No. 13-1352

In The Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION, AND IOWA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

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INTEREST OF *AMICI CURIAE*[1]

Arizona Attorneys for Criminal Justice ("AACJ"), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal-defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training, and mutual assistance, and fostering public awareness of citizens' rights, the criminal-justice system, and the role of the defense lawyer.

The Connecticut Criminal Defense Lawyers Association ("CCDLA") is a not-for-profit organization of approximately three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal-defense lawyers' organization in Connecticut. An affiliate of the National Association of Criminal Defense Lawyers, CCDLA works to improve the criminal-justice system by insuring that the individual rights guaranteed by the Connecticut and

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[1] Letters of blanket consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

United States Constitutions are applied fairly and equally and that those rights are not diminished.

The Iowa Association of Criminal Defense Lawyers ("IACDL"), the Iowa state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1992. IACDL is a statewide not-for-profit membership organization of criminal-defense lawyers, law students, and associated professionals dedicated to promoting the proper administration of criminal justice; protecting individual rights and improving criminal law, its practice, and procedures; and fostering, maintaining, and encouraging the integrity, independence, and expertise of the defense lawyer in criminal cases.

INTRODUCTION

Ohio asks the Court to create an exceptionally broad, nationwide rule that the Confrontation Clause does not apply to statements made to private parties not acting at the direction of law enforcement. Pet. Br. 10. The Court should decline to use such a blunt instrument to solve a case-specific problem that Ohio can address itself. The child victim-witness in this case is unavailable because of Ohio's witness-competency rules. Though the victim's inability to testify may affect what evidence is presentable at trial in this particular case – a prosecution where the government has ample evidence at its disposal as set forth in the brief of *amici* Fern and Charles Nesson – the solution to that state-law problem should not be to

make irrelevant to the Confrontation Clause a whole category of witness statements.

Outside Ohio, states are already solving the problem of child testimony in flexible and innovative ways that preserve the essential right of the accused to confront his accusers. *Amici* offer this brief to illustrate the legal and practical landscape in other states making it possible for children to testify in court. The Court need not set out a broad constitutional rule to address a witness-competency issue in Ohio. The desire for easier prosecutions in Ohio and elsewhere does not justify the costs Ohio's proposed rule would impose on the right to confrontation and the integrity of convictions.

SUMMARY OF THE ARGUMENT

The Confrontation Clause prohibits admission at trial of "testimonial" statements unless the witness is unavailable and there has been a "prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Ohio would have this Court exclude from the Confrontation Clause every statement a child-witness makes to a "private party" on the theory that a child's statement to a private party could not be testimonial. Pet. Br. 19. Ohio insists this should be the rule even though Ohio, like every other state, requires many private individuals to report to state authorities suspected child abuse, including suspicions that arise because of a child's verbal accusation. Notwithstanding an accused's right "to be

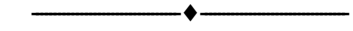
confronted with the witnesses against him," U.S. Const. amend. VI, when a child accuses a defendant of abuse or other egregious crime, Ohio argues that it is constitutionally irrelevant whether the child himself or some private-party proxy witness repeats that accusation at trial.

Instead, Ohio would have this Court limit the application of the Confrontation Clause to the contexts the Court listed in *Crawford* as being obviously testimonial – before grand juries, in prior court proceedings, or during police interrogations – and leave to state evidentiary rules the task of regulating when an alleged victim's hearsay accusation could be admitted to convict the accused. *See Crawford*, 541 U.S. at 68 (holding that "[w]hatever else the term [testimonial] covers, it applies at a minimum" to prior statements in court, before a grand jury, or during police interrogation). Pet. Br. 16-18. This suggested rule is inconsistent with the Confrontation Clause and this Court's decisions interpreting it.

Moreover, Ohio's preferred bright-line rule plainly sweeps too broadly. Every state in the nation has mandatory-reporting laws that require broad groups of individuals to report suspected child abuse on threat of criminal prosecution for failing to make a report. Unquestionably among these laws' purposes is to facilitate the discovery, investigation, and prosecution of crimes against children. The Court should not allow this powerful tool for protecting children and assisting in the prosecution of those who harm them to be turned into an incentive for prosecutors to introduce proxy testimony at criminal trials.

The issue in this case does not call out for a bright-line rule. Nor is this the case for the Court to resolve, for all cases, "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006). Ohio's difficulty here derives from the fact that the child-witness was, under Ohio law, incapable of testifying, yet Ohio wants the jury to hear the child's accusations through some other witness. Whether or not the child-victim's statements in this specific instance are testimonial or not, the anomaly of the child's incompetence under Ohio law (and the desire to ensure a conviction in this particular case) should not justify the sweeping rule Ohio urges.

The purpose of this brief is to show that there are other solutions that do not sacrifice the right to confrontation in cases involving children-witnesses. In recent decades, states have developed ways to avoid the witness-incompetency problem Ohio has in this case. The experiences in other states, including Arizona, Connecticut, and Iowa, show that there can be accommodations made to facilitate child testimony. States are doing all sorts of things to deal with this problem in ways that do not involve abandoning the confrontation right when it comes to young witnesses. Constitutional protections of the accused are not costless, but prosecutions in these cases – and convictions – are still happening. The broad rule suggested by Ohio and some *amici curiae* is simply not necessary.



