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The Cost of Comfort: Protecting a Criminal Defendant's Constitutional Rights when Child Witnesses Request Comfort Accommodations

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The Cost of Comfort: Protecting a
Criminal Defendant's Constitutional
Rights when Child Witnesses Request
Comfort Accommodations

61 N.Y.L. SCH. L. REV. 395 (2016–2017)

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THE COST OF COMFORT ACCOMMODATIONS

I. INTRODUCTION

There is a lot at stake for a defendant during the course of a criminal trial.¹ Every possible measure should be taken to preserve the integrity of the proceedings.² The Constitution provides a defendant with the right to confront her accuser and witnesses against her during trial.³ Defendants also have a due process right to a fair trial.⁴ Both of these rights can conflict with a child witness's right to be afforded special accommodations to protect her from any potential trauma associated with testifying. But the use of these measures, specifically the use of comfort objects, comfort dogs, and support persons during child testimony, can prejudice a defendant's right to a fair trial.

Much of the criminal trial process involves the presenting and evaluating of evidence, which is relied on to make a judgment. One must look closely at the presentation of evidence in cases involving alleged child victims because comfort accommodations can pose negative consequences for defendants. The use of comfort accommodations therefore should not receive blanket approval from a court. The prosecution should have to show that such accommodations are necessary to prevent the child from experiencing serious trauma, or that without the accommodation the child would be unable to testify. Only once a compelling necessity for the accommodation is shown should the measure that may prejudice the defendant be permitted.

This note argues that the current standard for permitting the use of comfort accommodations during child testimony is too low, and a higher standard, such as a showing of a compelling necessity, should be used. Following this Introduction, Part II explains the use of comfort objects, comfort dogs, and support persons as accommodations for child victims in the courtroom, and then discusses how courts deal with implementing these special measures. Part III discusses the conflicting interests in criminal cases and the problems defendants potentially face from

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1. Criminal defendants may face consequences ranging from probation, house arrest, restitution, fines, and community service to outright incarceration. See *Sentencing Alternatives: Prison, Probation, Fines, and Community Service*, NOLO, <http://www.nolo.com/legal-encyclopedia/sentencing-alternatives-prison-probation-fines-30294.html> (last visited Apr. 6, 2017). However, there are often hidden costs to a criminal conviction. Defendants must worry about "collateral consequences," which may affect their parental rights along with their future ability to secure employment, vote, and take advantage of certain loan and housing programs. See KATE RUBIN ET AL., *THE BRONX DEFS., THE CONSEQUENCES OF CRIMINAL CHARGES: A PEOPLE'S GUIDE* 1, 13, 20, 29 (2008). Criminal defendants also have to live with the stigma that comes from a conviction, especially one for a sexual offense. *Id.* See generally Carla Schultz, *The Stigmatization of Individuals Convicted of Sex Offenses: Labeling Theory and the Sex Offense Registry*, 2 *THEMIS* 64 (2014). Criminal convictions may have especially harsh consequences for immigrants. See OFFICE OF IMMIGRATION LITIG., U.S. DEP'T OF JUSTICE, *IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: PADILLA V. KENTUCKY* (2010).
 2. See, e.g., David J. Norman, Note, *Stymied by the Stigma of a Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 *QUINNIPIAC L. REV.* 985 (2013) (proposing reforms to Connecticut's criminal pardons program because of the inherent difficulties convicted defendants face while reintegrating into society).
 3. U.S. CONST. amend. VI.
 4. *Id.* amends. V, XIV.

witnesses' use of comfort accommodations. Further, Part III discusses the test used by most courts in applying these special measures, and why the standard applied is too low. Part IV proposes a solution to this problem by raising the standard that must be met to a showing of compelling necessity before a court may allow these special measures to be used. Part V concludes this note.

II. THE USE OF COMFORT ACCOMMODATIONS IN CRIMINAL COURTROOMS

There has been a striking increase in the number of cases involving child witnesses over the past few decades.⁵ Children are estimated to compose over seventy per cent of all reported sex crime victims.⁶ In sexual abuse cases involving children, the abuser is usually known by the victim, and is commonly a family member or friend.⁷ While being interviewed or giving testimony, many children appear confused, timid, or embarrassed.⁸ The trauma that children can suffer from having to testify and relive memories in these types of cases can be massive, especially if they are testifying against a close friend or family member who is present during testimony.⁹ Some abused children may even feel too threatened or embarrassed to testify.¹⁰ This trauma can interfere with the disclosure of valuable evidence during testimony.¹¹

Children often fear confronting the defendant in the courtroom, and are scared that because they are testifying, they will be hurt by the defendant.¹² Children may also fear testifying or answering questions incorrectly, and crying on the stand.¹³ They may be confused and may incorrectly believe that they can go to jail if they do not please certain

