be violated by her testifying under oath via closed-circuit television because [the defendant] retain[ed] the opportunity to cross-examine her via his counsel” and both the defendant and jury were still able to observe the child “throughout her testimony.” *Id.* at 687. Consequently, the court held that “a defendant does not have a right to present informed expert testimony to rebut the Commonwealth’s evidence in support of its motion pursuant to 42 Pa.C.S. § 5895 to allow a child witness to testify in a room separate from courtroom proceedings.” *Id.* at 691. As *Williams* demonstrates, by only requiring the prosecution to show necessity for an alternative mode of testimony for the child, and prohibiting the defense from “probing” to rebut the prosecution’s evidence, the court wants to protect child witnesses and minimize their stress from being involved in the criminal justice system as much as possible.

162. In *Williams*, the Supreme Court of Pennsylvania recognized that the trial court must find “‘necessity’ in order to allow a child to testify via contemporaneous alternative method” but never explicitly requires a “substantial” need as found in *Gomez v. State*, 25 A.3d 786 (Del. 2011) and *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 2013). Illustrative of this *less than compelling need* standard, the Pennsylvania Supreme Court specifically noted that section 5985 does not require expert testimony “to establish a finding of ‘serious emotional distress’ in order to permit the child to testify via alternative mediums. *Williams*, 84 A.3d at 688. Instead, the court can perform its own investigation, and it can also hear testimony from the “child’s parent or custodian or any other person” about the emotional distress the child would experience if required to testify in front of the defendant. *Id.*

163. *See, e.g., Charlton*, 902 A.2d at 559 (agreeing that child-victim was permitted “to testify via closed-circuit television” after court determined such accommodation was “‘necessary and a reasonable alternative’” (quoting trial court opinion)); *see also Commonwealth v. Kemmerer*, 33 A.3d 39, 41 (Pa. Super. Ct. 2011) (finding testifying via contemporaneous alternative method to be proper because child would “suffer serious emotional distress that would substantially impair his ability to reasonably communicate” if required to testify in defendant’s presence).

mining if a child should be permitted to testify through closed-circuit television.¹⁶⁴ The Pennsylvania Supreme Court found the “confrontation elements” necessary to ensure a defendant’s right to a fair trial when a child testifies from outside the courtroom, as articulated in *Craig*, were present in section 5985.¹⁶⁵ The court continued to didactically analyze section 5985 and concluded that the statute properly required the court to balance the state’s interest in protecting the child with the defendant’s right to confront the child witness.¹⁶⁶

In response to the defendant’s argument that “he had the right to present testimony of an expert witness to rebut the Commonwealth’s evidence,” which supported its motion to permit the child to testify outside the presence of the defendant, the court announced, “[i]t is of no small import that expert testimony is *not required* to establish a finding of ‘serious emotional distress.’”¹⁶⁷ Following the *Craig* Court’s analysis, the Pennsylvania Supreme Court emphasized that the right to face-to-face confrontation was not absolute when important public policy considerations, especially those involving children, were “at stake.”¹⁶⁸ Consequently, the court held the “defendant [did] not have a right to present informed expert testimony to rebut” the prosecutor’s evidence in support of a section 5985 motion to permit a child witness to testify via closed-circuit television.¹⁶⁹

164. *See Williams*, 84 A.3d at 689 (“Section 5985 sets forth circumstances under which face-to-face confrontation of child victims/witnesses may be eliminated, but it preserves the crucial confrontation elements of oath, full cross-examination, and observation by judge, jury, and defendant.”).

165. *See id.* (“The interests of the accused are protected by Section 5985’s mandates preserving the crucial confrontation elements of oath, full cross-examination, and observation of the child witness by judge, jury, and defendant.”).

166. *See id.* at 688 (finding section 5985 “balances the state’s interest in protecting a child who is the victim of a crime against the constitutional interest of the accused in confronting the witnesses against him or her”).