ARGUMENT

I. The Court should not adopt Ohio's over-inclusive proposed rule

Ohio asks this Court to hold that the statements of "a child too young to testify" made to "private parties without any police direction" are never subject to the Confrontation Clause, even when state law obligates the private party to report the statements to the government. Pet. Br. 11-12.

As ably explained in Respondent's merits brief, Ohio's proposed rule is inconsistent with the right to confront adverse witnesses. *See* Resp. Br. 22-33. Such a bright-line rule is particularly ill-suited to resolve confrontation questions in the context of mandatory reporters because some statements to mandatory reporters will be made with the "primary purpose" of "meet[ing] an ongoing emergency" and some "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. That is, some statements to mandatory reporters will be "testimonial" and some will not.

Ohio's suggested rule unjustifiably disregards the purpose of mandatory-reporting schemes. Every state has laws requiring professionals and others who frequently interact with children to report suspected abuse to government officials, including law enforcement in some states. *Mandatory Reporters of Child Abuse and Neglect*, U.S. Dep't of Health and Human Services, 1 (2014), https://www.childwelfare.gov/pubPDFs/manda.pdf. While it is true that a driving purpose

behind these requirements is to protect children, it is clear that one of the ways mandatory-reporting laws serve this purpose is by aiding the investigation and prosecution of crimes against children. *See, e.g.*, *Cross-Reporting Among Responders to Child Abuse and Neglect*, U.S. Dep't of Health and Human Services, 2 (2012), https://www.childwelfare.gov/pubPDFs/xreporting.pdf (noting that a majority of states require that serious mandatory reports be cross-reported to law-enforcement agencies for investigation). The reporting schemes were "designed to spur casefinding. Their purpose is to throw a spotlight on situations which may require protective services, juvenile court adjudication, or criminal prosecution." Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 Colum. L. Rev. 679, 716 (1966).

Mandatory-reporting laws are a state-developed system to convert typical recipients of information into conduits of information for the government's use, including for criminal investigations and prosecutions. Given that one purpose of mandatory-reporting laws is to assist in criminal investigations and prosecutions, adopting Ohio's proposed bright-line rule would violate "[t]he purpose of enshrining this [confrontation] protection in the Constitution," namely "to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." *Maryland v. Craig*, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting).

Ohio's proposed rule would remove from the protections of confrontation and cross-examination every statement a child makes to these individuals, who are compelled by threat of criminal prosecution to make reports with details that will assist in the investigation and prosecution of crimes. That result would risk "depriving criminal defendants of the benefit of the adversary process" with respect to the principal complaining witness. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment); *see also Davis*, 547 U.S. at 838 (Thomas, J., concurring in the judgment in part and dissenting in part) ("even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation") (citing *Coy v. Iowa*, 487 U.S. 1012 (1988)); *Craig*, 497 U.S. at 845 ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.").

Indeed, this Court's earlier decisions indicate that the Confrontation Clause applies in full force to child testimony:

> The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses. . . . That face-to-face presence may, unfortunately,

> upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.

Coy, 487 U.S. at 1020; *see also Craig*, 497 U.S. at 853 ("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" (emphasis added)).

As the experiences in Arizona, Connecticut, and Iowa illustrate, an overarching policy of protecting children-witnesses from the trauma of testifying in court is not weighty enough to gut the right to confrontation in the way that Ohio suggests. *See Coy*, 487 U.S. at 1021 ("something more than the type of generalized finding underlying such a statute is needed when the exception [to confrontation] is not firmly rooted in our jurisprudence.") (citations and internal quotation marks omitted). The Court should not now, on Ohio's suggestion, remove this entire category of witnesses from the protections of the Confrontation Clause.

II. The experiences in other states show that children can testify in criminal trials with accommodations in appropriate cases

Amici acknowledge that crimes against children can be difficult to prosecute for a number of reasons, many of which also apply to other kinds of crimes.

But the difficulty in prosecuting crimes should not motivate the Court to deteriorate a constitutional right: "It is a truism that constitutional protections have costs." *Coy*, 487 U.S. at 1020.

Aside from being wrong, Ohio's blanket rule excluding an entire category of victim statements as irrelevant to the confrontation right is simply unnecessary. Although the child-witness in this particular case was incompetent to testify under Ohio law, the Court should avoid setting an inflexible bright-line rule carving out of the Constitution statements made to individuals required by state law to report child abuse.

Ohio's evidence rules presume that children under ten are incompetent to testify. Ohio R. Evid. 601(A). Members of *amici curiae* AACJ, CCDLA, and IACDL practice in three states with very different rules for witness competency than Ohio has. The experiences in these states and elsewhere show that states can provide protections and accommodations for children-witnesses, in appropriate cases, making it possible for children to testify in less uncomfortable settings, while at the same time preserving a criminal defendant's right to confront his accusers. *See Craig*, 497 U.S. at 853 (this Court noting a quarter century ago that thirty-seven states permitted videotaped testimony, twenty-four allowed one-way closed circuit, and eight allowed two-way systems). Prosecutions and convictions can and do happen in these states, with testimony from children-victims and even without such testimony.

The Court should take into account the states' experiences with these accommodations when deciding how the Confrontation Clause applies in this case and others involving children-witnesses.