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5. 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, 1158 (2013).
 6. Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239, 241 (2010).
 7. David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, FUTURE CHILD., Summer/Fall 1994, at 31, 45 ("Sexual abuse is committed primarily by individuals known to the child, unlike the child molester stereotype that prevailed until the 1970s. In adult retrospective surveys, victims of abuse indicate that no more than 10% to 30% of offenders were strangers, with the remainder being either family members or acquaintances.")
 8. See John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 23 (1996).
 9. See Raeder, *supra* note 6, at 262; *id.* at 244 & n.38 (explaining that many victims of child molestation were molested by a family member or friend).
 10. Myers et al., *supra* note 8, at 45.
 11. *Id.*
 12. Katherine W. Grearson, Note, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgement of Criminal Defendants' Rights*, 45 B.C. L. REV. 467, 485 (2004).
 13. *Id.*; see Holder, *supra* note 5, at 1159 ("Even when children want to testify against their abusers, the courtroom and the trial process can intimidate them and make them feel anxious.")

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people.¹⁴ These concerns have led to some activism¹⁵ and legislative reform,¹⁶ and have led courts to implement safeguards and permit special accommodations, which have been widely accepted and supported by case law for years.¹⁷

A. The Use of Blankets, Stuffed Animals, and Other Support Objects by Child Witnesses in Criminal Cases

Children have been permitted to hold objects to comfort themselves while testifying in court.¹⁸ These objects, like familiar stuffed animals, blankets, or even food, are said to comfort children during stressful times and may assist a reluctant child witness while testifying.¹⁹ But while the stuffed animals and other support objects may help calm a child, they can also have “unintended consequences.”²⁰ These items can be used as “props or gimmicks to make the child appear vulnerable or to elicit an emotional response from [a jury].”²¹

When a judge is involved in issuing comfort accommodations to a child witness in front of jurors, the results can be particularly detrimental to a defendant. In *State v. R.W.*, a child witness refused to testify without ice cream or other treats.²² The child was given ice cream, cookies, and lollipops by the judge in the presence of jurors, and then was cross-examined while eating the ice cream.²³ The Superior Court of New Jersey, Appellate Division found that even with jury instructions, there was a strong possibility that the jurors associated the reward of treats with an award for truthful testimony.²⁴ By rewarding the child witness with treats in the presence of the jury, “the judge unequivocally . . . gave his opinion as to the accuracy of the most significant testimony in the case.”²⁵ The child could have been given the comfort items in the judge’s chambers, or the jurors could have been excused during

14. Grearson, *supra* note 12, at 485.

15. Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 ANIMAL L. 171, 175–77 (2009).

16. See NAT’L CTR. FOR THE PROSECUTION OF CHILD ABUSE, NAT’L DIST. ATT’Y ASS’N, A CHILD-FAIR COURT ROOM—COMFORT ITEMS (2014) (surveying statutes authorizing comfort items for persons in all U.S. jurisdictions).

17. Debra S. Hart-Cohen, *Canines in the Courtroom*, GPSOLO, July/Aug. 2009, at 54, 55; see cases cited *infra* notes 44, 70.

18. Noreal Weems, Note, *Real or Fake: Animals Can Make a Difference in Child Abuse Proceedings*, 2 MID-ATLANTIC J. ON L. & PUB. POL’Y 117, 121 (2014).

19. *Id.* at 121–22.

20. *Id.* at 123.

21. *Id.* (quoting Bradley M. Cowan, *Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse*, ARMY LAW., Feb. 2013, at 4, 10).

22. 491 A.2d 1304, 1306 (N.J. Super. Ct. App. Div. 1985).

23. *Id.*

24. *Id.* at 1309.

25. *Id.*

the time the accommodations were made.²⁶ The potential exposure to bias from seeing the child with treats left the jurors “capable of producing an unjust result.”²⁷

B. *The Use of Support Dogs to Aid Child Testimony*

Children have also been permitted to have dogs comfort them while testifying. Therapy dogs have been assisting inside of courtrooms as early as 2003.²⁸ Many of these instances have been to aid child witnesses testifying against the defendant in sexual abuse cases.²⁹

Because therapy dogs have been repeatedly used by courts as a comfort accommodation, some courts allow this practice in cases involving child testimony without a showing that the assistance is actually needed. In *People v. Chenault*, the California Fourth District Court of Appeal allowed two child witnesses to have a therapy dog present while they were testifying.³⁰ The defendant argued that the trial court had abused its discretion by not finding a showing of need for the witnesses to use the dog while testifying.³¹ The *Chenault* court found that the presence of the support dog was not inherently prejudicial to the defendant and therefore “decline[d] to adopt a standard that requires the prosecution to show a ‘need’ or ‘necessity’ for the presence of the support dog.”³²

