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## NOTES A PERSPECTIVE FOR INDIANA

### THE USE OF “THERAPY DOGS” IN INDIANA COURTROOMS: WHY A DOG MIGHT NOT BE A DEFENDANT’S BEST FRIEND

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#### INTRODUCTION

A recent phenomenon is happening in courtrooms across this country: therapy dogs accompanying witnesses to the stand.<sup>1</sup> In early August 2011, the first therapy dog was allowed inside a New York courtroom in the case of *People v. Tohom*.<sup>2</sup> “Rosie, the first judicially approved courtroom dog in New York, was in the witness box here nuzzling a [fifteen]-year-old girl who was testifying that her father had raped and impregnated her. Rosie sat by the teenager’s feet. At particularly bad moments, she leaned in.”<sup>3</sup> Therapy dogs have been entering courtrooms since 2003, typically aiding child victims of sexual abuse testify against their perpetrators.<sup>4</sup> Indiana is joining other states such as Washington, Maryland, Texas, Georgia, and Florida in adopting this practice.<sup>5</sup> Boone County has used a trained therapy dog to assist victims in its special assault unit,<sup>6</sup> and the

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1. See William Glaberson, *By Helping a Girl Testify at a Rape Trial, a Dog Ignites a Legal Debate*, N.Y. TIMES, Aug. 9, 2011, at A15, available at [http://www.nytimes.com/2011/08/09/nyregion/dog-helps-rape-victim-15-testify.html?\\_r=1](http://www.nytimes.com/2011/08/09/nyregion/dog-helps-rape-victim-15-testify.html?_r=1).

2. *People v. Tohom*, No. 338/2010 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at [http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople\\_v\\_Tohom.pdf](http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf).

3. Glaberson, *supra* note 1.

4. *Courthouse Dogs Foundation: Expert Education and Guidance for Legal Professionals*, COURTHOUSE DOGS, <http://courthousedogs.com/index.html> (last visited Aug. 19, 2013). This website is run by Ellen O’Neill-Stephens, a senior deputy prosecutor in Seattle, Washington, and Celeste Walsen, DVM. Although currently the typical use of therapy dogs is in child sexual abuse cases, it is important to note that therapy dogs have also accompanied others, including adults to the stand. *Id.*

5. Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 ANIMAL L. 171, 176 (2009), available at [http://www.animallaw.info/journals/jo\\_pdf/lralvol15\\_2\\_p171.pdf](http://www.animallaw.info/journals/jo_pdf/lralvol15_2_p171.pdf).

6. Ellen O’Neill-Stephens, *Full Circle: Prison Inmates Train a Courthouse Dog*,

Marion County Superior Court's Juvenile Division recently obtained a therapy dog to minimize stress for victims both during child interviews and at trial as well.<sup>7</sup>

The argument for allowing this practice is that these specially trained dogs can help calm victim witnesses during what can be a very emotional and stressful experience.<sup>8</sup> Prosecutors are vocal proponents of this technique because the use of therapy dogs allows victims to remain calm and thoroughly explain what happened in a more competent manner.<sup>9</sup> Significant research supports the conclusion that the "presence of a dog can have dramatic emotional and psychological benefits" for victims discussing traumatic events.<sup>10</sup>

Defense attorneys, on the other hand, are concerned with the effect therapy dogs might have in "unfairly sway[ing]" the jury against their clients.<sup>11</sup> Victor Tohom, the defendant in the above-mentioned New York case,<sup>12</sup> received a sentence of twenty-five years to life in prison after the jury convicted him of rape.<sup>13</sup> Tohom's attorney stated that Rosie "infected the trial with such unfairness that it constituted a violation of [his] client's constitutional rights."<sup>14</sup> The appellate court affirmed the trial court's decision, finding that Rosie's presence in the courtroom did not "impair[] [Tohom's] right to a fair trial[] or . . . compromise[] his constitutional right of confrontation and cross-examination."<sup>15</sup> Defense attorneys argue that the use of therapy dogs sends unconscious messages to jurors that a witness is vulnerable because of the trauma he or she experienced at the hands of the defendant.<sup>16</sup> Further, the presence of the dogs creates sympathy for the victim that could "distract from otherwise contradictory evidence that negates the truth of the witness's accounting."<sup>17</sup>

The purpose of this Note is to discuss how the use of therapy dogs unfairly prejudices criminal defendants and to advocate for Indiana to enact safeguards to

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COURTHOUSE DOGS, <http://courthousedogs.com/pdf/CourthouseDogs-FullCircle.pdf> (last visited Aug. 20, 2013).

7. Jenny Montgomery, *Canines in Court*, 22 IND. LAW. 17, 17 (Oct. 12-15, 2011).

8. See Dellinger, *supra* note 5, at 175-76.

9. Glaberson, *supra* note 1.

10. Andrew Leaser, Note, *See Spot Mediate: Utilizing the Emotional and Psychological Benefits of "Dog Therapy" in Victim-Offender Mediation*, 20 OHIO ST. J. ON DISP. RESOL. 943, 961 (2005); see also Dellinger, *supra* note 5, at 179 ("Scientific studies have shown that dogs help people by reducing blood pressure, stress and anxiety, improving feelings of self-worth and decreasing loneliness.").

11. See Glaberson, *supra* note 1.

12. *People v. Tohom*, No. 338/2010 (N.Y. Dutchess Cnty. Ct. June 1, 2011).

13. Glaberson, *supra* note 1.

14. *Id.* (internal quotation marks omitted).

15. *People v. Tohom*, 969 N.Y.S.2d 123, 138 (N.Y. App. Div. 2013).

16. Decision and Order at 2, *People v. Tohom*, No. 338/2010 (N.Y. Dutchess Cnty. Ct. June 1, 2011) available at [http://courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople\\_v\\_Tohom.pdf](http://courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf).

17. *Id.*

minimize these prejudices. Part I focuses on child witnesses, in particular how techniques used in the past to ease these witnesses testify against their perpetrators have led to the present use of therapy dogs in the courtroom. Part II provides background context regarding the use of therapy dogs in courtrooms, including what they are, how they are trained, and where, how, and why they are being used across the country. Part III analyzes the potential pitfalls for defendants, centering on how the presence of therapy dogs might bias the jury against defendants, as well as how the presence of the dogs influences the child and makes the appellate process more difficult for criminal defendants. Finally, Part IV focuses on how Indiana should proceed in utilizing therapy dogs in its courtrooms and proposes a new rule of criminal procedure that includes safeguards Indiana should enact to protect the rights of criminal defendants while still addressing the special needs of child witnesses.

#### I. ADDRESSING THE NEEDS OF CHILD WITNESSES: PAST TECHNIQUES

Testifying in court can be an intimidating and traumatic experience for anyone. The formality of the courtroom and the oath, the presence of the judge and attorneys, and the pressure of knowing the high-stakes involved for the defendant can surely make a witness nervous, uncomfortable, and perhaps frightened. Imagine a child being called to the witness stand. Imagine further a child called to the witness stand to testify against a defendant who sexually abused him or her. The child, thus, has to come face-to-face with the abuser and essentially relive the abuse he or she endured. Recognizing the potential consequences of this scenario, the judicial system has developed numerous techniques geared towards addressing the special needs of child witnesses while still aggressively prosecuting and convicting criminal defendants.<sup>18</sup> While these techniques ease some of the stresses child witnesses experience in the courtroom, they often conflict with defendants' Sixth Amendment rights.<sup>19</sup> This Part of the Note first addresses the delicate balancing act courts must perform when dealing with child witness in order to address their needs, while preserving defendants' rights. Secondly, this Note explores some of the alternative methods of testifying approved by courts for child witnesses. Finally, this Note examines the Supreme Court's decision in *Crawford v. Washington*,<sup>20</sup> and how it has impacted the admissibility of child witnesses' statements and arguably led to the present use

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18. Katherine W. Gearson, Note, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgement of Criminal Defendants' Rights*, 45 B.C. L. REV. 467, 467-69 (2004) (discussing "screening, videotape, and closed-circuit television" as methods to shield the child victim from the defendant).

19. Claudia L. Marchese, Note, *Child Victims of Sexual Abuse: Balancing a Child's Trauma Against the Defendant's Confrontation Rights*—Coy v. Iowa, 6 J. Contemp. Health L. & Pol'y 411, 413 (1990).

20. 541 U.S. 36, 68-69 (2004) (holding that the confrontation clause bars out-of-court statements by a witness unless the defendant had a prior opportunity to cross-examine, and the witness is unavailable to testify at trial).

of therapy dogs in courtrooms.

