IN THE COURT OF APPEALS
OF THE STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex rel. WILLIAM G. MONTGOMERY , Maricopa County Attorney, Plaintiff/Petitioner, v. THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, CHRISTOPHER ALLEN SIMCOX, Pro Per Defendant, Real Party In Interest.	)	Arizona Court of Appeals No. 1 CA-SA 15-0087 Maricopa County Superior Court No. CR-2013-428563-001

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE, AND PIMA COUNTY PUBLIC DEFENDER'S OFFICE IN SUPPORT OF REAL PARTY IN INTEREST

David J. Euchner, No. 021768
Pima County Public Defender's Office
33 N. Stone Ave. #2100
Tucson, Arizona 85701
(520) 724-6800
David.Euchner@pima.gov

Kathleen E. Brody, No. 026331
Osborn Maledon, P.A.
2929 N. Central Ave., Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9000
kbrody@omlaw.com

Mikel P. Steinfeld, No. 024996
Amy Kalman, No. 024978
Maricopa County Public Defender's Office
Main Office – Downtown Justice Center
620 W. Jackson, Suite 4015
Phoenix, Arizona 85003
ACE@mail.maricopa.gov

Attorneys for amici curiae **Arizona Attorneys for Criminal Justice, Maricopa County Public Defender's Office, and Pima County Public Defender's Office**

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INTRODUCTION

This case raises the questions of whether and when a court may limit two of a criminal defendant's constitutional rights – the right of self-representation and the right to confront witnesses against him – for the sake of protecting witnesses from the potential discomfort of being cross-examined by the accused. The Superior Court correctly concluded that a parent's letter that a child sex-crime victim fears the defendant and has been traumatized is insufficient to curtail these two fundamental rights afforded those accused of crimes.

In reaching this conclusion, the Superior Court correctly determined that, absent evidence that witnesses would suffer emotional trauma that would impair his or her ability to communicate, or some indication that the defendant intended to use cross-examination to intimidate or embarrass the witness, the defendant's rights of self-representation and confrontation must take priority over concerns of witnesses.

The State presented no such evidence in support of its motion to preclude the defendant from personally cross-examining the child witnesses except for letters from the witnesses' mothers stating that the experience would be traumatic for the children. The State's position would result in a rule that victims of sex crimes or crimes against children may *never* be cross-examined by the alleged abuser, if the accused elects to represent himself at trial. Such a rule does not adequately protect the defendant's constitutional rights.

This is the second time that the Maricopa County Attorney's Office ("MCAO") has brought a petition for special action to this Court on this issue. In the first case, *State ex rel. Montgomery v. Bassett (Cuen)*, 1 CA-SA 12-0283 (jurisdiction declined February 27, 2013), this Court declined to hear the case in a three-page order. This Court solicited *amicus curiae* briefs, and Arizona Attorneys for Criminal Justice ("AACJ"), the Maricopa County Public Defender's Office ("MCPD"), and the Pima County Public Defender's Office ("PCPD") filed a brief in support of the defendant. This time around, MCAO filed a similar motion in the trial court but again failed to make an adequate factual record. While it continues to rely on the few cases that support its position, however, it altogether failed to address the strongest authorities that oppose its position. This failure is very revealing; if the State had a good argument against those cases, it would have made that argument.

For that reason, *amici* ask this Court to grant jurisdiction over this special action, deny relief, and publish an opinion explaining that the defendant's right to self-represent extends to cross-examining all witnesses unless the trial court finds evidence that the defendant intends to abuse the right.

INTERESTS OF *AMICI CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those 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.

MCPD is the largest indigent defense law firm in Arizona with more than 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. During the past fiscal year, the MCPD handled approximately 36,000 cases.

PCPD is the second largest indigent defense law firm in Arizona with approximately 75 assistant public defenders providing indigent legal services in the Pima County Superior Court, Pima County Juvenile Court, and appellate courts.

Amici offer this brief in support of Christopher Simcox regarding the State's petition for special action because the issue presented touches the core of their shared mission to protect individual rights guaranteed by the federal and state Constitutions

and to resist all efforts made to curtail such rights. Furthermore, because public defenders are frequently appointed to act as advisory counsel or standby counsel in cases such as these, *amici* have an interest in ensuring that defendants representing themselves at trial are not prevented from exercising their constitutional rights to confront and cross-examine witnesses and that public defenders are not placed in the precarious position of engaging in an ineffective cross-examination using someone else's questions and tactics.