C. *The Use of Support Persons to Aid Child Testimony*

A third accommodation that may be available to a child witness is the presence of a support person.³³ A child’s therapist or a family member can act as support during

26. *Id.*

27. *Id.*

28. Sarah V. Bowers, Note, *The Use of “Therapy Dogs” in Indiana Courtrooms: Why a Dog Might Not Be a Defendant’s Best Friend*, 46 IND. L. REV. 1289, 1289 (2013). Dogs can potentially be more appropriate in allowing defendants to confront the witness without encountering the “props or gimmicks” appearance, Weems, *supra* note 18, at 123 (quoting Cowan, *supra* note 21, at 10), as the dog can sit under the witness’s chair and out of the view of the jury, *id.* at 130. But some argue that a dog no better addresses the confrontation and due process issues. *Id.* at 123. Having a dog present in the courtroom may distract the jury from carefully examining the witness’s credibility because people generally find dogs to be lovable and empathetic. *Id.* The dog’s presence can also cause the jury to automatically believe that since the child needs the dog present to testify, the child has gone through a traumatic event and the dog is there to help the child expose the truth of the event. *Id.* These assumptions by jurors can affect the defendant’s right to a fair trial. In the words of George Flores, a public defender, “‘the most sympathetic thing for a jury is a kid,’ and ‘the next most sympathetic is a dog.’” *Id.* (quoting Randall Beach, *Branford Therapist’s Courtroom Dog Calms Witness in Child Sex Assault Case in Hartford*, NEW HAVEN REG. (Sept. 25, 2011, 12:01 AM), <http://www.nhregister.com/general-news/20110925/branford-therapists-courtroom-dog-calms-witness-in-child-sex-assault-case-in-hartford>).

29. Bowers, *supra* note 28, at 1289.

30. 175 Cal. Rptr. 3d 1, 7 (Ct. App. 2014).

31. *Id.* at 10–11.

32. *Id.* at 11 n.8.

33. Holder, *supra* note 5, at 1165.

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testimony.³⁴ However, these support persons carry an added risk when compared to therapy dogs or stuffed animals; when a child with a support person looks nervously around the courtroom, it can appear as though the child is looking to the support person for answers.³⁵ While the support person is not permitted to communicate with the child witness in any way,³⁶ the child may hesitate to answer questions without first seeking the approval of her support person.³⁷

Additional potential problems may stem from the use of support persons. One problem is that a support person can sit or stand near the witness, or the child may sit on the support person's lap.³⁸ Testimony delivered in this manner is arguably manipulated or even coerced. In *State v. Johnson*, the court discussed that the trial court took note of the demeanor of the alleged victim, and from her appearance concluded that she was frightened, embarrassed, or reluctant to testify.³⁹ The child witness was permitted to testify while seated on the lap of her aunt.⁴⁰ In *Johnson*, the defendant "argue[d] that the child's testimony could not be 'free and voluntary, nor free from coercion or encouragement by the adult aunt.'"⁴¹ The Ohio Fifth District Court of Appeals ruled that the trial court did not abuse its discretion when it allowed the child to sit on her aunt's lap because the judge "struck a balance between the goals of [the Ohio Rules of Evidence] and the constitutional right of confrontation."⁴²

D. How Criminal Courts Have Dealt with the Use of Comfort Accommodations

So long as a defendant's constitutional rights are protected, a judge is permitted broad discretion in changing standard trial practices and tailoring procedures to aid vulnerable child witnesses.⁴³ Many courts perform a balancing test,⁴⁴ balancing

34. *Id.*; see *People v. Johns*, 65 Cal. Rptr. 2d 434, 436 (Ct. App. 1997) (allowing a child's mother to sit beside him while he was giving testimony); *People v. Whitman*, 205 P.3d 371, 378–79 (Colo. App. 2007) (allowing the witness's sister to walk into court with her and sit near her while testifying); *Czech v. State*, 945 A.2d 1088, 1095–96 (Del. 2008) (allowing a child witness's mother to sit behind her while testifying); *State v. Letendre*, 1361 A.3d 249, 256 (N.H. 2011) (allowing a child witness's guardian ad litem to sit behind her while testifying); *State v. Reeves*, 448 S.E.2d 802, 812–14 (N.C. 1994) (allowing a witness to sit on her stepmother's lap while testifying); *State v. Johnson*, 528 N.E.2d 567, 568–69 (Ohio Ct. App. 1986) (allowing a witness to sit on her aunt's lap while testifying).

35. Weems, *supra* note 18, at 122.

36. Holder, *supra* note 5, at 1166.

37. Weems, *supra* note 18, at 122.

38. Holder, *supra* note 5, at 1165; see cases cited *supra* note 34.

39. 528 N.E.2d at 568.