*A. The Needs of Child Victims vs. The Constitutional Rights of Defendants*

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>21</sup> Known as the “Confrontation Clause,”<sup>22</sup> the Supreme Court has interpreted this phrase to “guarantee[] the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”<sup>23</sup> Indiana has adopted an even more expansive provision of this right, giving defendants the right “to meet the witnesses face to face.”<sup>24</sup> The Confrontation Clause has ancient roots and preserves the right to check live testimony through the adversarial process.<sup>25</sup> This guarantee, however, is not absolute.<sup>26</sup> In cases where children testify, “the court must strike a balance between the defendant’s right to a fair trial and the witness’s need for an environment in which he or she will not be intimidated into silence or to tears.”<sup>27</sup> Typically, therefore, alternative methods of offering testimony are permitted when

an adequate showing [by clear and convincing evidence] has been made of the child witness’s vulnerability to severe mental and emotional harm, or where the court makes a specific finding of a substantial likelihood that the child witness and sex-abuse victim would suffer at least moderate emotional or mental harm if required to testify in open court.<sup>28</sup>

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21. U.S. CONST. amend. VI.

22. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 366-67 (7th ed. 2011).

23. *Coy v. Iowa*, 487 U.S. 1012, 1016, 1020-22 (1988) (finding a violation of the confrontation clause when a teenage girl was allowed to testify with a screen present, shielding her view of the defendant).

24. IND. CONST. art. I, § 13(a); *Brady v. State*, 575 N.E.2d 981, 988 (Ind. 1991) (“Indiana’s confrontation right contains both the right to cross-examination and the right to meet the witnesses face to face.”).

25. *Crawford*, 541 U.S. at 43.

26. *See Maryland v. Craig*, 497 U.S. 836, 853 (1990) (“We likewise conclude today that a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.”).

27. *State v. Cliff*, 782 P.2d 44, 47 (Idaho Ct. App. 1989).

28. *Dellinger*, *supra* note 5, at 178. *See* 81 Am. Jur. 2d Witnesses § 694 (2013); *see also Danner v. Motley*, 448 F.3d 372, 380 (6th Cir. 2006) (“[*Maryland v. Craig* requires the trial court seeking to avoid psychological harm to find that: (1) the procedure is necessary to *protect the child’s welfare*; (2) the child witness would be traumatized specifically by the presence of the defendant; and (3) the emotional distress the child witness would endure as a result of testifying is more than *de minimis*, i.e., more than mere nervousness or reluctance to testify.”).

This standard has granted courts the flexibility to use different methods when a child’s testimony is desperately needed.

*B. Techniques to Aid Child Witnesses*

Prosecutors have long used the flexibility of evidence rules to create alternatives to live testimony in court with the defendant present in order to ease the stress of child witnesses.<sup>29</sup> Federal Rule of Evidence 611<sup>30</sup> and Indiana Rule of Evidence 611<sup>31</sup> both set out the same standard for courts to follow: “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.”<sup>32</sup> Further, much deference is given to the trial court’s chosen method of allowing interrogation of witnesses under the deferential abuse of discretion standard of review.<sup>33</sup> The flexibility of the evidentiary rules, therefore, has opened the doors to various alternative methods of interrogating child witnesses.

*1. Child Witnesses Holding Comforting Items While Testifying.*—One method courts have used allows child witnesses to take comforting items, such as teddy bears or dolls, to the witness stand and testify while holding the items.<sup>34</sup> Many courts have allowed this practice over defendants’ objections. For example, in *State v. Powell*,<sup>35</sup> an eleven-year-old and sixteen-year-old were allowed to hold teddy bears while testifying against their defendant uncle for child molestation.<sup>36</sup> On appeal, Powell argued that “the teddy bears unfairly bolstered the witnesses’ testimony and made the jury more sympathetic to their allegations.”<sup>37</sup> The court disagreed:

Young children, who are victims of sexual abuse, have great difficulty in recounting to juries the sordid details of their painful experience. Wide latitude should be granted to trial courts so that such victims can

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29. Dellinger, *supra* note 5, at 176, 179.

30. FED. R. EVID. 611.

31. IND. R. EVID. 611.

32. Ind. R. Evid. 611(a). *See* Fed. R. Evid. 611(a) (having nearly identical language).

33. *See* Dellinger, *supra* note 5, at 180; *see also* *State v. Marquez*, 951 P.2d 1070, 1074 (N.M. Ct. App. 1997) (“An abuse of discretion will be found only when the trial court’s decision is clearly untenable or contrary to logic and reason.”).

34. *See, e.g., State v. Palabay*, 844 P.2d 1, 3, 10 (Haw. Ct. App. 1992) (holding it was error for the trial court to permit the witness to testify holding a teddy bear because there was no “compelling necessity”); *State v. Hakimi*, 98 P.3d 809, 811-12 (Wash. Ct. App. 2004) (permitting witness to hold a doll while testifying).

35. 318 S.W.3d 297 (Mo. Ct. App. 2010).

36. *Id.* at 300.

37. *Id.* at 302.

recount their experiences without being overwhelmed by crippling emotional strain. Their testimony is often of critical importance since they are often the only occurrence witness.<sup>38</sup>

In finding that the trial court did not abuse its discretion, the court noted that the “trial court had the opportunity to observe the child witnesses and fully consider the usefulness of the teddy bears against the possibility of any prejudice.”<sup>39</sup> Although many courts have similarly allowed this practice, prosecutors still have the burden of proving that the witness’s need for the comforting item is compelling and are not permitted to use the doll or teddy bear as a ruse to “arouse the sympathy of the jury.”<sup>40</sup>

2. *Two-Way Closed Circuit Television*.—Similarly, courts have allowed for the testimony of a child to be taken via two-way closed circuit television.<sup>41</sup> “Two-way systems permit the child witness to see the courtroom and the defendant over a video monitor.”<sup>42</sup> This method is typically allowed if any of the following are found:

- (i) The child is unable to testify because of fear.
- (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
- (iii) The child suffers a mental or other infirmity.
- (iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.<sup>43</sup>

38. *Id.* at 303 (quoting *State v. Pollard*, 719 S.W.2d 38, 42 (Mo. Ct. App. 1986)).

39. *Id.*; see *State v. Marquez*, 951 P.2d 1070, 1074 (N.M. Ct. App. 1997) (“The trial court questioned [the] [v]ictim, observed her demeanor, and made a finding that she would be more comfortable with the teddy bear during difficult testimony. The trial court properly balanced the prejudicial effect of the teddy bear against the necessity of the teddy bear’s calming effect. Therefore, we hold that it was not error for the trial court to allow [the] [v]ictim to testify with a teddy bear.”).

40. *State v. Palabay*, 844 P.2d 1, 7 (Haw. Ct. App. 1992) (finding “no evidence on the record to indicate the compelling necessity for Complainant to hold a teddy bear while testifying”).

41. See 18 U.S.C. § 3509(b)(1) (2006 & Supp. V 2011).

42. *Coy v. Iowa*, 487 U.S. 1012, 1023 (1988) (O’Conner, J., concurring).

43. 18 U.S.C. § 3509(b)(1)(B)(i)-(iv) (2006). See *United States v. Quintero*, 21 F.3d 885, 892 (9th Cir. 1994) (holding that the district court did make the findings required by § 3509 by concluding “that the child would be unable to testify in open court due to the presence of the defendant” and that there was “a substantial likelihood that the child would suffer emotional trauma from testifying”). While this is a federal statute, many states have enacted statutes with similar language. One such example is Virginia, where

[t]he court may order that the testimony of the child be taken by closed-circuit television . . . if it finds that the child is unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons:

- 1. The child’s persistent refusal to testify despite judicial requests to do so;
- 2. The child’s substantial inability to communicate about the offense; or
- 3. The substantial likelihood, based upon expert opinion testimony, that the child will

Courts have generally allowed child witnesses to testify in this manner because it reduces “the trauma caused by in-court testimony before the accused . . . without compromising [defendants’] right to meet the witnesses face to face.”<sup>44</sup> Indiana is one of many states that has chosen this option as an alternative to live testimony.<sup>45</sup>

3. *Testifying with an Adult*.—Children have also been allowed to have an adult accompany them to the witness stand:

A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child’s hand or allow the child to sit on the adult attendant’s lap throughout the course of the proceeding.<sup>46</sup>

The adult attendant, however, cannot in any way prompt the child witness, nor can he or she give the child witness any answers to the questions asked.<sup>47</sup>

Despite all these statutory accommodations that attempt to ease the stress of testifying for child witnesses, a recent Supreme Court decision suggests that child witnesses will have to face their perpetrators in court in order to preserve defendants’ Sixth Amendment rights.

### C. *Crawford v. Washington*

In 2004, the Supreme Court decided *Crawford v. Washington*<sup>48</sup> and “fundamentally reinterpreted the federal [C]onstitution’s Confrontation Clause.”<sup>49</sup>

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suffer severe emotional trauma from so testifying.

VA. CODE ANN. § 18.2-67.9 (2013).

44. *Brady v. State*, 575 N.E.2d 981, 989 (Ind. 1991).

45. *See* IND. CODE § 35-37-4-8(c) (2013) (“On the motion of the prosecuting attorney, the court may order that the testimony of a protected person be taken in a room other than the courtroom, and that the questioning of the protected person by the prosecution and the defense be transmitted using a two-way closed circuit television arrangement that: (1) allows the protected person to see the accused and the trier of fact; and (2) allows the accused and the trier of fact to see and hear the protected person.”).