ARGUMENT

> If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.

McKaskle v. Wiggins, 465 U.S. 168, 178 (1984). The State here seeks to force the exact scenario against which the United States Supreme Court sought to protect: the State wants to require an unwanted attorney "to control the questioning of witnesses [and] to speak *instead* of the defendant" on matters of importance, without any justification. The Superior Court rightly rejected the State's position, which would erode the fundamental rights of a criminal defendant to represent himself and confront the witnesses against him.

I. Pro se defendants have the right to personally cross-examine witnesses, including victims.

A. The right to counsel includes the right to proceed pro se.

In *Faretta v California*, 422 U.S. 806 (1975), the Supreme Court held that the Sixth Amendment grants the accused the right to reject assistance of counsel if he so chooses and represent himself. The Court discussed the history of criminal trials from their beginnings in England through the present and concluded that the right to defend against an accusation is personal to the accused and that the accused directs the decision whether he shall be assisted by counsel.

The Court noted that the Judiciary Act of 1789, "signed one day before the Sixth Amendment was proposed," provided that 'in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel …." *Id*. at 812-13. The Court also wrote that, although counsel may be advantageous to the accused's defense, counsel cannot be forced on a defendant:

> What were contrived as protections for the accused should not be turned into fetters …. To deny him in the exercise of his free choice the right to dispense with some of those safeguards ... is to imprison a man in his privileges and call it the Constitution.

Id. at 815 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942)). Thus, "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id*. at 820.

Faretta found the greatest proof that the right to represent oneself is embodied in the Sixth Amendment in English history:

> In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions…. The Star Chamber not merely allowed but required defendants to have counsel. The defendant's answer to an indictment was not accepted unless it was signed by counsel. When counsel refused to sign the answer, for

> whatever reason, the defendant was considered to have confessed. Stephen commented on this procedure: "There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence." 1 J. Stephen, A History of the Criminal Law of England 341-342 (1883). The Star Chamber was swept away in 1641 by the revolutionary fervor of the Long Parliament. The notion of obligatory counsel disappeared with it.

Id. at 821-23. As a result of this history, English citizens had a severe distrust of lawyers, and even as the criminal law continued to evolve to permit lawyers to appear on behalf of criminal defendants, it was only if the accused so desired. *Id*. at 824. "At no point in this process of reform in England was counsel ever forced upon the defendant." *Id*. at 825-26.

B. The right to confront witnesses includes the right to personally face witnesses and the right to cross-examine witnesses.

A defendant's right to cross-examine witnesses is a bedrock element of the Confrontation Clause. Indeed, "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (internal quotations omitted). The confrontation right affords a defendant two rights: "the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). Even though other elements – such as the swearing of an oath and the right of the jury to observe a witness – factor into Confrontation Clause analysis, "the right to confront witnesses personally, embracing also the right to

cross-examine adverse witnesses, has a high priority on our constitutional scale." *United States v. Carlson,* 547 F.2d 1346, 1357 (8th Cir. 1976). The Confrontation Clause demands that a defendant have the ability to cross-examine his accusers even if other state interests favor limiting such examinations because proper cross-examination "cannot be had except by the direct and personal putting of questions and obtaining immediate answers." *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (forbidding a defendant to cross-examine a witness about the witness's juvenile record violates the Confrontation Clause).

The Supreme Court has affirmed that this principle is not merely constitutional, but that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy v. Iowa,* 487 U.S. 1012, 1017 (1988) (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)). Confrontation serves "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." *Maryland v. Craig,* 497 U.S. 836, 845 (1990). To protect the confrontation right, the means are more important than the ends – the Supreme Court has emphasized that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington,* 541 U.S. 36, 61 (2004). The Confrontation Clause, therefore, seeks to

ensure reliable evidence by giving a defendant access to cross-examination, the "greatest legal engine ever invented for the discovery of truth." 5 Wigmore § 1367.