40. *Id.*

41. *Id.*

42. *Id.* at 569.

43. Fern L. Kletter, Annotation, *Propriety of Allowing Witness to Hold Stuffed Animal, Doll, Toy or Other Comfort Item During Testimony*, 82 A.L.R.6th 373 Art. I, § 2 (2013).

44. *State v. Cliff*, 782 P.2d 44, 47 (Idaho Ct. App. 1989) (holding that when it is necessary for a child to testify, the court must find a balance "between the defendant's right to a fair trial and the witness's need

defendants' constitutional rights against the need to make testifying less frightening for child witnesses.⁴⁵ A child's need to have the comfort accommodation present during testimony is weighed against the potential prejudice to the defendant.⁴⁶ Courts will look at certain factors, including "the age of the witness, the nature of the comfort item, whether the prosecutor encouraged or initiated the witness to hold a comfort item, the nature of the offense, the likely impact of testifying in court facing the defendant, and any cautionary instructions given to the jury."⁴⁷ Many judges simply weigh these factors and come to a result without further elaboration. And sometimes "the benefit of a calm and articulate witness outweighs any potential prejudicial effects on the defendant."⁴⁸

III. THE CURRENT STANDARD: IS IT TOO LOW?

A. *The Items Provide Comfort for Whom?*

There is inherent conflict in criminal cases between the interest of a child witness and that of the prosecution. The child may not want to testify and may be harmed by doing so, but the prosecution may deem that testimony crucial to its case. Indeed, if the child witness is involved in a case in which she is the alleged victim of abuse, her testimony is vital for the prosecution to prove the defendant's guilt.⁴⁹ The prosecution seeks to present reliable and coherent testimony. The child seeks to testify with as little trauma as possible. The use of comfort accommodations can help both the prosecution and the child witness.

for an environment in which he or she will not be intimidated into silence or to tears"); *State v. Dickson*, 337 S.W.3d 733, 743–44 (Mo. Ct. App. 2011) (finding that the trial court did not abuse discretion in allowing a child witness to hold a teddy bear while testifying because its use was balanced against potential prejudice); *State v. Marquez*, 951 P.2d 1070, 1074 (N.M. Ct. App. 1997) (holding that the trial court did not err in allowing a child witness to hold a teddy bear while testifying because it "properly balanced the prejudicial effect of the teddy bear against the necessity of the teddy bear's calming effect"); *State v. Hakimi*, 98 P.3d 809, 812 (Wash. Ct. App. 2004) (finding that the trial court did not err in allowing two child witnesses to hold dolls while testifying because it weighed the interests of the witnesses against any potential prejudice the dolls might present).

45. Kletter, *supra* note 43, § 2.

46. *Id.*; *see State v. Powell*, 318 S.W.3d 297, 303 (Mo. Ct. App. 2010) (reviewing several jurisdictions where courts have found comfort accommodations acceptable when the beneficial effects of the comfort accommodations are weighed against potential prejudice).

47. Kletter, *supra* note 43, § 2; *see Dickson*, 337 S.W.3d at 744 (determining that it was appropriate for an eight-year-old witness to hold a stuffed animal while testifying); *Powell*, 318 S.W.3d at 303–04 (allowing eleven- and sixteen-year-old witnesses to hold teddy bears despite being older because they were testifying about extremely traumatic experiences of alleged sexual abuse); *State v. Perovich*, 632 N.W.2d 12, 17–18 (S.D. 2001) (holding that the trial court's decision to allow an emotional six-year-old witness to carry a teddy bear was not reversible error); *Hakimi*, 98 P.3d at 812 (allowing two nine-year-old girls to hold dolls while testifying in court, even though they did not have them in their earlier interview with a child interview specialist, because testifying at trial is a different, more stressful environment than an individual interview with a specialist).

48. Holder, *supra* note 5, at 1164 (citing *Cliff*, 782 P.2d at 47, and *Hakimi*, 98 P.3d at 811–12).

49. *Id.* at 1160 ("Often, prosecutors have to drop cases when children will not testify against the defendant.").