46. 18 U.S.C. § 3509(i) (2006); *see* IDAHO CODE ANN. § 19-3023 (2013) (“When a child is summoned as a witness . . . parents, a counselor, friend or other person having a supportive relationship with the child shall be allowed to remain . . . with the child during the child’s testimony unless in written findings made and entered, the court finds that the defendant’s constitutional right to a fair trial will be unduly prejudiced.”).

47. 18 U.S.C. § 3509(i) (2006).

48. 541 U.S. 36 (2004).

49. *Courthouse Dogs Promote Justice for Children and Defendants*, COURTHOUSE DOGS, [http://courthousedogs.com/legal\\_overview.html](http://courthousedogs.com/legal_overview.html) (last visited Aug. 21, 2013) [hereinafter *Courthouse Dogs Promote Justice*].

The Court held that “[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”<sup>50</sup> Some argue that this reinterpretation has had dramatic effects on child abuse cases:

*Crawford* established a new bright line rule regarding the Confrontation Clause’s requirement of cross-examination for testimonial statements, causing many, if not all child abuse victims’ statements to become potentially inadmissible at trial and significantly altering the courtroom dynamic of child abuse and molestation cases.<sup>51</sup>

This means that there will be an increase of sexual abuse cases where child victims will be required to testify live in court against their perpetrators because their out-of-court statements will no longer be admissible under *Crawford*.<sup>52</sup> Therefore, some argue that new and innovative methods, such as the use of therapy dogs, are needed to ease the fears and potential emotional trauma of child witnesses now that they are more likely to have to testify in the presence of their perpetrators.<sup>53</sup>

## II. ADDRESSING THE NEEDS OF CHILD VICTIMS: THE PRESENT USE OF THERAPY DOGS

While the introduction of therapy dogs into the courtroom may be a fairly recent phenomenon, therapy dogs have been positively affecting humans in a variety of settings for years. Hospitals, nursing homes, prisons, and rehabilitation centers have all utilized therapy dogs with great success.<sup>54</sup> “Therapy dogs elicit responses from some nursing home patients who are typically withdrawn and

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50. *Crawford*, 541 U.S. at 59.

51. Andrew W. Eichner, Note, *Preserving Innocence: Protecting Child Victims in the Post-Crawford Legal System*, 38 AM. J. CRIM. L. 101, 102 (2010) (italics added) (internal quotation marks omitted).

52. See Myrna S. Raeder, *Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1009 (2007) (“However, *Crawford* . . . up[s] the ante for prosecutors who are trying to protect vulnerable young children who are unable or unwilling to testify at trial, because [it] defeat[s] the admission of testimonial statements, including the highly regarded best practice of videotaping multidisciplinary forensic interviews.” (italics added) (footnote omitted)); see also Stephanie McMahon, Note, *The Turbulent Aftermath of Crawford v. Washington: Where Do Child Abuse Victims’ Statements Stand?*, 33 HASTINGS CONST. L.Q. 361, 393 (2006) (“With the holding in *Crawford* and the requirement of the opportunity for cross-examination, it is unlikely that courts will allow the admission of otherwise inadmissible hearsay testimony. Instead, it is more likely that courts will seek an alternative method for child testimony, whereby a child is protected from the additional trauma caused by the physical presence of the defendant, while the defendant’s right of cross-examination is still protected.” (italics added)).

53. See Dellinger, *supra* note 5; see also *Courthouse Dogs Promote Justice*, *supra* note 49.

54. Leaser, *supra* note 10, at 945-47.



limited in their abilities”<sup>55</sup> and comfort hospital patients who “are awaiting major surgery, are depressed, or have not had a visitor in a while.”<sup>56</sup> Not surprisingly, after seeing these types of benefits in other settings, in 2004 “Ellie” became the first therapy dog to be used in a courtroom.<sup>57</sup> This Part first explores what type of training therapy dogs receive as well as what qualities the dogs need to possess before they are allowed into a courtroom. Second, it summarizes how these dogs are presently being used in courtrooms across the country. Finally, it discusses both the benefits for child witnesses as well as a potential benefit for defendants.

### A. Training

Before allowing a therapy dog to enter into the formal setting of a courtroom, the dog must be professionally trained, and it is recommended that an organization accredited by Assistance Dogs International (“ADI”) perform that training.<sup>58</sup> Typically the dog will attend obedience classes for a year-and-a-half as a puppy, followed by six months or more of training with a professional dog trainer.<sup>59</sup> After the dog is placed in a courthouse, the dog can continue to receive ongoing support and training from various ADI-accredited organizations.<sup>60</sup> Although the dog will interact with many members of the courthouse staff as well as the community’s public, it is recommended that the dog be assigned a primary caretaker or handler who is an employee of the courthouse.<sup>61</sup> This person would not only be physically responsible for the dog during non-workday hours but also financially responsible for the dog’s care.<sup>62</sup>

### B. The Use of Therapy Dogs in the Courtroom

Before a dog is allowed to enter a courtroom and accompany a witness to the stand, the dog must possess certain characteristics:

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55. *Nursing Homes*, THERAPY DOGS INT’L, <http://www.tdi-dog.org/OurPrograms.aspx?Page=Nursing+Homes> (last visited Aug. 21, 2013).

56. *Hospitals (General)*, THERAPY DOGS INT’L, <http://www.tdi-dog.org/OurPrograms.aspx?Page=Hospitals+%28General%29> (last visited Aug. 21, 2013).

57. Rebecca Wallick, *Dogs in the Courtroom*, BARK, <http://www.thebark.com/content/dogs-courtroom> (last visited Aug. 20, 2013).

58. See *Courthouse Dog Program Development*, COURTHOUSE DOGS, [http://courhousedogs.com/starting\\_program.html](http://courhousedogs.com/starting_program.html) (last visited Aug. 21, 2013); see also *Home*, ASSISTANCE DOGS INT’L, <http://www.assistedogsinternational.org/> (last visited Aug. 21, 2013) (“Assistance Dogs International (ADI) is a coalition of not for profit assistance dog organi[z]ations. The purpose of ADI is to improve the areas of training, placement, and utilization of assistance dogs, as well as staff and volunteer education . . .”).

59. *Courthouse Dog Program Development*, *supra* note 58.

60. *Id.*

61. *Best Practices for the Use of Courthouse Dogs*, COURTHOUSE DOGS, [http://courhousedogs.com/starting\\_best\\_practices.html](http://courhousedogs.com/starting_best_practices.html) (last visited Aug. 21, 2013).

62. *Id.*

- They must be quiet, unobtrusive, and emotionally available for the witness when the need arises
- The dogs should be able to sit or lie down beside the witness for an extended period of time
- The dogs should not engage in any behavior that would distract the witness or other people in the courtroom
- The dogs should be able to assist the witness for as long as necessary.<sup>63</sup>

Further,

[f]or the dog to be most successful in supporting the witness, the dog and witness should have had an opportunity to bond and interact with one another during pre-trial interviews. This will give the dog an opportunity to “read” the emotional state of the witness and make [the witness] more comfortable being in one another’s presence during this stressful time.<sup>64</sup>

Successful therapy dog programs have utilized dogs that possess these characteristics, as well as those that have participated in the above-mentioned training process.

### *C. Jurisdictions Presently Using Therapy Dogs*

Currently, twenty-one states, including Indiana, have implemented some type of courthouse dog program.<sup>65</sup> These dogs are used not only in the courtroom but also to help witnesses in the interview setting and in drug courts.<sup>66</sup>

1. *Washington: The Beginnings of the Program.*—Ellen O’Neill-Stephens had “an ‘Aha!’ moment” in 2003, after observing a boy, sexually abused by his mother, latch onto Jeeter, Ellen’s son’s service dog.<sup>67</sup> Previously, the boy had been reluctant to testify against his mother; however, once introduced to Jeeter, the boy told his entire story to attorneys and police.<sup>68</sup> Jeeter continued to work with other children and eventually began to accompany child witnesses to the

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63. *Using a Courthouse Dog in the Courtroom*, COURTHOUSE DOGS, [http://courthousedogs.com/settings\\_courtroom.html](http://courthousedogs.com/settings_courtroom.html) (last visited Aug. 21, 2013).

64. *Id.*

65. *Where Courthouse Dogs Are Working*, COURTHOUSE DOGS, [http://www.courthousedogs.com/settings\\_where.html](http://www.courthousedogs.com/settings_where.html) (last visited Aug. 21, 2013). The states that currently have a courthouse dog program are Arizona, California, Colorado, Hawaii, Idaho, Indiana, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Washington. *Id.*

66. *Using a Courthouse Dog in a Forensic Interview*, COURTHOUSE DOGS, [http://courthousedogs.com/settings\\_forensic\\_interview.html](http://courthousedogs.com/settings_forensic_interview.html) (last visited Aug. 21, 2013); *Using a Courthouse Dog in Drug, Mental Health, and Veterans Treatment Courts*, COURTHOUSE DOGS, [http://courthousedogs.com/settings\\_treatment\\_court.html](http://courthousedogs.com/settings_treatment_court.html) (last visited Aug. 21, 2013).