167. *See id.* at 681–82, 688 (“[T]he General Assembly employed the term ‘serious emotional distress’ in its plain, common sense, lay meaning, and did not intend to imply a specific mental health diagnosis, condition, or prognosis which could only be established by the testimony of a psychologist, psychiatrist, or other mental health expert.”). The Pennsylvania Supreme Court explained that the trial court must first “engage in a practical inquiry” and then reach a decision based “‘on evidence presented to it.’” *Id.* at 688 (quoting 42 PA. CONS. STAT. § 5985(a.1)). Moreover, section 5985(a.1) describes the “evidentiary options” a judge has to determine whether a contemporaneous alternative method of testimony is proper under the circumstances. *See id.* In particular, the statute permits the judge to both “observe and question the child” and “[h]ear testimony of a child’s parent or custodian or any other person” who could provide clear evidence supporting the need for the particular child to testify outside the defendant’s presence, such as a “medical professional or therapist.” *Id.* at 682, 688.

168. *See id.* at 689 (“[T]he preference for face-to-face confrontation must give way to public policy considerations and the necessities of the case when important public policy concerns, such as the protection of children, are at stake, and the reliability of the testimony in question is otherwise assured.”).

169. *See id.* at 691 (allowing child testimony to take place “in a room separate from courtroom proceedings”).

Taking into consideration the Pennsylvania courts' commitment to protecting a defendant's right to a fair trial, Pennsylvania's precedent involving accommodations for child witnesses while at the witness stand, amendments to Act 1986-14, and subsequent case law, the proper legal standard trial courts should use when assessing the permissibility of courthouse dogs at the witness stand is the Washington Supreme Court's standard created in *Dye II*.¹⁷⁰

VI. WHY PENNSYLVANIA COURTS SHOULD ROLL OVER FOR THE LESS STRINGENT STANDARD

Besides the abovementioned reasons for using the legal standard the Washington Supreme Court established in *Dye II* to assess the courthouse dog accommodation for a child witness, further support can be garnered for this standard by comparing closed-circuit television to courthouse dogs and by also examining how the program would further current legislative policy.¹⁷¹

A. *Comparing the Courthouse Dog Program to the Closed-Circuit System*

The legal standard for permitting dogs with a testifying child should be less onerous on the prosecution than when the prosecution moves for testifying via closed-circuit television because of courthouse dogs' unique qualities as tools for the judicial system.¹⁷² Closed-circuit television directly interferes with the defendant's right to face his accuser, and courts have to balance the interests of both sides before deciding if the alternative medium of testimony is appropriate.¹⁷³ Upon adequate proof that a child witness will be unable to testify inside the courtroom in front of the defendant, the child is taken to a separate room where the child's testimony is broadcast via closed-circuit television to the courtroom, where the jury and defendant remain.¹⁷⁴ Many defendants believe this practice

170. For a description of the Washington Supreme Court's legal standard for permitting special accommodations for witnesses, see *supra* notes 50–57 and accompanying text.

171. For a comparison of closed-circuit television to courthouse dogs, see *infra* notes 172–83 and accompanying text. For a discussion about how the program would further current legislative policy, see *infra* notes 184–91 and accompanying text.

172. See Holder, *supra* note 2, at 1178 (describing why defendant may prefer courthouse dog to closed-circuit television or another alternative method of testimony); Weems, *supra* note 5, at 126 (same).

173. See 42 PA. CONS. STAT. ANN. § 5985 (West 2014); see also Holder, *supra* note 2, at 1182 (inferring closed-circuit television prevents defendants from confronting witnesses face-to-face).