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But the defendant seeks to receive a fair trial. Protecting the child witness can conflict with the defendant's right to confront witnesses, afforded by the Sixth Amendment's Confrontation Clause and the due process right to a fair trial.⁵⁰ These rights are fundamental to the criminal justice system, and should not be easily infringed.⁵¹

The Confrontation Clause grants a defendant two rights, "the right physically to face those who testify against him, and the right to conduct cross-examination."⁵² While defendants' right to confront their accusers is guaranteed by the Constitution, this guarantee says nothing about placing conditions on the constitutional right, such as accommodating an accuser (often to the detriment of the defendant) when she is scared.⁵³ The presence of these comfort accommodations can "distract from otherwise contradictory evidence that negates the truth of the witness's accounting,"⁵⁴ or even from evidence that disproves what the witness says.⁵⁵ Defendants can object, contending that the accommodations distract jurors, but courts too often allow a child witness to have a comfort accommodation during testimony on the ground that the child's need for support outweighs the possibility of prejudice.⁵⁶ When a court allows these accommodations, the defendant faces the risk of being convicted in violation of her constitutional rights.⁵⁷

A defendant may oppose the use of comfort accommodations on due process grounds, arguing that the accommodations elicit sympathy, making the witness appear vulnerable, which may persuade jurors to believe the ensuing testimony is more credible.⁵⁸ Other defendants argue that the presence of comfort accommodations

50. U.S. CONST. amends. VI, XIV; Janet Leach Richards, *Protecting the Child Witness in Abuse Cases*, 34 FAM. L.Q. 393, 411 (2000); Abigayle L. Grimm, Note, *An Examination of Why Permitting Therapy Dogs to Assist Child-Victims when Testifying During Criminal Trials Should Not Be Permitted*, 16 J. GENDER RACE & JUST. 263, 263–64 (2013).

51. The use of comfort accommodations may at times be in the best interest of the defendant *and* the child witness. Children face immense pressure during trials and may be so frightened on the stand that they cannot testify coherently. Holder, *supra* note 5, at 1159. Children are therefore often allowed to use comfort accommodations to help them testify. *Id.* at 1160–61. If the defendant wants to confront the witness, the use of a comfort accommodation may be the only way to do so. *See* Holder, *supra* note 5, at 1179–80. However, as discussed *infra* Part IV, these interests should only intersect when there is a compelling necessity that the child be allowed to use a comfort accommodation.

52. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987).

53. *See* U.S. CONST. amend. VI.

54. Bowers, *supra* note 28, at 1290 (quoting *People v. Tohom*, No. 338/2010, at *2 (N.Y. Dutchess Cty. Ct. June 1, 2011), http://courthousedogs.org/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf).

55. Grimm, *supra* note 50, at 283–84.

56. *State v. Dye*, 283 P.3d 1130, 1133 (Wash. Ct. App. 2012) (“[A] court may allow a child witness to hold a comfort item during testimony where the witness’s need for emotional support outweighs the possibility of prejudice.”); *see* cases cited *supra* note 44.

57. *See* Dellinger, *supra* note 15, at 171; Grimm, *supra* note 50, at 263–64.

58. Richards, *supra* note 50; *see also* Dellinger, *supra* note 15, at 181 (“[A] ‘cute dog,’ assisting a young or emotionally frail complaining witness would be too prejudicial towards defendants because it sends a message of the witness’s innocence and need for protection.”); Bowers, *supra* note 28, at 1290 (noting

interferes with their right to confront witnesses because of the sympathy the witness's testimony elicits, encouraging jurors to presume that the child is the defendant's victim.⁵⁹

The jury may also assume from the circumstances that the defendant is dangerous. The situation is analogous to undercover detectives testifying anonymously and in full disguise in narcotics cases.⁶⁰ Jurors may assume that because the court has to implement the special measures to protect the witness, the defendant must be harmful or dangerous, as well as guilty.⁶¹ In cases allowing disguised testimony, there needs to be an interest present that overrides the defendant's interest in a fair trial and to confront her accusers face-to-face.⁶² Without this overriding interest, there is no justification to intrude on these rights by allowing an anonymous witness to testify.⁶³

Another issue in cases of anonymous officer testimony is the risk that jurors will not be able to properly observe the witness's demeanor and credibility.⁶⁴ Similarly, the use of comfort accommodations may distract jurors from properly observing the witness's demeanor and can interfere with fair assessments of a witness's credibility. A defendant's confrontation rights are usually fulfilled when a witness is testifying face to face with the defendant.⁶⁵ Defendants have argued that their right to cross-

that the rights of a defendant are jeopardized by the use of comfort accommodations because the accommodations send a sympathetic message that a witness is vulnerable because of the defendant's actions).