67. Wallick, *supra* note 57.

68. *Id.*

stand: “When the Lab/golden retriever sensed the girls [(two seven-year-old victims of sexual molestation)] getting tense, he put his head on their laps. One rubbed his back throughout the cross-examination. . . . It ended with guilty verdicts on two assault counts.”<sup>69</sup>

2. *Other States.*—After the success of Jeeter in Washington, other states began to follow suit and obtain their own therapy dogs. For example, in Maryland, after a five-year-old child witness and victim of child abuse was introduced to Buddy, a therapy dog, she agreed to testify against her perpetrator.<sup>70</sup> Not only have the therapy dogs helped child witnesses agree to testify, but the dogs have actually calmed the nerves and eased some of the stresses children can feel while testifying in a courtroom. In Marin County, California, a judge allowed Vivian, a therapy dog, to lie at the feet of a four-year-old child abuse victim during his testimony.<sup>71</sup>

It was the first time a Bay Area judge had allowed prosecutors to use a courthouse dog, a canine trained to soothe the nerves of jittery witnesses, usually children but sometimes adults. . . . [T]he boy testified for an hour, reaching down to pet Vivian at particularly stressful moments. He later hugged the [three]-year-old dog and told her he couldn’t wait to see her when he returned.<sup>72</sup>

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69. Casey McNerthney, *Dogs Give Prosecutors a Hand in Difficult Cases*, SEATTLE PI (Sept. 2, 2007, 10:00 PM), <http://www.seattlepi.com/local/article/Dogs-give-prosecutors-a-hand-in-difficult-cases-1248466.php>.

70. Pierre Thomas & Jack Date, *Victims Find a ‘Buddy’ at the Courthouse*, ABC NEWS (June 25, 2008), <http://abcnews.go.com/TheLaw/story?id=5244356&page=1> (“Buddy [the dog] made the judicial system less intimidating for Lexi. She felt more comfortable talking to prosecutors and agreed to testify. Faced with that prospect, [the defendant] opted out of a trial and the court convicted him of a child abuse charge.”); see also Charlie Ban, *Dog Puts Victims at Ease in Courtroom*, 43 NACO CNTY. NEWS (Feb. 14, 2011), <http://www.naco.org/newsroom/countynews/Current%20Issue/2-14-11/Pages/ModelProgramsformtheNation%27sCounties.aspx> (“[In Arizona,] [w]hen an eight-year-old victim’s reticence to enter a courtroom to face a perpetrator led to a mistrial, personnel in the county attorney’s office looked for a way to bolster her confidence and sense of security. They found it—two feet from the ground, standing on four legs—and with the aid of Sam, a Golden Retriever-Irish Setter mix, the victim was able to take the stand during the retrial, which resulted in a conviction.”).

71. Justin Berton, *Courtroom Canines Calm Kids, Raise Bias Fears*, S.F. CHRON. (Dec. 26, 2009, 4:00 AM), [http://articles.sfgate.com/2009-12-26/news/17461761\\_1\\_new-dog-abuse-case-vivian](http://articles.sfgate.com/2009-12-26/news/17461761_1_new-dog-abuse-case-vivian).

72. *Id.* See also *Rape Victim, 12, Describes Horrific Attack*, WFTV.COM (Oct. 28, 2009, 5:53 PM), <http://www.wftv.com/news/news/rape-victim-12-describes-horrific-attack/nFB4X/> (“In an effort to calm the [twelve]-year-old rape victim, prosecutors [in Florida] brought in a golden retriever lab mix and he stayed where she could see him the whole time she was on the witness stand.”).

*D. Why Go Dog: Benefits to the Child Witness*

The reasons why so many states have implemented some form of a therapy dog program to assist child witnesses is rooted in scientific findings that dogs can have measurable benefits on human beings. Dogs have been proven to reduce anxiety and arousal by lowering blood pressure<sup>73</sup> and slowing the heart rate.<sup>74</sup> They have also been beneficial in decreasing depression and loneliness, as well as increasing feelings of safety and security.<sup>75</sup> With children, the presence of a dog has been shown to lower behavioral distress as well as improve their physical and emotional health.<sup>76</sup>

Particularly relevant to child witnesses is the idea that “dogs have an almost sixth sense capacity to sense and alleviate emotional tension in humans.”<sup>77</sup> The dogs seem to “pick up on . . . emotional neediness and . . . can almost anticipate the user’s needs.”<sup>78</sup> Judi Johnson, a former prosecutor and the former executive director of the Marion County Child Advocacy Center, argued that using therapy dogs to aid children testify “was really the only thing I’d seen in [sixteen] years of prosecution that actually was effective in reducing stress and comforting victims during the criminal justice process.”<sup>79</sup> Other prosecutors agree and have no doubt that these dogs are helping children “cope with the stress of testifying.”<sup>80</sup> Parents of child witnesses are thankful for the benefits as well: “Without Jeeter [two young, female victims of sexual molestation] never would have testified. . . . They never would have said a word. They wouldn’t be where

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73. Karen Allen, *Are Pets a Healthy Pleasure? The Influence of Pets on Blood Pressure*, 12 CURRENT DIRECTIONS PSYCHOL. SCI. 236, 238 (2003), available at <http://psychcentral.com/blog/images/allen2003paper.pdf>. This study divided stockbrokers into two groups: one group adopted an animal from a shelter, and one group did not. *Id.* Results showed that when both groups were under stress, the group that adopted a dog had blood pressure increases less than half as often as the other group. *Id.*

74. Judy L. Jenkins, *Physiological Effects of Petting a Companion Animal*, 58 PSYCHOL. REP. 21, 21 (1986). This study measured blood pressure and heart rates of pet-owners while they read and while they petted their animals. *Id.* Results showed reduced rates while participants were petting their animals. *Id.* See also Sunny Lyn Nagengast et al., *The Effects of the Presence of a Companion Animal on Physiological Arousal and Behavioral Distress in Children During Physical Examination*, 12 J. PEDIATRIC NURSING 323, 323 (1997) (finding reduced heart rate and arterial pressure when a dog was present during an exam).

75. Erika Friedmann, *The Role of Pets in Enhancing Human Well-Being: Physiological Effects*, in THE WALTHAM BOOK OF HUMAN-ANIMAL INTERACTION: BENEFITS AND RESPONSIBILITIES OF PET OWNERSHIP 33, 39 (I. Robinson ed., 1995), available at <http://www.petpartners.org/document.doc?id=48>.

76. Nagengast et al., *supra* note 74.

77. Leaser, *supra* note 10, at 962-63 (internal quotation marks omitted).

78. Dellinger, *supra* note 5, at 177 (alterations in original).

79. Montgomery, *supra* note 7.

80. *Dog’s Presence Calms Girl Testifying About Sex Assault*, N.Y. L.J. (June 20, 2011), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202497825279>.

they are now.”<sup>81</sup>

#### *E. Why Go Dog: Benefit to the Defendant?*

Along with the many benefits therapy dogs offer to child witnesses, some argue that the dogs offer a benefit to criminal defendants as well. For one, having the child witness testify live in court, rather than having the child testify via closed circuit television or videotape, better preserves defendants’ Sixth Amendment rights.<sup>82</sup> “[T]estimony in open court by the complaining witness is legally preferable to the defendant whose confrontation rights are less likely to be impeded if the witness is present.”<sup>83</sup> Further, live testimony is generally deemed to be more reliable because of the ability to cross-examine the witness. “[T]he Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>84</sup> Finally, having the child witness testify live in court gives the jury the opportunity to observe the child and evaluate his or her credibility. “[T]he oath and the courtroom environment quell at least casual impulses to deceive, [and] the visible demeanor of the witness provides clues [to a jury] if she tries to mislead . . . .”<sup>85</sup> These benefits to defendants, however, are outweighed by the prejudicial effect the presence of therapy dogs has in the courtroom.

### III. PITFALLS FOR CRIMINAL DEFENDANTS

While it is difficult to dispute the benefits therapy dogs can bring, many believe that the infringement on defendants’ rights outweighs these benefits. This Part first focuses on how the presence of the dog might bias a jury against criminal defendants. Second, it addresses how receiving the aid of a therapy dog might influence a child’s suggestibility. Third, it recognizes some of the inconsistencies that still exist when utilizing therapy dogs in the courtrooms and how these inconsistencies are unfair to criminal defendants. Finally, it summarizes the difficulties criminal defendants will face when preparing for an appeal because of the presence of the therapy dog at trial.

#### *A. Jury*

All criminal defendants have “the right to a speedy and public trial, by an

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81. McNerthney, *supra* note 69.

82. Dellinger, *supra* note 5, at 178.

83. *Id.* See also *Cox v. State*, 937 N.E.2d 874, 878 (Ind. Ct. App. 2010) (“[O]ur system of justice clearly prefers live, in-court testimony given under oath, as evidenced in part by the Confrontation Clause . . .”).

84. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

85. MUELLER & KIRKPATRICK, *supra* note 22, at 108.

impartial jury.”<sup>86</sup> These selected men and women are present for the entire trial, weigh the evidence against the defendant, assess the credibility of the witnesses, and eventually render a verdict, guilty or not guilty.<sup>87</sup> The fate of many criminal defendants, therefore, lies in the hands of these selected men and women. Because of this great responsibility, it is imperative that nothing collateral to the evidence be present in the courtroom that would unfairly prejudice the jury against the defendant.<sup>88</sup>

*1. Believability.*—The Supreme Court has recognized that “the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.”<sup>89</sup> The presence of a therapy dog, however, disrupts that atmosphere and unfairly prejudices the jury against the defendant. Defense attorneys are beginning to make this exact argument in appealing convictions from trials where therapy dogs were present.<sup>90</sup> Timothy Dye was convicted of burglarizing the home of Douglas Lare, a developmentally disabled adult who resided in Washington.<sup>91</sup> Lare was allowed to testify with the aid of Ellie, a therapy dog,<sup>92</sup> which Dye’s attorneys argued was an infringement of their client’s rights:

A juror could easily come to the conclusion that Ellie the dog was present to protect the complainant from the accused, which would only be necessary, were he guilty. Alternatively, the dog’s presence could be seen as comforting a witness made to feel vulnerable, specifically because he was in the presence of the person who committed a crime against him. Either analysis—both improper—suggests the guilt of the accused, and the jury instruction given by the trial court in no way ameliorated this problem.<sup>93</sup>

In fact, recognizing this exact problem, prosecutors are urged not to use the term “therapy dog” when implementing this type of program in their courthouses.<sup>94</sup> Courthouse Dogs, LLC provides on their website to

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86. U.S. CONST. amend. VI.

87. See Daniel P. Collins, *Making Juries Better Factfinders*, 20 HARV. J.L. & PUB. POL’Y 489, 494 (1997) (“[T]he traditional reason for having juries is to promote impartial, factually accurate decisions about criminal guilt.”).

88. See *id.* at 491 (“Indeed, the United States Supreme Court, in its cases discussing the nature of the right to a jury trial, has tended to emphasize the jury’s role as an *impartial factfinder*.” (emphasis added)).

89. *Estes v. Texas*, 381 U.S. 532, 540 (1965).

90. See Petition for Review, at \*3-12, *State v. Dye*, No. 87929-0, 2012 WL 7767256 (Wash. Oct. 1, 2012).

91. *Id.* at \*1-2.

92. *Id.* at \*2.

93. Brief of Appellant at 12-13, *State v. Dye*, 283 P.3d 1130 (Wash. Ct. App. 2012) (No. 66549-9-1), available at <http://courthousedogs.com/pdf/CourthouseDogs-DyeAppeal.pdf>.

94. Courthouse Dogs, LLC, *Using a Courthouse Facility Dog in the Courtroom*, COURTHOUSE DOGS (2008), <http://www.courthousedogs.com/pdf/Using%20a%20Dog%20in%20the%20Courtroom.pdf>.

[a]void using the term “therapy dog” because the use of this term may create grounds for a mistrial or raise an issue on appeal. . . . A defense attorney could argue that the use of the term “therapy dog” by the judge or the prosecutor implies to the jury that the witness is in fact a victim in need of therapy and could be construed as a comment on the evidence.<sup>95</sup>

Instead, the preferred neutral term is “courthouse dog” or “courtroom dog.”<sup>96</sup> No matter what the dog is titled, however, the mere presence of the dog suggests the guilt of the defendant, a suggestion that is strictly prohibited in our criminal justice system.

2. *Disregard for Contradictory Testimony.*—In a criminal trial, the jury’s role is to weigh the evidence accordingly.<sup>97</sup> This becomes difficult when a dog is present because of the novelty of having dogs in the courtroom. The presence of a dog could make the child’s testimony stand out in the jury’s mind to the exclusion of other testimony that might contradict what the child said.<sup>98</sup> This argument was raised by defense counsel for Victor Tohom in arguing against allowing Rosie to aid the child witness.<sup>99</sup> “The defen[se] argue[d] that the use of the dog . . . would distract from otherwise contradictory evidence that negates the truth of the witness’s accounting, as raised by the defense.”<sup>100</sup>

3. *Inability to Assess the Credibility of the Witness.*—Part II(D) of this Note discusses many of the benefits dogs can have on easing the stress of humans. Although the dogs have benefits in hospital or rehabilitative settings, the legal setting poses different challenges. “[T]his very feature of the canine-human relationship [that is, the fact that dogs have been shown to ease stress in humans] is troubling in the fact-finding context, where a certain level of emotional tension and stress is integral to the process of confrontation.”<sup>101</sup> Unfortunately, regardless of the oath to tell “the truth, the whole truth, and nothing but the truth[,]”<sup>102</sup> witnesses lie on the stand, and it is the jury’s job to assess whether or not the witness is telling the truth.<sup>103</sup> The presence of the dog, however, makes this difficult.

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20the%20Courtroom.pdf [hereinafter Courthouse Dogs, LLC, *Dog in the Courtroom*].

95. *Id.*

96. *Id.*

97. See Collins, *supra* note 87, at 490-91 (“[T]he Framers were concerned that an individual judge might not fairly and accurately weigh the evidence in a case. By contrast, a jury was thought to reflect the common sense of the community and thus would not suffer from the biases or idiosyncracies [sic] of an individual judge.”).

98. See Decision and Order, *supra* note 16.

99. See *id.*

100. *Id.*

101. Brief of Appellant, *supra* note 93, at 10.

102. IND. R. EVID. 603 (“Before testifying, every witness shall swear or affirm to testify to the truth, the whole truth, and nothing but the truth.”).

103. See *Williams v. State*, 749 N.E.2d 1154, 1156 (Ind. 2001) (“[I]t was within the jury’s province to judge the credibility of each witness.”).

Since defense counsel clearly cannot cross-examine the dog as to the source of the witness's stress—truth-telling or subterfuge—the jury is free to interpret the dog's signals as testimony from . . . an unsworn witness that the victim is upset because he or she is telling the truth.<sup>104</sup>

4. *Sympathy*.—Arguably one of the biggest fears defendants have is “that the use of the dog [will] create a natural empathy towards the witness.”<sup>105</sup> It is not difficult to imagine a scenario in which jurors exude sympathy for a child victim of sexual abuse who needs a therapy dog to assist him or her in order to endure testifying. Some have tried to argue that having a dog accompany a child to the witness stand is no different than allowing a child to bring a teddy bear or doll to the witness stand as discussed in Part I(B)(1) of this Note; however, as Joel Schumm, a professor at Indiana University Robert H. McKinney School of Law, states, “[A] dog is completely different.”<sup>106</sup> He explains that “[a] lot of people love dogs, and that could influence their ability to be objective.”<sup>107</sup> Dogs are beloved in our society and are even known as “man's best friend.”<sup>108</sup> Further, many members of a jury will be able to personally relate to having a dog and the comfort that a dog can provide. These issues raise questions about how, and if, therapy dogs should be addressed during voir dire.

5. *Jury Selection*.—Because the use of therapy dogs in the courtroom is so new, questions still remain about how the jury should be informed about the dog and if this should happen during voir dire or later in the trial. The first question is who gets to decide: the prosecutor, the defense attorney, or the judge? Courthouse Dogs, LLC believes this decision should be left to the defense attorney and states, “It is very important that the defense attorney be given deference regarding if or how this issue should be addressed before a jury.”<sup>109</sup>

Some “recommend[] that the issue of the dog accompanying the witness should not be addressed in front of the jury during voir dire or in an instruction because it draws more attention to why the witness would need the dog's presence in the courtroom.”<sup>110</sup> In a recent Idaho case, a judge ruled that the therapy dog could be used as long as the jury did not detect the dog, preventing jurors from being “unduly influenced by a child who has a dog comfort her on the witness stand.”<sup>111</sup>

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104. Brief of Appellant, *supra* note 93, at 10.

105. Decision and Order, *supra* note 16.

106. Montgomery, *supra* note 7.

107. *Id.*

108. Marsha Walton, *15,000 Years with Man's Best Friend*, CNN.COM (Nov. 22, 2002, 10:35 PM), <http://edition.cnn.com/2002/TECH/science/11/21/coolsc.dogorigin/>.

109. Courthouse Dogs, LLC, *Dog in the Courtroom*, *supra* note 94.

110. *Id.*

111. Patrick Orr, *Ada County is the First in Idaho to Allow Service Dogs to Comfort Children Who Testify in Criminal Trials*, STATESMANJOURNAL (Dec. 24, 2011), <http://community.statesmanjournal.com/blogs/petadvice/2012/01/08/happy-sunday-as-dogs-help-children-cope-with-court-appearances/>.