C. These rights combine to give defendants the right to personally cross-examine witnesses.

In light of the combination of these rights, when a defendant appears pro se, "[t]he pro se defendant must be allowed … to question witnesses …." *McKaskle*, 465 U.S. at 174; *accord People v. Lofton*, 740 N.E.2d 782, 794 (Ill. 2000) ("When a defendant appears pro se, the right to confront witnesses includes the right to cross-examine adverse witnesses."). Cross examination is a fluid process which requires the questioner "to listen to the answer and then, especially with a young child, be able to reword the question or come up with another question based upon the answer." *State v. Folk*, 256 P.3d 735, 745 (Idaho 2011). "[T]he person forming the questions must be able to concentrate on the answers and what further questions are necessary to elicit the desired information." *Id.* Thus, a pro se defendant's ability to personally cross-examine witnesses gives force to his right to exercise actual control over his case. *See McKaskle*, 465 U.S. at 178.

II. A pro se defendant's right to personally cross-examine witnesses can only be infringed in limited circumstances.

A. Thrusting counsel upon a pro se defendant for cross-examination violates the defendant's rights.

1. Thrusting counsel upon a pro se defendant for cross-examination interferes with the defendant's self representation and confrontation rights because it interferes with the pro se defendant's ability to control and conduct cross-examination and make tactical decisions.

"[T]he right to confront witnesses means more than simply being able to physically confront witnesses in the courtroom; confrontation also includes as its 'main and essential purpose' the ability to *effectively* cross-examine witnesses." *State ex rel. Romley v. Super. Ct.*, 172 Ariz. 232, 240, 836 P.2d 445, 453 (App. 1992) (quoting *Van Arsdall*, 475 U.S. at 678) (emphasis added). Because cross-examination is a fluid process that requires quick tactical decisions, "[r]equiring Defendant to write out questions to be asked by someone else in order to cross-examine [a witness] is a significant impairment of the right of confrontation." *Folk*, 256 P.3d at 745; *see also Commonwealth v. Conefrey*, 570 N.E.2d 1384, 1389 (Mass. 1991) (standby counsel appointed to cross-examine child witness noted "that he could not adjust his questions quickly enough to respond to the complainant's answers without constantly conferring with the defendant."). If advisory counsel is thrust upon a pro se defendant and required to conduct a cross-examination instead of the defendant, the cross-examination will not achieve its constitutional goals.

Restricting the scope or nature of cross-examination implicates the Confrontation Clause "because such restrictions may 'effectively ... emasculate the right of cross-examination itself.'" *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985) (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968)). This principle is no less true when a defendant representing himself is denied the right to conduct his own cross-examination. Writing in dissent for four justices in *Craig*, Justice Scalia lamented that even the narrow exception adopted by the Court in that case would produce the following scenario:

> A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, *personally or through counsel*, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?"

497 U.S. at 861 (Scalia, J., dissenting) (emphasis added). The result urged by the State in this case would deny Simcox – the parent in Justice Scalia's hypothetical made real – the same rights without even requiring the procedural safeguards outlined by the *Craig* majority.

Although Arizona courts have not addressed the scope of a pro se defendant's right to cross-examine witnesses, a number of other jurisdictions have. For example, the Florida District Court of Appeal reversed a sex-crime conviction because the

trial court's refusal to allow the pro se defendant to cross-examine the victim personally violated his right of self-representation. *Nesmith v. State*, 6 So.3d 93 (Fla. App. 2009). In *Nesmith*, like this case, the State filed a motion asking that standby counsel cross-examine the victim based on questions written by the defendant, and the court granted the motion. *Id.* at 94. Relying on *Faretta*, the appellate court concluded that this procedure violated the right of self-representation because "counsel [was] unwillingly 'thrust' upon the accused." *Id.* at 95. The Court held:

> Although Appellant's ability to cross-examine the victim was a major element of conducting his own defense, the trial court, over Appellant's objection, required him to cross-examine the victim in the presence of the jury through standby counsel. This was error, as Appellant was denied the ability to appear as he saw fit.

Id.

2. Thrusting counsel upon a pro se defendant for cross-examination interferes with the defendant's rights to an unbiased jury and the presumption of innocence.