59. *State v. Cliff*, 782 P.2d 44, 46 (Idaho Ct. App. 1989) (arguing that the court's approval of the witness holding a doll while testifying prejudiced the defendant's right to a fair trial and his right to confrontation because his right to cross-examination was hampered by the court allowing the witness to have a "psychological security blanket"); *People v. Tohom*, 969 N.Y.S.2d 123, 136 (App. Div. 2013) (arguing that the presence of a comfort dog during testimony impeded the "right of confrontation because the dog's 'presence made it unlikely that the jury was able to utilize [its] common sense and experience in making a determination as to [the witness's] truthfulness'" (first alteration in original) (citation omitted)); *Dye*, 283 P.3d at 1132 (arguing that the support dog's presence during the witness's testimony interfered with defendant's right to confront the witness because the dog "improperly incit[ed] the jury's sympathy and encourag[ed] the jury to infer [the witness's] victimhood").
60. See Adam J. Golden, Note, *Closing the Courtroom for the Testimony of Undercover Officers: The En Banc Rehearing in Ayala v. Speckard, Okonkwo v. Lacy, and Pearson v. James*, 31 CONN. L. REV. 243, 244 (1998).
61. *Id.* at 265.
62. *Id.* at 274, 296.
63. *Id.* at 293.
64. *Id.* at 270.
65. Grearson, *supra* note 12, at 468–69. "The rationale behind the Confrontation Clause is the presumption that people are less likely to lie under oath, particularly when facing the accused." *Id.* at 469. The Sixth Amendment's Confrontation Clause guarantees the right to confront a witness so that the jurors may evaluate a witness's demeanor and determine truthfulness during cross-examination. Stacy R. Huss, Note, *Melendez-Diaz v. Massachusetts: Testing the Adaptation of the Confrontation Clause to Neutral Analysts and Developing Technology*, 56 S.D. L. REV. 316, 317 (2011).

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examine a child witness is tainted by the use of comfort accommodations.⁶⁶ Often, however, this argument fails.⁶⁷

B. The Current Test for Permitting Comfort Accommodations Is Insufficient to Protect the Rights of the Defendant and Avoid Prejudice

Not applying a strict standard for use of comfort accommodations leads to problems in the way guilt is determined by jurors, ultimately prejudicing the defendant and infringing on her rights. The discretionary approach used by courts often weighs in favor of permitting comfort accommodations.⁶⁸ This approach is too flexible because it allows the use of comfort items when they may not even be necessary.⁶⁹ Appellate courts seem willing to allow trial courts to “fashion[] an appropriate measure to address a testifying child witness’s emotional or psychological stress, based upon *the particular needs of that child*.”⁷⁰ On appeal, as long as a trial court did not abuse discretion, the standard it used is upheld.⁷¹

The majority of criminal trial courts use a balancing test, attempting to weigh the defendant’s due process rights to a fair and impartial trial against the child witness’s need for a safe, nonthreatening environment in which to testify.⁷² This balancing gives great discretion to judges and is insufficient to protect a defendant’s rights. In *State v. Powell*, two child witnesses—one eleven-year-old and one sixteen-year-old—were allowed to hold teddy bears during their testimony.⁷³ The Missouri Court of Appeals for the Western District stated that the trial court properly

66. *State v. Cliff*, 782 P.2d 44, 46 (Idaho Ct. App. 1989) (arguing that the defendant’s right to cross-examination was disrupted by the witness’s use of a doll during testimony); *People v. Tohom*, 969 N.Y.S.2d 123, 136 (App. Div. 2013) (arguing that the comfort dog “impeded the jury’s ability to observe [the witness] as she testified,” thus violating the defendant’s right to confront the witness); see also Holder, *supra* note 5, at 1172–73.

67. See, e.g., *Tohom*, 969 N.Y.S.2d at 136–38.

68. See Dellinger, *supra* note 15, at 181–84.

69. See, e.g., *State v. Devon D.*, 90 A.3d 383, 405 (Conn. App. Ct. 2014), *rev’d*, 138 A.3d 849 (Conn. 2016).

70. *Tohom*, 969 N.Y.S.2d at 132–33; accord *Goings v. United States*, 377 F.2d 753, 762 (8th Cir. 1967) (noting that a “trial judge should exercise his discretion with wide latitude to assure an atmosphere in which a witness will feel at ease in telling the truth”); *Cliff*, 782 P.2d at 47 (“In cases . . . where it is necessary to receive testimony from young children, 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.”); *People v. Gutkaiss*, 614 N.Y.S.2d 599, 602 (App. Div. 1994) (noting that judges should “be sensitive to the psychological and emotional stress a child witness may undergo when testifying”).

71. See, e.g., *State v. Powell*, 318 S.W.3d 297, 302–03 (Mo. Ct. App. 2010).

72. See *State v. T.E.*, 775 A.2d 686, 697 (N.J. Super. Ct. App. Div. 2001) (“Our review of the opinions addressing this issue reveals that objection to this procedure is typically based upon potential prejudice to the defendant because of increased sympathy for the child-witness or the appearance of enhancing the credibility of the child-witness. A balancing process is required to minimize such potential prejudice to defendant while advancing the interest of the State in presenting the testimony of critical witnesses.”); Dellinger, *supra* note 15, at 182; see also cases cited *supra* notes 44, 70.