A. The experience in Arizona

1. Arizona gives trial judges "practically unlimited" discretion to determine the competency of children-witnesses

Unlike in Ohio, the default rule in Arizona is that "[i]n any criminal trial every person is competent to be a witness." Ariz. Rev. Stat. § 13-4061; *see also* Ariz. R. Evid. 601 ("Every person is competent to be a witness unless these rules or an applicable statute provides otherwise.").

Before the enactment of section 13-4061, Arizona courts had developed a flexible approach to witness competency that accorded substantial discretion to trial courts. In *Donnelley v. Territory*, 52 P. 368, 370-71 (Ariz. 1898), the Arizona territorial court held that the trial court improperly allowed the testimony of a seven-year-old boy where the record did not reflect an understanding of "the nature of an oath and the consequences of falsehood." But the court explained that "[t]here is no precise age at which children are competent or incompetent." *Id*. The court gave the rule, "A child produced as a witness, who understands that he is brought into court to tell the truth, and that it is wrong to tell a lie, has sufficient understanding of an oath to be competent." *Id*. *See*

also Keefe v. State, 72 P.2d 425, 428 (Ariz. 1937) (reversing conviction and directing court on remand to find six-year-old boy competent to testify based on his understanding of the oath that was reflected in the record).

Arizona's modern test for competency was established in *Litzkuhn v. Clark*, 339 P.2d 389 (Ariz. 1959), where the Arizona Supreme Court held that the trial court could not refuse to allow a five-year-old girl to testify without a preliminary voir dire examination as to her competency to testify. The next year, the court held that a trial court properly found an eight-year-old girl competent to testify based on a thorough voir dire examination. *State v. Dominguez*, 348 P.2d 919 (Ariz. 1960). In the following years, the Arizona Supreme Court found no error in trial courts' permitting young children to testify. *See, e.g.*, *State v. Berry*, 419 P.2d 337 (Ariz. 1966) (six-year-old girl testified about molestation); *State v. Goldsmith*, 450 P.2d 684 (Ariz. 1969) (five-year-old girl testified about sodomy); *State v. Jerousek*, 590 P.2d 1366 (Ariz. 1979) (eight-year-old child competent to testify); *State v. Ault*, 724 P.2d 545, 553-54 (Ariz. 1986) (six-year-old testified through interpreter after trial court conducted voir dire examination and determined competency).

The court reasoned that "proof that an eight year old child is incapable of formulating an abstract definition of truth aids us very little in determining whether that child has an intuitive grasp of the difference between truth and falsehood." *State v. Pittman*, 574 P.2d 1290, 1295 (Ariz. 1978). In *State v.*

Bowie, 580 P.2d 1190, 1195 (Ariz. 1978), not only were children aged six and seven years properly qualified as competent to testify, but the court held that the prosecutor had a good-faith basis for believing a four-year-old boy would be competent under the specific facts of that case.

The Arizona Court of Appeals, in reviewing this history, noted, "More recent authority reveals a more relaxed approach [for determining competency] . . . [T]he trial court's discretion in determining a child's competency is practically unlimited." *State v. Melendez*, 661 P.2d 654, 658 (Ariz. Ct. App. 1982). Even the combination of youth and intellectual disability will not bar a witness from testifying, although the party opposing the witness's competency may raise those concerns through cross-examination and contrary evidence. *State v. Roberts*, 677 P.2d 280 (Ariz. Ct. App. 1984).

In 1985, Arizona's legislature enacted section 13-4061, which presumes "every person is competent to be a witness" in "any criminal trial." As a result, it was "no longer mandatory" for courts to make "a competency determination . . . for children under the age of ten years." *State v. Superior Court*, 719 P.2d 283, 286 (Ariz. Ct. App. 1986) (holding three-year-old was competent to testify). Although particular witnesses could be challenged on competency grounds, by 1985 Arizona law removed "artificial bases for disqualifying a witness as incompetent." *Id*. "The fact of the extreme youth of the witness," and problems with the accuracy and consistency of child testimony "are

matters to be considered by the jury in connection with her credibility and the weight which should be given to her testimony, but do not affect competency." *Id*. at 286. *See also Escobar v. Superior Court*, 746 P.2d 39, 43 (Ariz. Ct. App. 1987) (holding prosecutor should not have refused grand jury's request to produce testimony from child who was two-and-a-half because it was for the jury not the prosecutor to "judge his competency and credibility").

For the last thirty years, Arizona law has been that all witnesses who are called by a party are presumed competent, regardless of age, mental capability, mental illness, or any other factor which may affect the ability to testify in court. A party opposing the competency of the witness must challenge it before the witness testifies in front of the jury. Arizona law now trusts in the "crucible" of cross-examination to allow the jury to weigh the credibility, consistency, and weight of child testimony. Now, attorneys rarely challenge a witness's competency because the law is so well settled that small children may testify and that cross-examination is the means to challenge the witness's ability to perceive and relay events.

2. Arizona has made accommodations to allow children-witnesses to testify comfortably

Not coincidentally, at the same time the Arizona Legislature modified the rule for witness competency in criminal cases, it also enacted statutes designed

to limit the ability of defendants to put children-witnesses at unease.