174. See CLOSED-CIRCUIT TELEVISION STATUTES, *supra* note 52, at 1 (describing how closed-circuit television accommodations work).

abridges their rights to face their accusers directly, regardless of whether the closed-circuit television is one-way or two-way.¹⁷⁵

Even though the *Williams* court approved the statutory construction of section 5985, the idea of dismissing a constitutional right is unsettling.¹⁷⁶ In his dissent, Pennsylvania Supreme Court Justice Thomas G. Saylor identified a more recent United States Supreme Court decision that reasserted the defendant's right to physical confrontation with the accuser, *Crawford v. Washington*.¹⁷⁷ In *Crawford*, "the Supreme Court entirely revamped the judicial understanding of [the Confrontation Clause] . . . in favor of the more formalistic reading of the Sixth Amendment provision," instead of "the more pragmatic, balancing-based approach applied" in *Craig*.¹⁷⁸ The Supreme Court in *Crawford* "explain[ed] that the constitu-

175. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 860 (1990) (rejecting defendant's claim that statute permitting testimony through one-way circuit television is unconstitutional); *Commonwealth v. Charlton*, 902 A.2d 554, 558–59 (Pa. Super. Ct. 2006) (upholding Pennsylvania Consolidated Statute section 5985 permitting testimony through "contemporaneous alternative methods," which includes two-way closed-circuit television).

176. See *Commonwealth v. Williams*, 84 A.3d 680, 695–96 (Pa. 2014) (Saylor, J., dissenting) ("[T]here is much uncertainty in Sixth Amendment Confrontation Clause jurisprudence [Moreover,] there should be little question that statutory provisions delineating methods for propounding testimony against an accused other than via face-to-face confrontation operate in a very sensitive area of constitutional law.").

177. See *Crawford v. Washington*, 541 U.S. 36 (2004) (barring out-of-court testimonial statements made by defendant's wife). The defendant in *Crawford* "stabbed a man who allegedly tried to rape his wife . . ." *Id.* at 38. Because of the state of Washington's marital privilege, "which generally bars a spouse from testifying without the other spouse's consent," the defendant's wife did not have to testify against her husband. *Id.* at 40. However, because the State considered the wife "unavailable" due to the marital privilege, "the State sought to introduce [the wife's] tape-recorded statements to the police as evidence that the stabbing was not in self-defense," contrary to the husband's claims. *Id.* The trial court admitted the recorded statements, and the defendant was ultimately convicted of assault. See *id.* at 40–41. Examining the historical purpose behind the Sixth Amendment, the United States Supreme Court followed a strict interpretation of the Sixth Amendment: "The historical record [] supports . . . that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53–54. The Supreme Court thus reversed the defendant's conviction and held that the admission of the wife's recorded statements violated the defendant's confrontation rights under the Sixth Amendment. See *id.* at 68. The majority concluded, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68–69. Some scholars fear that this interpretation could limit the alternative methods of testimony children can use during the legal process. See, e.g., Holder, *supra* note 2, at 1162 (addressing effect *Crawford* can have on child witnesses). But see, e.g., CLOSED-CIRCUIT TELEVISION STATUTES, *supra* note 52 (distinguishing *Crawford* from *Craig*).

178. *Williams*, 84 A.3d at 695–96 (Saylor, J., dissenting) ("[T]he Supreme Court entirely revamped the judicial understanding of [the Confrontation Clause] in *Crawford*, jettisoning . . . pragmatism . . . in favor of the more formalistic reading of the Sixth Amendment provision.").

tional text ‘is most naturally read as a reference to the right of confrontation at common law,’ with ‘[t]he common-law tradition [being understood as] one of live testimony in court subject to adversarial testing.’”¹⁷⁹

Despite potential difficulties in accommodating child witnesses after the United States Supreme Court’s decision in *Crawford*, the direct confrontation concern addressed in *Crawford* is mitigated with the use of courthouse dogs.¹⁸⁰ Importantly, the child witness can remain inside the courtroom because the child feels comfortable testifying with the dog by his or her side.¹⁸¹ Using a courthouse dog thus meets all of the Confrontation Clause’s essential requirements described in both *Craig* and *Crawford* and also permits the defendant to face the accuser physically, meaning these dogs offer less interference with defendants’ rights than closed-circuit television or alternative contemporaneous transmission methods.¹⁸² Therefore, with *Williams* in mind, the standard of acceptance for courthouse dogs should not be any more stringent than the test used to permit closed-circuit television testimony.¹⁸³