73. 318 S.W.3d at 300.

balanced the usefulness of the comfort accommodations against the potential prejudices a defendant would face.⁷⁴ There was nothing found to suggest that the teddy bears were used as an attempt to elicit sympathy from the jurors.⁷⁵ The appellate court therefore upheld the trial court's decision to allow the teddy bears, even though the children's ages—one a teenager—"may have counseled against the need for such accessories."⁷⁶ This case illustrates the need for a higher standard that would require a court to show a compelling necessity for the comfort accommodation before potentially infringing on a defendant's rights. The *Powell* court allowed the witnesses to use the teddy bears despite no showing by the prosecution that they actually needed the teddy bears.⁷⁷

The current balancing test forces a defendant to guess what factors the court will consider in determining whether special measures should be allowed. In *State v. Dickson*, a child witness was allowed to hold a teddy bear while testifying without a showing of necessity—over the objections of the defendant.⁷⁸ The trial court in this instance balanced the benefit of the teddy bear against any potential prejudice it might cause the defendant, noting that the teddy bear would allow the eight-year-old victim, who had been kidnapped, raped, sodomized, and left in a burning building, to testify "more comfortably and completely."⁷⁹

Upon review, the appellate court found that the trial court had not abused its discretion.⁸⁰ Moreover, the appellate court noted that the defendant's trial strategy was to concede that the victim experienced a tragic and brutal assault, but that the acts were committed by someone else.⁸¹ The child's holding of a teddy bear while reenacting horrific stories for the jury did not negatively affect the defendant's strategy.⁸² This further supported its decision that the comfort item did not unduly prejudice the defendant.⁸³

Some courts have used a compelling necessity standard in cases that involve child testimony and the potential infringement on a defendant's rights.⁸⁴ In Hawaii, a

74. *Id.* at 303–04.

75. *Id.* at 303.

76. *Id.* at 304.

77. *Id.*

78. 337 S.W.3d 733, 742 (Mo. Ct. App. 2011).

79. *Id.* at 744.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *State v. Menzies*, 603 A.2d 419, 428 (Conn. App. Ct. 1992) (finding that "clear and convincing evidence" must be shown that a child has a compelling need to have a guardian sit by her while testifying); *State v. Rulona*, 785 P.2d 615, 617 (Haw. 1990) (finding that a child witness may not sit on the lap of an accompanying person without showing a compelling necessity to do so), *overruled on other grounds* by *State v. Mueller*, 76 P.3d 943 (Haw. 2003); *State v. Palabay*, 844 P.2d 1, 7 (Haw. Ct. App. 1992) (holding that the lower court's decision to allow a child witness to testify while holding a stuffed

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compelling necessity must always be shown to permit use of a comfort accommodation.⁸⁵ In *State v. Rulona*, the Hawaii Supreme Court held the trial court's rationale, allowing a child witness to sit on a support person's lap while giving her testimony because she was frightened and it would make her feel better, was insufficient.⁸⁶ Most witnesses, the court found, of any age, can be frightened while testifying.⁸⁷ Absent an indication that the child could not testify without being seated on the counselor's lap, the use of a support person was held to be improper.⁸⁸

In *State v. Menzies*, the Connecticut Appellate Court affirmed the trial court's order, which required the prosecution to prove by clear and convincing evidence that there was a compelling need to have a child's guardian ad litem sit next to her while testifying.⁸⁹ The trial court had conducted an evidentiary hearing to determine whether the state demonstrated a compelling need.⁹⁰ To prove a compelling need, the prosecution had to show that the child witness would be too frightened or otherwise unable to testify without the presence of a support person.⁹¹ The court was concerned with the trustworthiness of the child's testimony as well as her ability to testify at all.⁹² Here, the appellate court held that the trial court did not abuse its discretion when it found that the state had provided clear and convincing evidence that the child witness needed the comfort accommodation.⁹³

In addition, some courts utilize a substantial need test, whereby a comfort accommodation is permitted if the prosecution shows that without it, the child witness is likely to be largely unresponsive, and that with the accommodation, the child is likely to provide worthwhile testimony.⁹⁴

bear without a finding of compelling necessity was an error); *cf. State v. T.E.*, 775 A.2d 686, 697 (N.J. Super. Ct. App. Div. 2001) (holding that a substantial need must be proven before a child witness is allowed to have an adult support person sit close to her while testifying).

85. *Palabay*, 844 P.2d at 7.

86. 785 P.2d at 617.

87. *Id.*

88. *Id.*

89. 603 A.2d at 429.

90. *Id.* at 428.

91. *Id.*

92. *Id.*

93. *Id.* at 428–29. At the special hearing, the state had provided testimony from three witnesses who testified that the guardian ad litem's presence would better facilitate the child witness's testimony; the trial court concluded that the child witness would be "intimidated or otherwise inhibited" if standard procedures were followed. *Id.* at 428.