The jurors never even knew. Sunday [the therapy dog] sat still and silent under the witness stand, close enough so Ariaah [an eleven-year-old witness who testified against the man who assaulted her mother] could hold her leash and touch her, but out of sight of the jury. Ariaah and Sunday were brought in and out of the courtroom while the jury was out of the room. Ariaah got through her testimony, and Sunday was perfectly behaved.<sup>112</sup>

Another possible fear is that announcing to the jury that a dog will be present during the trial could prove to be a distraction for jurors, taking their focus away from the trial because they will constantly be wondering when the dog will enter the courtroom and how the dog will act. These are valid concerns; however, practically, shielding the dog might not be an option in all courtrooms—some might not have a large enough witness stand, or even a stand at all to prevent detection.

Whether or not the jury is informed ahead of time, the judge will most likely offer a limiting instruction regarding the dog.<sup>113</sup> The jury should not be permitted to infer the guilt of the defendant because of the presence of the dog. In Timothy Dye’s trial,<sup>114</sup> the judge instructed the jury that it “should not draw any conclusions based on the presence of this service dog.”<sup>115</sup> However, even with this limiting instruction, the fear remains that the jury will infer the defendant’s guilt from the dog’s presence and will not simply recognize the presence of the dog as an aid to the child witness in testifying.<sup>116</sup>

If the attorneys and judge decide that the jury should be informed of the presence of the dog during voir dire, new questions arise that may be appropriate to ask the potential jurors. One relevant question may be whether or not the jurors have or had an affinity for dogs. If so, this could perhaps be a basis for a dismissal of the potential juror due to bias. In some areas of the country, however, the number of “dog lovers” may pose a problem for defense attorneys. In *State v. Dye*, for example, the judge stated that “[t]his being Seattle, you’re going to probably get a near unanimous [y]es on the pets and the dog lovers.”<sup>117</sup>

### *B. Suggestibility of Child Witnesses*

Along with potentially creating a biased jury, defendants also have to worry

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112. *Id.*

113. IND. R. EVID. 105 (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly.”).

114. See discussion *supra* Part III(A)(1).

115. Brief of Appellant, *supra* note 93, at 12 (internal quotation marks omitted).

116. See *Defense Objections and Outline for Trial Brief*, COURTHOUSE DOGS, [http://courthousedogs.com/legal\\_brief.html](http://courthousedogs.com/legal_brief.html) (last visited Aug. 20, 2013) (“The dog is comforting the witness because the defendant committed the crime against the witness.”).

117. Brief of Appellant, *supra* note 93, at 12.

about how the presence of a dog might impact the suggestibility of child witnesses. “Suggestibility means that children’s memories, thoughts, and statements are easily influenced by others, especially adults, regardless of their truthfulness.”<sup>118</sup> In any trial in which children are testifying, suggestibility is a concern of defendants.<sup>119</sup> It has been well documented that “children yearn for acceptance and approval, especially from adults, and may provide inaccurate answers when they perceive a positive response.”<sup>120</sup> When dogs are introduced to children who later take the stand, however, another layer of complexity is added. As Bonnie Marmor, a California Public Defender stated, “Child witnesses who are nervous are often allowed to cuddle a favorite toy or blanket . . . but to provide them with a special prize—a new dog—and praise them each time they come and testify is profoundly troubling and can undermine the truth.”<sup>121</sup>

### C. Practical Considerations—Who, When, and How?

Further complicating matters are the divergent uses and inconsistencies that exist in implementing and utilizing a courthouse dog program. Being such a new phenomenon, no consistent standards exist for judges to use in determining who gets the aid of a therapy dog, when to allow the dog to accompany a witness to the stand, and how to actually make that determination.<sup>122</sup> This lack of consistency is inherently prejudicial to defendants and could ultimately change their fate at trial.

The first question that remains unanswered is who gets the aid of a therapy dog. Many jurisdictions that have enacted this program use therapy dogs to aid child witnesses;<sup>123</sup> however, at least one state allows therapy dogs to aid adults

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118. Grearson, *supra* note 18, at 488.

119. Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 34-35 (2000) (“Young children have historically been viewed as particularly vulnerable to suggestion. . . . [S]cholars agree that young children are more susceptible than older individuals to leading questions and pressures to conform to the expectations and desires of others. . . . The vulnerabilities of young children have far-reaching implications for the juvenile and criminal justice systems. Arguably, these vulnerabilities may affect . . . whether a criminal conviction based principally on [the child’s] testimony should be allowed.” (footnote omitted)).

120. Grearson, *supra* note 18, at 488.

121. Berton, *supra* note 71 (internal quotation marks omitted).

122. See Dellinger, *supra* note 5, at 190 (noting that “state laws or local court rules *could* include guidelines for when using canines in court is permissible” (emphasis added)).

123. See, e.g., Randall Beach, *Brandford Therapist’s Courtroom Dog Calms Witness in Child Sex Assault Case in Hartford*, SHORELINE TIMES (Sept. 27, 2011), <http://www.shorelinetimes.com/articles/2011/09/27/news/doc4e80766181e33597066824.txt?viewmode=fullstory> (discussing an eight-year-old victim of sexual abuse in Connecticut); Glaberson, *supra* note 1 (fifteen-year-old rape victim); Orr, *supra* note 111 (discussing an eleven-year-old witness testifying about an attack on her mother in Idaho).

with intellectual disabilities.<sup>124</sup> Still others argue that therapy dogs should be “available to any witness who requests one.”<sup>125</sup> Some argue that because the trial will certainly be emotionally taxing and stressful for criminal defendants, they should get the aid of a dog, especially if they choose to take the stand in their own defense.<sup>126</sup> Although arguments can be made for each of these arrangements, these inconsistencies create difficulties for criminal defendants in not knowing whether a therapy dog will be allowed during their trials.

The final questions that have yet to be answered are when witnesses should qualify for the aid of a therapy dog and what standard judges should use in evaluating the request. Typically, a prosecutor will have to make a motion requesting the use of a therapy dog for his or her witness and support that motion with a brief demonstrating the witness’s need for a therapy dog and the legal precedent that allows witnesses to have support while testifying.<sup>127</sup> The lack of a clear standard for prosecutors to use when making this determination, however, can lead to abuse. It may be difficult to accurately determine the true ability of a witness, especially a child witness, to testify— “[p]rosecutors, parents, and therapists often underestimate a child’s emotional ability to testify in court.”<sup>128</sup> There is a fear that prosecutors will push for the use of a therapy dog to aid the child witness in order to create sympathy in the jury, even in cases where a witness could be able to testify without the aid of a therapy dog.<sup>129</sup> Of course, defense counsel will have an opportunity to object and raise arguments for why the use of a therapy dog is prejudicial; however, ultimately the decision is left to the sound discretion of the trial judge.<sup>130</sup>

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124. See Brief of Appellant, *supra* note 93, at 3-4.

125. Terry Campos, *Practical Tips and Legal Strategies for Protecting Child-Victims While Testifying*, NCVLI NEWS 12, 15 n.24 (10th ed. 2008), available at [http://issuu.com/ncvli/docs/ncvli\\_newsletter\\_10th\\_edition?mode=embed&layout=http%3A%2F%2Fskin.issuu.com%2Fv%2Fflight%2Flayout.xml&showFlipBtn=true](http://issuu.com/ncvli/docs/ncvli_newsletter_10th_edition?mode=embed&layout=http%3A%2F%2Fskin.issuu.com%2Fv%2Fflight%2Flayout.xml&showFlipBtn=true) (“Testifying in court is an unfamiliar and stressful event for most people, these dogs are used in the courthouse setting to help reduce witness anxiety and are available to *any witness who requests one*.” (emphasis added)).

126. See T.M. Uhlman & N.D. Walker, *A Plea is No Bargain: The Impact of Case Disposition on Sentencing*, 60 SOC. SCI. Q. 218, 218 (Sept. 1979) (finding that “anxieties, personal stress, humiliation, and publicity surrounding the trial process are so great that even minimal sentencing rewards may be sufficient to make the defendant opt for a plea in exchange for a quick and certain settlement”).

127. See *Defense Objections and Outline for Trial Brief*, *supra* note 116 (offering a sample brief that could prosecutors could use).

128. Grearson, *supra* note 18, at 490.

129. See *State v. Palabay*, 844 P.2d 1, 5, 7 (Haw. Ct. App. 1992) (finding “no evidence on the record to indicate the compelling necessity for Complainant to hold a teddy bear while testifying” after defense counsel argued “that the teddy bear was a ‘blatant prosecutorial ploy to make the child even more appealing and attractive than she already is’”).