Although some of those statutes fell to state constitutional challenges unrelated to confrontation, one that survives is Arizona Revised Statutes section 13-4253, which allows children to testify by closed-circuit television from a different room apart from where the defendant, judge, and jury sit. Consistent with this Court's decisions in *Coy*, 487 U.S. 1012, and *Craig*, 497 U.S. 836, Arizona courts have approved such accommodations so long as there is a case-specific finding that an accommodation (such as video testimony) is necessary. *See State v. Vincent*, 768 P.2d 150, 160 (Ariz. 1989) (holding section 13-4253 facially constitutional but unconstitutionally applied when the state relied on only "generalized assertion that any minor child" forced to testify "would be traumatized by a face-to-face encounter"); *State v. Vess*, 756 P.2d 333, 335 (Ariz. Ct. App. 1988) (requiring a showing of witness-specific "particularized need" to allow testimony to be taken via closed-circuit transmission from another room).

Arizona is also pioneering other accommodations, such as the use of a "courthouse dog." The Pima County Attorney's Office has recently introduced a golden retriever named Russell to accompany children-victims and witnesses to the courthouse and the Child Advocacy Center (a child-friendly environment for conducting video-recorded interviews and physical examinations). Pima County Bar Association, *The Writ*, November 2012, p.5, *see* Appendix B. Likewise,

the Victim Services Division of the Maricopa County Attorney's Office uses a service dog, Sam, to "provide[ ] the support needed for these [young victims] to successfully attend court and confront their perpetrator." Maricopa County Attorney's Office K-9 Victim Support Program, http://www.maricopacountyattorney.org/serving-victims/k9-vsp/. This type of program originated in Washington and has withstood challenges in that state. *State v. Dye*, 283 P.3d 1130, 1132-34 (Wash. Ct. App. 2012) ("facility dog" accompanied mentally handicapped victim to witness stand; no interference with confrontation rights under *Coy*, no prosecutorial misconduct by making gift to witness, and no abuse of discretion of trial court which has discretion to control courtroom proceedings). The Maricopa County Attorney's Office's Victim Services Division also offers a "Kids In Court" program to help children prepare to give testimony in court, including providing tips such as how to ask for a break, teaching relaxation techniques, and allowing children to visit a courtroom and practice testimony through role playing. Maricopa County Attorney's Office, Victim Services Division, Kids In Court, http://www.maricopacountyattorney.org/pdfs/victim-services/Kids-in-Court.pdf.

B. The experience in Connecticut

Similarly, Connecticut, by statute, evidence rules, and case law, has designed and implemented procedures allowing a child-victim to provide personal, non-hearsay testimony in a manner that protects

both the child's wellbeing and the constitutional rights of the accused.

By statute, the default rule in Connecticut is that "[n]o witness shall be automatically adjudged incompetent to testify because of age." Conn. Gen. Stat. § 54-86h. Thus, although a court may determine that a witness is incompetent because, for example, the witness is "incapable of understanding the duty to tell the truth" or is incapable "of expressing himself or herself in a manner which can be understood," the witness's age cannot be the basis of the court's determination. *See* Conn. Code Evid. 6-3. And in cases where the witness is a "child who is a victim of assault, sexual assault or abuse," Connecticut law declares that the child "shall be competent to testify without prior qualification." Conn. Gen. Stat. § 54-86h.

Similar to Arizona, Connecticut law, in appropriate cases, provides for numerous accommodations for child testimony. For instance, a Connecticut statute permits a child under twelve to testify in a room other than the courtroom, to be televised by closed-circuit equipment in the courtroom or recorded for later showing before the court. Conn. Gen. Stat. § 54-86g(a). Furthermore, Connecticut has also established procedures to ease the process of in-court testimony. *See* Conn. Gen. Stat. § 54-86g(b). In cases involving physical or sexual abuse of a child under twelve, a court has discretion to, among other things: (1) limit who can "enter[ ] and leav[e] the courtroom during the child's testimony"; (2) allow "an adult who

is known to the child and with whom the child feels comfortable" to sit next to the child; and (3) require questioning attorneys to sit "at a table positioned in front of the child" and "remain seated." *Id*.

Connecticut case law directs courts to implement these accommodations in a manner designed to both facilitate testimony from children-victims and preserve the constitutional rights of the accused. *See State v. Jarzbek*, 529 A.2d 1245, 1255 (Conn. 1987) (rejecting per se rule allowing videotaped testimony and holding that state may "in particular circumstances . . . establish[ ] a compelling need to have a minor victim of tender years testify outside the physical presence of his or her alleged sexual assaulter"); *State v. Marquis*, 699 A.2d 893, 900-01 (Conn. 1997) (holding that defendant's expert may examine child to rebut prosecution's effort to establish need for videotaped testimony under *Jarzbek*).

C. The experience in Iowa

1. Children in Iowa are presumed competent to testify

Iowa courts presume that children are competent to testify. *State v. Andrews*, 447 N.W.2d 118, 120 (Iowa 1989). If a child's competency to testify is challenged, the court considers whether the child (1) "is mentally capable of understanding the questions"; (2) "is able to formulate intelligent answers and communicate impressions regarding the incident"; and (3) "can understand the responsibility to tell the

truth." *State v. Brotherton*, 384 N.W.2d 375, 377 (Iowa 1986). The trial court has "broad discretion on issues surrounding determination of witness competency" and is reversed only "on a showing the trial court's ruling is clearly untenable and without reason." *State v. Dodson*, 452 N.W.2d 610, 611 (Iowa Ct. App. 1989).