94. *State v. T.E.*, 775 A.2d 686, 697 (N.J. Super. Ct. App. Div. 2001) ("Adopting the common thread in the majority opinions, we hold that upon a showing of substantial need, with appropriate safeguards imposed, and a cautionary instruction given, a trial judge's discretion is not abused in permitting an adult support person to sit in close proximity to a young child while testifying before a jury.").

IV. REQUIRING THE PROSECUTION TO DEMONSTRATE A COMPELLING NECESSITY

The prosecution should have to meet the standard of compelling necessity. The prosecution should have to demonstrate that unless the child witness in a criminal jury trial is allowed to testify with comfort accommodations, (1) the child will not be able to testify credibly or at all, or (2) the child will suffer traumatic harm. The critical evidence in most child assault cases comes from child victims' testimony "since they are often the only occurrence witness."⁹⁵ Because of this, a child's inability to testify credibly or at all without a comfort accommodation is a major concern. In addition, it is a significant state interest that a child will not suffer traumatic harm if forced to testify without a comfort accommodation.⁹⁶

This standard will provide protection to the child, because if a true need for the item is shown, the child will be allowed the accommodation. This standard also protects the defendant because, if a child's compelling need is shown, that interest overrides any risk of prejudice. The overriding interest of the child needs to justify the infringement on the defendant's rights, and a showing of compelling necessity evinces the overriding interest. The important factors in a preliminary hearing should continue to include the age of the child, the nature of the comfort accommodation, the nature of the offense, and the likely impact on the defendant.⁹⁷ The demeanor of the child should also be presented as evidence to determine the necessity of a support person or comfort item.⁹⁸

Too few courts apply the compelling necessity standard to allow witnesses to use comfort accommodations when testifying.⁹⁹ This standard is more often applied when the prosecution wishes to allow a child witness to testify via video from a remote location.¹⁰⁰ Allowing out of court testimony presents confrontation and due process issues similar to those that arise from allowing witnesses to use comfort accommodations.¹⁰¹ In *State v. Jarzbek*, a case involving the video testimony of a child witness, the Connecticut Supreme Court held that this accommodation is only permitted if "the state proves by clear and convincing evidence a compelling need" to

95. *State v. Powell*, 318 S.W.3d 297, 303 (Mo. Ct. App. 2010) (quoting *State v. Pollard*, 719 S.W.2d 38, 42 (Mo. Ct. App. 1986)).

96. Richards, *supra* note 50, at 395.

97. Kletter, *supra* note 43, § 2.

98. Holder, *supra* note 5, at 1166.

99. Most courts have used the balancing test instead of a compelling necessity approach. Kletter, *supra* note 43, § 2. Examples of the balancing test can be seen in cases cited *supra* note 44.

100. *Maryland v. Craig*, 497 U.S. 836, 857–58 (1990) (holding that a finding of necessity must be made before allowing a child witness to testify via a one-way closed circuit television); *Spigarolo v. Meachum*, 934 F.2d 19 (2d Cir. 1991) (upholding a trial court's decision to allow two children to testify via sworn testimony on videotape after a finding of necessity); *State v. Jarzbek*, 529 A.2d 1245, 1256 (Conn. 1987) (holding that testimony through a videotape is constitutional so long as a compelling necessity is shown).

101. Holder, *supra* note 5, at 1161–62 ("Modification of traditional testimony presentation alleviates a child's anxiety while maintaining the fairness of the trial process. The use of closed-circuit television preserves the foundation of the Confrontation Clause, namely the 'right to observe, cross-examine, and have the jury view the demeanor of the witness.'" (footnotes omitted) (quoting *Craig*, 497 U.S. at 842)).

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do so.¹⁰² To satisfy this evidentiary burden, the prosecution was required to show that the child would be intimidated or unable to testify in the presence of the defendant, and would therefore make the testimony questionable.¹⁰³ A similar standard should be extended to the context of comfort accommodations.

V. CONCLUSION

The interests articulated above in criminal cases involving child witnesses have been in conflict for many years. When a defendant's confrontation and due process rights are at risk, there needs to be a compelling interest to justify the possible infringement. The common standard used in trial courts for permitting the use of comfort accommodations today allows for potential violations of a defendant's constitutional rights. The test applied by a majority of courts today allows the special measures to be implemented without a need being proven in the first place.

Courts should use the compelling necessity standard in order to simultaneously protect the prosecution's case, protect the defendant's rights, and protect the child. Showing the existence of these compelling, overriding interests justifies the risk to the defendant's interests. Only then can we feel comfortable allowing these special measures to be implemented in a criminal courtroom.

102. 529 A.2d at 1256.

103. *Id.* at 1255.

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