130. See *Legal Support for the Use of a Courthouse Facility Dog to Assist Testifying Crime Victims and Witnesses: A Review of the Evidence Rule, Case Law, State Statutes, and Legislation*, COURTHOUSE DOGS, [http://courthousedogs.com/legal\\_support.html](http://courthousedogs.com/legal_support.html) (last visited Aug. 20, 2013);

In determining whether or not the therapy dog is needed for the witness, the trial judge will have to strike a balance between a defendant's constitutional rights and a witness's need for an environment where he or she can testify comfortably and not endure any additional emotional trauma.<sup>131</sup> Therefore, in order to determine if a therapy dog is needed, prosecutors should have to meet certain standards, showing that the use of the dog is appropriate. Prosecutors should rely on standards similar to those used in their state in determining if a child can testify via two-way closed circuit television, with the aid of a doll, or with an accompanying adult attendant. Some standards that currently exist for these purposes include the following: (1) "[if] the child witness is unable to testify because of fear caused by the presence of the defendant;"<sup>132</sup> (2) "if the presiding officer makes specific findings that the child witness would be unable to testify face-to-face with the defendant without suffering unreasonable and unnecessary mental or emotional harm;"<sup>133</sup> or (3) "if the judge or presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant."<sup>134</sup>

Indiana has adopted a Protected Person Statute,<sup>135</sup> which allows certain witnesses' testimony to be entered via videotape or as a prior statement after a showing that the witness is unavailable. Protected persons are defined as victims of certain crimes—such as sex crimes, human trafficking, and fraud—that are children under the age of fourteen or individuals with a mental disability.<sup>136</sup> Further, the use of a prior statement or videotape can only be used when the witness is unavailable for one of the following reasons:

- (i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.
- (ii) The protected person cannot participate in the trial for medical reasons.
- (iii) The court has determined that the protected person is incapable of understanding the nature and obligation of an oath.<sup>137</sup>

An underlying theme emerges from these existing standards: emotional

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*see also* IND. R. EVID. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . .").

131. *See* *State v. Cliff*, 782 P.2d 44, 47 (Idaho Ct. App. 1989).

132. MONT. CODE ANN. § 46-16-229(1)(a) (2013).

133. N.M. STAT. ANN. § 38-6A-5(A)(2) (2013).

134. OKLA. STAT. tit. 12, § 2611.7(A)(2) (2013).

135. IND. CODE. § 35-37-4-6 (2013).

136. *Id.* § 35-37-4-6(c).

137. *Id.* § 35-37-4-6(e)(2)(B).

trauma. Although a broad standard is needed to encompass the ranging disabilities witnesses could face when testifying in court, this ambiguous standard creates inconsistencies that still remain. Clear standards need to be in place outlining when it is appropriate for witnesses to have the aid of a therapy dog during their testimony in order to maintain the fundamental guarantees of fairness for criminal defendants.

#### *D. Appeals*

The presence of therapy dogs in courtrooms creates numerous issues for defendants to raise at trial and, eventually, to argue on appeal:

- Jurors that like dogs will like the witness more than the defendant.
- The State orchestrated the presence of the dog in order to engender sympathy for the complainant.
- If the dog physically responds to a witness exhibiting signs of stress, the jury cannot tell if the dog is responding to stress produced by lying or stress produced by recounting a traumatic experience.
- . . . .
- The dog is comforting the witness because the defendant committed the crime against the witness.
- . . . .
- The presence of the dog bolsters the credibility of the witness.<sup>138</sup>

These arguments, in order to be preserved on appeal, must be raised at trial—“[t]he failure to raise an issue at trial waives the issue on appeal.”<sup>139</sup> Defense attorneys, however, may find difficulties in how to create the record so these issues are preserved for appeal.

It is well established that when an appeal is filed, a complete record of the proceedings below is needed.<sup>140</sup> The issue, however, is in creating that record. In the *Dye* appeal, for example, prosecutors argued, “The record demonstrates that the presence of the dog did not interfere with cross-examination, which was lengthy and thorough. The record also demonstrates that the jury followed the trial court’s instruction not to consider the dog in any way.”<sup>141</sup> Perhaps this is true; however, it is also possible that the defense attorney did not know how to illustrate that the therapy dog caused his client to experience an unfair trial.

For example, should defense attorneys take a picture of the dog in order to illustrate its cuteness and how this could potentially cause the jury to find the witness more appealing? Do defense attorneys need to seek admission of physical evidence—written, via a photograph, or with a video camera—of the

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138. *Defense Objections and Outline for Trial Brief*, *supra* note 116.

139. *Wilson v. State*, 931 N.E.2d 914, 919 (Ind. Ct. App. 2010).

140. IND. R. APP. P. 27 (“The Record on Appeal shall consist of the Clerk’s Record and all proceedings before the trial court or Administrative Agency . . .”).

141. Brief of Respondent at 16, *State v. Dye*, 283 P.3d 1130 (Wash. Ct. App. 2012) (No. 66549-9-1), available at <http://courthousedogs.com/pdf/CourthouseDogs-DyeResponse.pdf>.

facial expressions of jurors, to show how they reacted to seeing the dog and hearing the witness's testimony? Or perhaps defense attorneys need to retain expert psychologists to observe jurors during trial, analyze any effect the therapy dog might have had, and then testify to their results, placing their analysis in the record for appeal. These questions remain as appeals begin to be filed in various states.<sup>142</sup>

#### IV. SUGGESTIONS FOR INDIANA

In light of the prejudices and questions that still remain, it seems clear that concrete, well-defined standards should emerge in order to ensure fairness and consistency for criminal defendants at trial. This Part addresses how Indiana should proceed in utilizing therapy dogs in its courtrooms while maintaining a balance between vulnerable witnesses and criminal defendants' constitutionally protected rights. First, it offers a brief overview of Indiana's therapy dog program thus far. Second, it proposes recommendations for Indiana, including proposed language for a new rule of criminal procedure that contains safeguards Indiana should enact to protect the rights of criminal defendants while still addressing the special needs of child witnesses.<sup>143</sup>

##### *A. Indiana's Therapy Dog Program Thus Far*

Indiana has had two different therapy dogs, Ellie and Mya, working with various legal organizations over the past few years.<sup>144</sup> Mya previously worked with Judi Johnson in the Boone County Special Assault Unit<sup>145</sup> and currently works with Johnson in her role as a volunteer Court Appointed Special Advocate.<sup>146</sup> Ellie currently serves as the canine companion for the Indiana Canine Companion Alliance ("INCCA"), a division of the Indiana Coalition Against Sexual Assault ("INCASA"), located in Indianapolis, Indiana.<sup>147</sup> INCCA's "mission is to comfort children and adults who have been the victim of violence and/or sexual abuse[.]" and the "program is modeled after similar programs in other states."<sup>148</sup> Ellie currently assists victims of sex crimes "during [the] initial interview, follow-up interviews, counseling sessions, family meetings and throughout the criminal justice process."<sup>149</sup> INCCA is hoping that more therapy dogs, like Ellie, will soon be seen in other areas around the state of Indiana—"INCCA's role is not to train dogs like Ellie, but rather to help others

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142. *Defense Objections and Outline for Trial Brief*, *supra* note 116.

143. The cases cited in this Note that have allowed therapy dogs to aid witnesses have all been criminal. Whether or not therapy dogs should be used in civil cases is beyond the scope of this Note.

144. Montgomery, *supra* note 7.

145. O'Neill-Stephens, *supra* note 6.

146. Montgomery, *supra* note 7, at 17.

147. INCCA, INCASA, <http://www.incasa.org/incca/> (last visited Aug. 20, 2013).

148. Montgomery, *supra* note 7.

149. INCCA, *supra* note 147.

around the state set up similar programs.”<sup>150</sup> Given that therapy dog programs appear likely to be implemented in other Indiana cities, it is imperative that Indiana adopts statewide standards regarding the use of these dogs.

### *B. Proposed Language*

Indiana needs clear guidelines regarding the use of therapy dogs to ensure “some standard of consistency [in order not to] end up with a patchwork of different rules around the state.”<sup>151</sup> A new rule of criminal procedure would help accomplish this goal. The Indiana Supreme Court has the power to adopt rules that govern practice and procedure for lower courts pursuant to its supervisory authority under the Indiana Constitution<sup>152</sup> and the Indiana Code.<sup>153</sup> In “the interest[] of justice and sound judicial administration[,]”<sup>154</sup> the Indiana Supreme Court should consider amending the Indiana Rules of Criminal Procedure to add a rule governing the use of therapy dogs in Indiana courtrooms.

1. *Procedure*.—At least thirty days prior to the start of the trial, Indiana prosecutors need to be required to file a motion with the judge, accompanied by a brief, requesting that an ADI-accredited therapy dog accompany their witness to the stand. This ensures that opposing counsel will have adequate time to prepare for the presence of a therapy dog and make opposing motions accordingly. A hearing should be held to determine if the witness is (1) eligible for a therapy dog and (2) if the eligible witness qualifies for the aid of a therapy dog. Again, this is an opportunity for the prosecution to present its case to the judge, the ultimate decision maker, and a chance for the defense attorney not only to oppose the dog but also to ensure that, if a therapy dog is used, certain safeguards are present to avoid great prejudice.

2. *Eligibility*.—Because Indiana has already enacted a “[P]rotected [P]erson” Statute,<sup>155</sup> outlining when alternatives to live testimony are allowed, it is logical to use this standard to determine who should be eligible for the aid of a therapy dog. Therefore, the proposed language for the new rule of criminal procedure could be as follows:

Those eligible for the assistance of a courthouse dog during live testimony include:

- (1) Children under the age of fourteen; or

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150. Montgomery, *supra* note 7.