Iowa's three factors for determining a child's competency to testify derive from the Iowa Supreme Court's application of Iowa's rules of evidence and criminal procedure. The Iowa Rules of Criminal Procedure incorporate the rules for determining witness competency in civil actions, Iowa R. Crim. P. 2.20(1), and the Iowa Rules of Evidence state that "[u]nless otherwise provided by statute or rule, every person is competent to be a witness." Iowa R. Evid. 5.601. The Iowa Supreme Court has further clarified that the determination of a witness's competency to testify has two aspects: "(1) the mental capacity to understand the nature of the questions put and to form and communicate intelligent answers thereto and (2) the moral responsibility to speak the truth, which is the essence of the nature and obligation of an oath." *State v. Harvey*, 242 N.W.2d. 330, 336 (Iowa 1976).

Iowa's presumption of competence is deeply rooted in Iowa's judicial system. The very first Iowa Constitution granted litigants the right to "use as a witness, or take the testimony of, any other person not disqualified on account of interest." Iowa Const. of 1857, art. I § 4. Similarly, the earliest Iowa evidence codes allowed the testimony of anyone who could appreciate the obligations of an oath. Iowa Code § 3978

(1860). Iowa's commitment to the court's right to hear every person's testimony has consistently run through Iowa cases for one hundred and fifty years. *See, e.g.*, *State v. King*, 91 N.W. 768 (Iowa 1902) (rejecting the "ancient" presumption of incompetency and stating that no presumption exists for children under age fourteen); *State v. Meyer*, 113 N.W. 322 (Iowa 1907) (trial court did not abuse its discretion when it allowed six-year-old child to testify about assault she had endured).

In 1981, the Iowa Legislature repealed the successor to Iowa Code section 3978 and replaced it with the Iowa Rules of Evidence. Those rules of evidence stated that "every person of sufficient capacity to understand the obligation of the oath" was competent. Iowa R. Evid. 5.601 (1981). The Iowa Supreme Court observed that the repeal did not change the standard that has historically existed in Iowa: children are presumed competent to testify. *State v. Van Hoff*, 371 N.W.2d 180, 183 n.1 (Iowa 1985). Indeed, to ensure that Iowa's rules of evidence continue to preserve the state's historical presumption of competency, Iowa Rule of Evidence 601 was expressly amended in 1985 to state that a child – defined as a person under the age of fourteen – was "presumed to be competent." Iowa R. Evid. 5.601 (1985). That rule was again amended in 1990 to more closely conform to the federal model. *See* 7 Laurie Kratky Doré, *Iowa Practice Series – Evidence*, § 5.601:1 (2014). According to the current Iowa Rule of Evidence 5.601, "[u]nless

otherwise provided by statute or rule, every person is competent to be a witness."

The very earliest reported cases in Iowa document the importance Iowa courts have placed on children's sworn testimony. For example, in *State v. Meyer*, the prosecution relied on a six-year-old child to testify about an assault. 113 N.W. at 322. Although the child could not define the words "oath" or "testimony," this was "not determinative of her capacity" because having "an adequate sense of the impropriety of falsehood [showed] she understood the nature of an oath, even though not able to state what those words meant." *Id.* at 323 (citations omitted). In affirming the defendant's conviction, the Iowa Supreme Court observed that to exclude the testimony of children-witnesses "would deprive them of the adequate protection of the law, for in cases wherein assault is charged conviction is ordinarily impossible without the aid of their evidence." *Id.* at 324.

As one would expect from this view of the competency of children, Iowa courts have consistently affirmed the admission of testimony of children, often of a tender age. *See, e.g.*, *State v. Brotherton*, 384 N.W.2d at 377-78 (four years old); *State v. Dodson*, 452 N.W.2d at 611 (five years old); *State v. Lusch*, No. 07-0491, 2008 WL 2514746, at *1 (Iowa Ct. App. 2008) (unpublished) (six years old); *State v. Paulsen*, 265 N.W.2d 581, 585-86 (Iowa 1978) (six years old); *State v. Van Hoff*, 371 N.W.2d at 183-84 (eight years old); *State v. Swanson*, 228 N.W.2d 101, 103 (Iowa 1975) (eight years old); *State v. Cartee*, 202 N.W.2d

93, 95-96 (Iowa 1972) (eight years old); *State v. Olson*, 149 N.W.2d 132, 134-35 (Iowa 1967) (eight years old); *State v. Hackett*, 200 N.W.2d 493, 493-94 (Iowa 1972) (ten and twelve years old); *State v. Whitfield*, 315 N.W.2d 753, 754-55 (Iowa 1982) (thirteen years old).

Consequently, Iowa joins Connecticut and Arizona in rejecting the kind of age-determinative presumption still used in Ohio. The Iowa approach represents a well-considered and well-developed set of rules that emphasize that litigants, courts, and witnesses all are entitled to the testimony of every person. It avoids the hyper-technical distinctions made under Ohio law.

2. Iowa's procedures protect the defendant's constitutional rights and the interest of the government in presenting evidence in criminal cases while also safeguarding children

With children presumed competent to testify under Iowa law, procedures in Iowa courts safeguard children-witnesses while also protecting defendants' constitutional rights. Pursuant to this Court's decisions in *Coy* and *Craig*, Iowa courts hold evidentiary hearings to make case-specific findings regarding trauma to children-victims before allowing children to testify via close-circuit television. *See, e.g.*, *Lomholt v. Iowa*, 327 F.3d 748, 756 (8th Cir. 2003) (affirming Iowa state court conviction where four-year-old and

five-year-old children provided sequestered, closed-circuit testimony).