B. *Man and Man’s Best Friend Align: Courthouse Dogs Further the Policy of the Child Victims and Witnesses Statutes*

One last reason why Pennsylvania should use the *Dye II* standard is because it is aligned with the overall policy stated in section 5981.¹⁸⁴ The Pennsylvania Legislature’s purpose behind the child witness and victims statutes is to protect individuals under eighteen years old “during their

179. See *id.* at 696 (alterations in original) (quoting *Crawford*, 541 U.S. at 43, 54) (reaffirming importance of face-to-face confrontation at trial).

180. See Holder, *supra* note 2, at 1178 (describing why defendant may prefer courthouse dog to closed-circuit television or another alternative method of testimony); Weems, *supra* note 5, at 126 (same).

181. See Dellinger, *supra* note 2, at 176–78 (explaining calming effect dogs can have on testifying children and how using courthouse dogs can enable children to be “present and testify in open court”); Holder, *supra* note 2, at 1179 (“Unlike closed-circuit television or videotaped testimony, court facility dogs allow a witness to testify in court and face the defendant.”); Weems, *supra* note 5, at 126–29 (describing how dogs can comfort children while testifying).

182. See *Crawford*, 541 U.S. at 68 (holding no opportunity to cross-examine witness is “alone [] sufficient to make out a violation of the Sixth Amendment”); *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (listing “elements of confrontation . . . that serve[] the purposes of the Confrontation Clause[:]” witness must be physically present, take statements under oath, be subject to cross-examination, and be observable “by the trier of fact”); Holder, *supra* note 2, at 1162 (identifying two key elements under *Crawford* to permit out-of-court statements: “witness is unavailable to testify in court” and “defendant previously had an opportunity for cross-examination”).

183. See *supra* note 182 (providing reasons why courthouse dogs are less detrimental to defendants’ rights than other alternative accommodations).

184. See *supra* note 94 (providing text of statute, which describes the policy of Pennsylvania’s child victims and witnesses statutes).

involvement with the criminal justice system.”¹⁸⁵ As a result, children are given unique privileges and assistance that adults are not similarly entitled to, such as creating “an exception to the hearsay rule” and alternative mediums for testifying.¹⁸⁶ This idea was even codified in the first version of Act 1986-14, in section 5981, when the General Assembly included a clear distinction that children required different treatment than that of adults; however, that language was later removed.¹⁸⁷

In addition, the 2004 Amendment to the Act replaced the word “closed-circuit television” with “contemporaneous alternative method.”¹⁸⁸ By rephrasing the term, courts now have more ways to make a testifying child feel comfortable, which will hopefully make it easier for the child to provide more truthful, coherent testimony.¹⁸⁹ This amendment demonstrates how Pennsylvania’s Legislature is forward thinking and willing to adapt to changes in society.¹⁹⁰ Overall, the use of courthouse dogs would fit neatly into this subsection of title 42 because the dogs would be an additional resource to effectively protect children within the criminal justice system.¹⁹¹

185. 42 PA. CONS. STAT. ANN. § 5981 (West 2014) (describing why Legislature implemented corresponding statutes to accommodate child victims and witnesses).

186. See *Commonwealth v. Louden*, 803 A.2d 1181, 1185 & n.5 (Pa. 2002) (describing legislative effort to protect and help child victims); see also 42 PA. CONS. STAT. ANN. § 5985 (permitting alternative methods of testimony for children in certain circumstances); *id.* § 5986 (providing hearsay exception for children); *supra* note 111 (describing statutes that allow support persons to accommodate children outside of courtroom).