151. *Id.* (quoting Professor Joel Schumm, Indiana University Robert H. McKinney School of Law).

152. See IND. CONST. art. VII, § 4 (“The Supreme Court shall have no original jurisdiction except in . . . supervision of the exercise of jurisdiction by the other courts of the State.”).

153. See IND. CODE § 34-8-1-3 (2013) (“The supreme court has authority to adopt, amend, and rescind rules of court that govern and control practice and procedure in all the courts of Indiana.”).

154. Order Amending Rules of Evidence, No. 94S00-0901-MS-4 (Ind. 2009), *available at* <http://www.in.gov/judiciary/files/rule-amends-2009-0909-evid617.pdf> (amending IND. R. EVID. 617).

155. IND. CODE § 35-37-4-6 (2013).

- (2) Individuals with mental disabilities attributable to an impairment of general intellectual functioning or adaptive behavior, who are the victims of a sex crime, battery, kidnapping, incest, neglect, robbery, human trafficking, or an attempt of any of the listed offenses; or
- (3) Individuals who are at least eighteen years of age and incapable by reason of mental illness, mental retardation, dementia, or other physical or mental incapacity of managing or directing their property or caring of directing their self-care, who are the victims of exploitation of a dependent or endangered adult, a sex crime, battery, kidnapping, fraud, identity theft, neglect, robbery, or human trafficking.<sup>156</sup>

This language, borrowed from the Protected Person Statute, aims to protect those who are most vulnerable in society—children and those with mental illness, including the elderly who have been victims of serious crimes.<sup>157</sup> The proposed rule of criminal procedure has an analogous aim.

3. *When*.—It is imperative that judges have well-defined guidelines for when a person eligible for a therapy dog actually qualifies for one. Again, Indiana’s Protected Person Statute<sup>158</sup> provides excellent guidance, and the proposed language is again borrowed from that statute. Therefore, the proposed language could be as follows:

The persons described above qualify for the aid of a therapy dog when testifying live in court when:

- (i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person’s testifying in the physical presence of the defendant will cause the protected person *to suffer serious emotional distress such that the protected person cannot reasonably communicate*.<sup>159</sup>

Admittedly, “suffer serious emotional distress” is very broad language; however, when combined with “such that the protected person cannot reasonably communicate,” a judge has more specific metrics by which to determine “serious emotional distress.” Not every eligible witness will be able to show that he will be silenced by the presence of the defendant—experiencing fear, stress, anxiety, etc. will not be enough under this standard. The emotional distress must be so severe that the person experiences debilitating silence in the presence of the defendant, such that he or she cannot reasonably communicate: cannot tell his or her story, cannot answer questions, and is visibly traumatized in the defendant’s presence.

4. *Hearing*.—The prosecutor should make her case for why the witness

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156. See *id.* § 35-37-4-6(a)-(c). The proposed language is similar, but not identical to the Protected Person Statute.

157. See Dellinger, *supra* note 5, at 190-91.

158. IND. CODE § 35-37-4-6 (2013).

159. *Id.* § 35-37-4-6(e)(2)(B)(i) (emphasis added).



needs the aid of a dog before a judge during a pre-trial hearing. Defense counsel should also be present and have the opportunity to enter his objections into the record. The judge should then be required to make findings of fact, similar to those made during criminal sentencing, to support her reasons for allowing or not allowing the dog to accompany the witness to the stand.<sup>160</sup> The Dutchess County Court adopted this procedure in *People v. Tohom*; the judge “conducted a hearing relative to the issues raised in the People’s application” for the use of a therapy dog and went on to make specific findings of fact in support of granting the motion.<sup>161</sup> This process will ensure that allowing witnesses to testify with a dog does not become the default, but rather will only occur in certain circumstances when it is truly needed and supported with factual evidence. Further, this process would preserve a record for appeal.

5. *Jury*.—Defense counsel should be allowed to decide whether or not to address the presence of the therapy dog during voir dire. Since the prosecution likely will request the use of the dog to aid its witness, it seems fair that the defense choose how this is addressed with the jury. If voir dire will address the presence of the dog, and the potential jury members’ affinity for dogs, the number of challenges to jurors should remain the same as the Indiana Jury Rules currently states.<sup>162</sup>

Consistent with Indiana Rule of Evidence 105, the judge should offer a limiting instruction regarding the witness’s use of a therapy dog unless the defendant does not desire to have one read to the jury.<sup>163</sup> The instruction needs to be adequate enough “so the jurors are aware that the dog is present” and “ma[k]e clear to the jury that no significance should be attributed to the dog’s presence, nor does it suggest the court’s endorsement of the testifying witness.”<sup>164</sup> Even though it may not be possible completely to shield the dog from the jury’s view, the court should take steps to minimize the distraction of the dog to the jury’s observation of the witness’s testimony.<sup>165</sup>

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160. See *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (finding that “trial court[s] must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence” and “[t]he reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion”).

161. Decision and Order, *supra* note 16.

162. See IND. JURY R. 17; see also IND. JURY R. 18.

163. IND. R. EVID. 105 (“When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly.”). The defendant may choose not to have a limiting instruction read to the jury, however, because he or she might not want to remind the jury of the dog right before they deliberate.

164. Brittany Milkowski & Ellen O’Neill-Stephens, *The Dog Days of Justice: Using Courthouse Dogs to Comfort Testifying Witnesses with Minimal Prejudice to Criminal Defendants*, COURTHOUSE DOGS, [http://courthousedogs.com/legal\\_minimizing\\_prejudice.html](http://courthousedogs.com/legal_minimizing_prejudice.html) (last visited Aug. 21, 2013); see also Dellinger, *supra* note 5, at 190.

165. Milkowski & O’Neill-Stephens, *supra* note 164.

If a dog is going to accompany a witness to the witness box, it should be positioned out of the jury's view as much as possible. The dog could enter the courtroom while the jury is on recess, and should remain on the floor of the witness box at all times. The dog should not be held in the witness's lap because the dog could be very distracting to the jury in that position.<sup>166</sup>

6. *Appeals*.—Defense attorneys should have wide discretion in creating a potential record for an appeal regarding the use of a therapy dog. In order to preserve issues for appeal, however, defense attorneys need to object at trial. At their discretion, judges should allow defense attorneys to photograph or videotape the therapy dog, including the jury's reaction to the dog, as well as allow defendants to hire their own experts to comment on their observations of the jury's reaction to the therapy dog. Eventually, once clear standards emerge outlining Indiana's use of therapy dogs, appeals regarding this issue might dwindle in number, creating even greater incentive to devise clear guidelines for efficiency purposes.

#### CONCLUSION

The use of therapy dogs to aid vulnerable children and other witnesses during court testimony is still an adapting area of the law. Certainly, the results—aneecdotes of young children finally able to face their perpetrators in court, scientific studies illustrating the medical benefits of interacting with dogs, and defendants able to confront witnesses face-to-face rather than through a television—explain why many believe this program is revolutionary and is going to have a lasting impact on how the law guides children and other vulnerable witnesses through the intricacies of the criminal justice system.<sup>167</sup> However, as therapy dog programs are beginning to root themselves in courtrooms across the country, some people are still hesitant about the appropriateness of dogs in court, especially criminal defense attorneys who are concerned about the prejudicial effect the presence of these types of dogs will have on their clients.<sup>168</sup> As the program begins to develop in Indiana, it is imperative that well-defined standards emerge to prevent the prejudicial inconsistencies that would occur across the state if judges use an ad hoc approach in determining if a therapy dog is needed for a particular witness.<sup>169</sup> Clear-cut guidelines for judges would help preserve the constitutional guarantees of criminal defendants, ensuring that they receive a fair trial and are judged by an unbiased jury. Further, eliminating the inconsistencies would help ease the mind of skeptics of therapy dog programs. Indiana could be at the forefront of cutting-edge law in enacting a new rule of criminal procedure that would specifically outline who is eligible for a therapy

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166. *Id.*

167. *See* discussion *supra* Part II.

168. *See* discussion *supra* Part III.

169. *See* discussion *supra* Part IV.

dog, under what circumstances they qualify, and explain procedurally how therapy dogs should be addressed to a jury and during appeals.<sup>170</sup> By only allowing therapy dogs to aid the most vulnerable witnesses when the alternative would be debilitating silence, the balance of preserving defendants’ rights versus preventing additional emotional trauma for those most vulnerable is maintained.<sup>171</sup>

It can be difficult to be cognizant of the rights of criminal defendants when their alleged crimes target the weak. However, it is when it is most challenging that the law is needed the most. The right to a fair trial by an impartial jury is a foundation of this country’s justice system. The constitutional rights of criminal defendants must be upheld; the bedrock of our criminal justice system must be preserved. In enacting explicit standards, already used in a similar context, Indiana’s therapy dog program can maintain the delicate balance of being sensitive to the needs of vulnerable witnesses while maintaining the fundamental rights of criminal defendants.

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170. *See id.*

171. *See id.*