The Iowa Legislature has codified the case-specific procedure discussed in *Craig* through Iowa Code section 915.38. Section 915.38 specifies that "[u]pon its own motion or upon motion of any party," the court may "protect a minor . . . from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate, by ordering that the testimony of the minor be taken in a room other than the courtroom and be televised by closed-circuit equipment for viewing in the courtroom." Iowa Code § 915.38(1)(a). In addition to requiring that the trial court make specific findings about the trauma that the child would experience if forced to testify in open court, section 915.38 contains additional "strict requirements" for the court to follow. *See, e.g.*, *State v. Shearon*, 660 N.W.2d 52, 54 (Iowa 2003) (discussing 1999 version of section 915.38(a)). Those strict requirements include the judge informing the child that the defendant will not be present in the room where the child is testifying but that the defendant will be able to view the child's testimony through closed-circuit television. *See* Iowa Code § 915.38(1)(a). Also under those requirements, the defendant remains in the courtroom while the defendant's counsel is present in the room where the child is testifying, but the defendant must be able to communicate effectively with his counsel by appropriate electronic methods. *See* Iowa Code § 915.38(1)(b).

While ensuring that trial courts comply with the strict requirements of section 915.38 and *Craig* before allowing a child to testify remotely, the Iowa Supreme Court has carefully preserved the core constitutional principles at stake. As recently as October 2014, the Iowa Supreme Court underscored *Craig*'s observation that "face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person." *State v. Rogerson*, 855 N.W.2d 495, 504 (Iowa 2014) (quoting *Craig*, 497 U.S. at 846) (internal quotation marks omitted). The Iowa Supreme Court also emphasized that "[r]emote testimony of any kind should not be lightly substituted in its place." *Id.* at 505. Through section 915.38's strict requirements and through Iowa courts' reluctance to allow children-witnesses to testify remotely unless absolutely necessary, Iowa courts strive to safeguard a child-witness that is competent to testify at the same time that they strive to protect the defendant's constitutional rights to confrontation and to the assistance of counsel.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to decline Ohio's invitation to impose a nationwide rule holding that a witness's accusations could never be subject to the Confrontation Clause if they are made to a private party. Ohio has itself created the

problem it faces in this case. Diminishing the right to confront adverse witnesses is not the cure.

Respectfully submitted,

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APPENDIX A

PERTINENT STATE STATUTES – EXCERPTS

Arizona

Ariz. Rev. Stat. § 13-4061 – Competency of witness

In any criminal trial every person is competent to be a witness.

Ariz. Rev. Stat. § 13-4253 – Out of court testimony; televised; recorded

A. The court, on motion of the prosecution, may order that the testimony of the minor be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment and any person whose presence would contribute to the welfare and well-being of the minor may be present in the room with the minor during his testimony. Only the attorneys may question the minor. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the minor during his testimony but does not permit the minor to see or hear them. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant.

B. The court, on motion of the prosecution, may order that the testimony of the minor be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection A may be present during the taking of the minor's testimony, and the persons operating the equipment shall be confined from the minor's sight and hearing as provided by subsection A. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant. The court shall also ensure that:

1. The recording is both visual and aural and is recorded on film or videotape or by other electronic means.

2. The recording equipment was capable of making an accurate recording, the operator was competent and the recording is accurate and is not altered.

3. Each voice on the recording is identified.

4. Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

C. If the court orders the testimony of a minor to be taken pursuant to this section, the minor shall not be required to testify in court at the proceeding for which the testimony was taken.

Connecticut

Conn. Gen. Stat. § 54-86g – Testimony of victim of child abuse. Court may order testimony taken outside courtroom. Procedure.

(a) In any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom in the presence and under the supervision of the trial judge hearing the matter and be televised by closed circuit equipment in the courtroom or recorded for later showing before the court. Only the judge, the defendant, the attorneys for the defendant and for the state, persons necessary to operate the equipment and any person who would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony, except that the court may order the defendant excluded from the room or screened from the sight and hearing of the child only if the state proves, by clear and convincing evidence, that the child would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that a compelling need exists to take the testimony of the child outside the physical presence of the defendant in order to insure the reliability of such testimony. If the defendant is excluded from the room or screened from the sight and hearing of the child, the court shall ensure that the defendant is able to observe and hear the testimony of the child, but that the child cannot see or hear the defendant. The

defendant shall be able to consult privately with his attorney at all times during the taking of the testimony. The attorneys and the judge may question the child. If the court orders the testimony of a child to be taken under this subsection, the child shall not be required to testify in court at the proceeding for which the testimony was taken.

(b) In any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the following procedures be used when the testimony of the child is taken: (1) Persons shall be prohibited from entering and leaving the courtroom during the child's testimony; (2) an adult who is known to the child and with whom the child feels comfortable shall be permitted to sit in close proximity to the child during the child's testimony, provided such person shall not obscure the child from the view of the defendant or the trier of fact; (3) the use of anatomically correct dolls by the child shall be permitted; and (4) the attorneys for the defendant and for the state shall question the child while seated at a table positioned in front of the child, shall remain seated while posing objections and shall ask questions and pose objections in a manner which is not intimidating to the child.