187. See PA. S.B. 176, Act. No. 1986-14, 1986 Pa. Laws 41, 41. The General Assembly’s declaration of its policy states:

In order to promote the best interests of the children of this Commonwealth and in recognition of the necessity of affording to children who are material witnesses to or victims of crimes *additional consideration and different treatment from that of adults*, the General Assembly declares its intent, in this subchapter, to provide these children with additional rights and protections during their involvement with the criminal system.

Id. (emphasis added). The phrases removed after the 1996 Amendment include “and in recognition of the necessity of affording to children,” “additional consideration and different treatment from that of adults,” and “with additional rights and protections.” PA. S.B. 1322, Act. No. 1996-162, 1996 Pa. Legis. Serv. Act 1996-161 (West).

188. See *supra* notes 124–25 and accompanying text (describing change between terms).

189. See Holder, *supra* note 2, at 1164 (“Courts consistently conclude that the benefit of clear and coherent testimony outweighs any potential prejudicial effect of a comfort item on the defendant’s right to a fair trial.”).

190. See *supra* note 125 and accompanying text (describing how changing term further protects and helps testifying children).

191. See Debra S. Hart-Cohen, *Canines in the Courtroom*, GPSOLO MAGAZINE, July/Aug. 2009, at 55, available at https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/caninesincourtroom.html (“[P]rosecutors and judges are finding that the presence of a well-trained dog aids witness testimony by providing the victim with emotional support and comfort both in the witness room and in the courtroom.”).

VII. CONCLUSION: WAG MORE, CRY LESS

Courthouse dogs have been used in Pennsylvania for many years in various capacities; however, one of their more controversial uses has been in the context of a criminal trial.¹⁹² Defendants have argued about prejudice, interference with their rights under the confrontation clause, distraction, and legislative decision-making when the state has sought to use a courthouse dog.¹⁹³ In the recent Pennsylvania Supreme Court case of *Williams*, the court approved the current procedure that permits closed-circuit television testimony.¹⁹⁴ Using more of a balancing test than a strict analysis of the confrontation clause, the court emphasized the need to ensure the policy goal of protecting children involved in the criminal justice system.¹⁹⁵ As a result of the analysis articulated in *Williams*, combined with amendments to the Pennsylvania Constitution and Act 1986-14, the proper legal standard Pennsylvania courts should use is the one that the Washington Supreme Court implemented in *Dye II*, which requires the prosecution to prove that the courthouse dog would be necessary, but not to the extent of a “compelling need,” for the child to testify in the courtroom.¹⁹⁶ Because the policy behind enacting Act 1986-14 was to further protect and assist children potentially overwhelmed and terrified in the judicial system, courthouse dogs would be a beneficial tool to further this end and still protect the defendant’s rights to a fair trial.¹⁹⁷

192. See *supra* note 28 and accompanying text (providing discussion on controversy surrounding use of courthouse dogs in trial setting).

193. See Holder, *supra* note 2, at 1169–74 (describing claims defendants have brought against use of courthouse dogs).

194. See *Commonwealth v. Williams*, 84 A.3d 680, 687 (Pa. 2014) (affirming permissibility of testimony through closed-circuit television during preliminary hearing).

195. See *id.* at 689 (“[T]he preference for face-to-face confrontation must give way to public policy considerations and the necessities of the case when important public policy concerns, such as the protection of children, are at stake, and the reliability of the testimony in question is otherwise assured.”).

196. For a discussion of the legal standard the Washington Supreme Court created in *Dye II*, see *supra* notes 50–57.

197. See 42 PA. CONS. STAT. ANN. § 5981 (West 2014) (describing policy of statutes that accommodate child victims and witnesses); Hart-Cohen, *supra* note 191, at 57 (“And victims are not the only ones benefiting from these new programs. Judges, lawyers, victim advocates, and court staff—all those who deal on a daily basis with the often-horrible consequences of crime—can find their morale boosted through the presence of dogs in court.”).