In his Response to the State's request for trial accommodations, Simcox wrote: "I expect under the rights of due process to be presumed innocent until proven guilty by a jury; I expect to be treated as innocent by the Court." Defendant's motion for response to State's request for Trial Accommodations, Page 2, State Appendix H. In addition to the concerns regarding confrontation and a defendant's right to control the course of his self-representation, the accommodation requested by the

State violates the pro se defendant's rights to an impartial jury under the Sixth Amendment and the presumption of innocence under the Due Process clauses.

The Sixth Amendment guarantees defendants the right to a trial "by an impartial jury." U.S. Const. Amend. 6; *accord* Ariz. Const. Art. 2, § 24; *see also* Ariz. Const. Art. 2, § 23 ("The right of trial by jury shall remain inviolate."). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *accord State v. Eddington*, 228 Ariz. 361, 363 ¶ 6, 266 P.3d 1057, 1059 (2011).

Similarly, "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). The presumption of innocence is fundamental to the protection of due process as guaranteed in the Fifth and Fourteenth Amendments to the United States Constitution. *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

While the defendant raised this issue in *Coy*, the Court declined to address the claim due to the clear violation of the confrontation right. 487 U.S. at 1015, 1022. The Court also did not evaluate this issue in *Craig*, possibly because it was not raised. However, the State's proposed procedure would violate both of Simcox's rights to a fair and unbiased jury and to be presumed innocent.

Justice Kennedy, concurring in *Riggins v. Nevada*, noted "[i]t is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table." 504 U.S. 127, 142 (1992). The jury is constantly watching the defendant, and is sensitive to any actions that occur outside the norm. The Supreme Court has recognized this with frequent evaluations of any unusual courtroom arrangement. *E.g.*, *Estelle* (defendant appearing in jail attire); *Deck v. Missouri*, 544 U.S. 622 (2005) (defendant visibly shackled); *Holbrook v. Flynn*, 475 U.S. 560 (1986) (unusual amount of courtroom security).

When a courtroom arrangement is challenged as inherently prejudicial, the first question is whether "an unacceptable risk is presented of impermissible factors coming into play," which might erode the presumption of innocence. *Estelle*, 425 U.S. at 505. If a procedure is found to be inherently prejudicial and unnecessary to further an essential state interest, a guilty verdict will not be upheld. *Holbrook*, 475 U.S. at 568–69. In *Illinois v. Allen* and *Deck*, the Court evaluated the conditions under which a defendant must be visibly restrained during trial, holding in *Allen* that the defendant had been sufficiently disruptive that binding and gagging him would have been reasonable, but in *Deck* that the capital defendant had not posed a particularized disruptive, violent, or escape risk and that his visible shackles warranted a new sentencing trial. *Illinois v. Allen*, 397 U.S. 337, 344 (1970); *Deck*,

544 U.S. at 631-32. The *Deck* Court was "mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms. But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." 544 U.S. at 631-32.

It is for these reasons that courts evaluate issues such as defendants appearing in prison attire (*Estelle*), with an unusual amount of courtroom security (*Holbrook*), and in visible restraints (*Allen* and *Deck*) with a close level of scrutiny. Notably, this heightened level of scrutiny mirrors the heightened scrutiny demanded in *Craig* for confrontation violations.

Imposing counsel for the limited purpose of cross-examination of witnesses raises the same concerns. The jury observes that the pro se defendant, who actively controls every other part of his or her defense, sits silenced and incapable during the most important stage of trial. Just as jail garb communicates guilt, the forced muzzling of the pro se defendant at the most crucial stage communicates guilt. Just as increased security or shackles communicates the defendant poses a generalized risk, the forced inactivity and silence communicates the pro se defendant poses a substantial risk to the particular person on the stand, the accuser. Either way, the jury easily infers guilt, thereby eviscerating the pro se defendant's right to an impartial

jury that will presume him or her innocent until the State has satisfied every element of a charge beyond a reasonable doubt.

B. To infringe upon these rights, the State must produce evidence, generally at an evidentiary hearing, that the pro se defendant plans to misuse cross-examination or that the witness will be uniquely harmed by the defendant's cross-examination.