Conn. Gen. Stat. § 54-86h – Competency of child as witness

No witness shall be automatically adjudged incompetent to testify because of age and any child who is a victim of assault, sexual assault or abuse shall be competent to testify without prior qualification. The weight to be given the evidence and the credibility of the witness shall be for the determination of the trier of fact.

Conn. Code Evid. 6-3 – Incompetencies

(a) Incapable of understanding the duty to tell the truth. A person may not testify if the court finds the person incapable of understanding the duty to tell the truth, or if the person refuses to testify truthfully.

(b) Incapable of sensing, remembering or expressing oneself. A person may not testify if the court finds the person incapable of receiving correct sensory impressions, or of remembering such impressions, or of expressing himself or herself concerning the matter so as to be understood by the trier of fact either directly or through interpretation by one who can understand the person.

Iowa

Iowa Code § 3978 (1860)

Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, both civil and criminal, except as herein otherwise declared.

Iowa Code § 915.38 – Televised, videotaped, and recorded evidence – limited court testimony – minors and others

1. a. Upon its own motion or upon motion of any party, a court may protect a minor, as defined in section 599.1, from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate, by ordering that the testimony of the minor be taken in a room other than the courtroom and be televised by closed-circuit equipment for viewing in the courtroom. However, such an order shall be entered only upon a specific finding by the court that such measures are necessary to protect the minor from trauma. Only the judge, prosecuting attorney, defendant's attorney, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the minor may be present in the room with the minor during the minor's testimony. The judge shall inform the minor that the defendant will not be present in the room in which the minor will be testifying but

that the defendant will be viewing the minor's testimony through closed-circuit television.

b. During the minor's testimony the defendant shall remain in the courtroom and shall be allowed to communicate with the defendant's counsel in the room where the minor is testifying by an appropriate electronic method.

c. In addition, upon a finding of necessity, the court may allow the testimony of a victim or witness with a mental illness, an intellectual disability, or other developmental disability to be taken as provided in this subsection, regardless of the age of the victim or witness.

2. The court may, upon its own motion or upon motion of a party, order that the testimony of a minor, as defined in section 599.1, be taken by recorded deposition for use at trial, pursuant to rule of criminal procedure 2.13(2)(b). In addition to requiring that such testimony be recorded by stenographic means, the court may on motion and hearing, and upon a finding that the minor is unavailable as provided in rule of evidence 5.804(a), order the videotaping of the minor's testimony for viewing in the courtroom by the court. The videotaping shall comply with the provisions of rule of criminal procedure 2.13(2)(b), and shall be admissible as evidence in the trial. In addition, upon a finding of necessity, the court may allow the testimony of a victim or witness with a mental illness, an intellectual disability, or other developmental disability to be taken as provided in this

subsection, regardless of the age of the victim or witness.

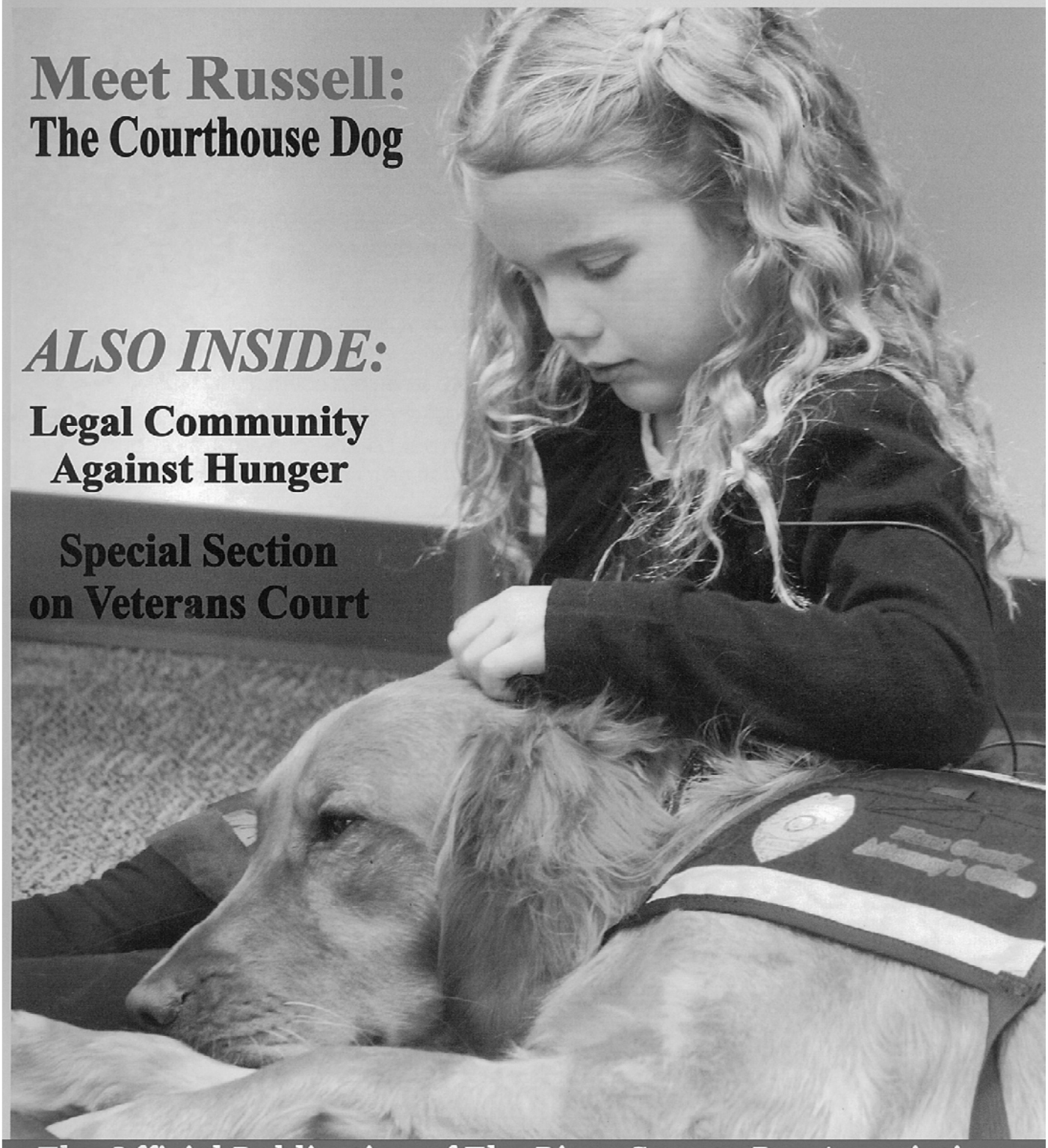
3. The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in section 702.5, describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statements substantially comport with the requirements for admission under rule of evidence 5.803(24) or 5.804(b)(5).

4. A court may, upon its own motion or upon the motion of a party, order the court testimony of a child to be limited in duration in accordance with the developmental maturity of the child. The court may consider or hear expert testimony in order to determine the appropriate limitation on the duration of a child's testimony. However, the court shall, upon motion, limit the duration of a child's uninterrupted testimony to one hour, at which time the court shall allow the child to rest before continuing to testify.

$3.00

The Writ

Volume 31, No. 11 November 2012



Meet Russell:
The Courthouse Dog

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The Official Publication of The Pima County Bar Association

Russell, The Courthouse Dog

By Linda Drake,
Special Staff Assistant to the Pima County Attorney

Russell, Golden Retriever

The Victim Services Division of the Pima County Attorney's Office has just welcomed its first four-legged staffer – Russell, a two-year-old golden retriever and highly trained, certified, professional courthouse dog.

Pima County Attorney Barbara LaWall was inspired by a presentation at a national prosecutors' meeting in 2011 to bring the innovative Courthouse Dog program to Tucson. She asked Kent Burbank, Director of

the Victim Services Division, if he could make it happen. Their primary goal: to help abused and neglected children, especially young victims of sexual abuse, through the criminal justice process. “Despite the progress we have made in how the criminal justice system treats children,” LaWall says, “it is still tremendously difficult for some children to talk about horrific things they have seen or experienced.” And that’s where Russell comes in.

Career prosecutor Ellen O’Neill-Stephens founded the Courthouse Dogs program in Seattle in 2004 after fortuitously discovering the beneficial effect a well-trained dog could have on court proceedings. In 2003 she occasionally took her disabled son’s service dog with her to juvenile court and noticed how markedly Jeeter’s calming presence lowered tensions in the room. A colleague learned of her experience and asked if he could introduce Jeeter to two young victims, twin girls unable to talk about being molested by their father. In Jeeter’s presence, the girls eventually relaxed enough to tell their stories.

In Tucson, Russell will perform the majority of his duties at the Southern Arizona Children’s Advocacy Center, lending much-needed emotional support to traumatized children. Kathy Rau, a retired police lieutenant, forensic interviewer, and the Executive Director of SACAC, is Russell’s new primary handler. She expects Russell will attend most of the forensic interviews conducted at the Center, comforting distraught or reticent children during an acutely stressful time. Those initial interviews will also help

identify which children may need Russell to accompany them throughout the criminal justice process, including trial.

Russell was raised and trained in Santa Fe by Assistance Dogs of the West, an accredited member of Assistance Dogs International. He responds to more than 80 verbal cues, and does so – as required for his certification – at least 90% of the time on the "first ask." Jill Felice, founder of ADW, says that, while the extensive training the dogs receive is obviously vital, "a dog's innate temperament is equally important" for a successful courthouse dog.

Ideal candidates are exceptionally gentle and remarkably nonreactive to stressful events in the environment; they must remain calm no matter what happens around them. They must be highly sociable and want to engage with humans, yet be patient, unobtrusive, and able to remain still (and tolerate petting) for extended periods. They need to be confident, resilient, and amenable to different handlers, different environments, and many different kinds of people. Not surprisingly, dogs possessing all of these saintly traits are rare indeed, but Russell is one such dog. He is, Felice says, truly exceptional and "a perfect dog for the tasks he will perform in Tucson."

Since 2004, O'Neill-Stephens has helped place 18 courthouse dogs in 35 different jurisdictions and been gratified by a Washington appellate court decision upholding their use at trial. She is passionate about the important, "legally neutral" role the dogs can play

in the criminal justice system. "If a traumatized victim or witness cannot provide the basic facts necessary to investigate and prosecute a crime, clearly justice is not served," she says. Because courthouse dogs can silently support the fact-finding process without intruding into it, they "facilitate the search for truth and justice that is the foremost duty of a prosecutor."

Ellen O'Neill-Stephens, the founder of Courthouse Dogs, at the October 25, 2012 Press Conference.

Russell, certified, professional Courthouse Dog.