In *Craig*, the Supreme Court identified four elements of confrontation: "physical presence, oath, cross-examination, and observation of demeanor." 497 U.S. at 846. The Court held that one of those elements may be compromised – in *Craig*, physical presence – without violating the Confrontation Clause so long as the other elements are preserved and a court finds after an evidentiary hearing "that use of the procedure is necessary to further an important state interest." *Id.* at 852.

Courts applying *Craig* have required findings, almost always after a hearing, that there is a "substantial likelihood established by her testimony that the child would suffer emotional trauma" if she were to testify in the physical presence of the defendant. *See, e.g.*, *United States v. Etimani*, 328 F.3d 493, 497 (9th Cir. 2003) (*Craig* findings made after reviewing report and hearing testimony of psychologist).

In fact, in *Craig* itself, although the trial court "made individualized findings that each of the child witnesses needed special protection," those findings were not directed at the right that was being denied – the right for the defendant to physically face the witness – and therefore did not conform to the Confrontation Clause. 497 U.S. at 845. Accordingly, confrontation rights – including the right to cross-

examination – may not be curtailed based solely on the nature of a charge. Rather, the Constitution requires individualized findings and accommodations tailored to the concerns underlying those findings if a court limits a criminal defendant's confrontation rights.

The Idaho Supreme Court addressed the same situation in *Folk*. In that case, over the pro se defendant's objection, the trial court required that the child victim be cross-examined by standby counsel reading questions prepared by the defendant. 256 P.3d at 336-37. Relying on *McKaskle*, the Idaho Supreme Court concluded, "Absent evidence that would justify doing so, preventing Defendant from personally conducting the cross-examination infringed upon his right to represent himself." *Id.* at 746-47.

Cases from other jurisdictions, including cases cited by the State, support the need for a hearing and particularized findings. For example, in *State v. Seymer*, the Wisconsin Court of Appeals reversed a sex-crime conviction because the trial judge cut off the defendant's questioning of the child victim in the middle of the examination. 699 N.W.2d 628, ¶ 4 (Wis. App. 2005). In its review of the record, the appellate court found "no evidence from the record that Seymer exhibited disrespect for the court, opposing counsel or the witnesses, nor did he appear to engage in derisive behavior or attempt to taunt the judge." *Id.* at ¶ 10.

Similarly, in *Commonwealth v. Conefrey*, the court appointed standby counsel to cross-examine the child victim, over the pro se defendant's objection. 570 N.E.2d 1384, 1388 (Mass. 1991) ((cited by State in Petition for Special Action, 3). Upon review, the Massachusetts Supreme Judicial Court reversed because there was nothing in the record justifying the limitations imposed by the trial court:

> The record contains nothing to show that the defendant intended to exploit or manipulate the right of self-representation for ulterior purposes. There is also no indication that the defendant's questioning of the complainant would harm her, that it would violate the rules of evidence and protocol which normally apply in this sort of trial, or that the complainant would not respond truthfully to his questions….
>
> ...
>
> The *mere belief* held by the judge that the complainant could be intimidated or harmed beyond the normal limits associated with a trial involving a young complainant, or that she might respond untruthfully if she was questioned by the defendant, is not sufficient to justify the restriction placed on cross-examination.

Id. at 1390-91. Following *Conefrey*, the Massachusetts Court of Appeals went further, overturning a conviction based on a confrontation violation because, although the child victim was cross-examined by the pro se defendant, the victim was "comfortably shield[ed] ... from a face-to-face meeting with the defendant" and the government had not made the required showing of a "compelling need" for the procedure employed by the court. *Commonwealth v. Spear*, 686 N.E.2d 1037, 1043 (Mass. App. 1997).

Even in cases that approved limiting a pro se defendant's right to cross-examine witnesses, the courts recognize the need for evidence supporting the limitations imposed. For example, in *Partin v. Commonwealth*, the trial court relied on a letter from the victim advocate expressing the victims' fears of the defendant due to threats on their lives. 168 S.W.3d 23, 26 (Ky. 2005) (cited by State in Petition for Special Action, 3). The court prohibited the defendant from cross-examination after holding a hearing. *Id.* The Kentucky Supreme Court, however, in upholding the ruling, noted that "[i]t would have been the better course to hold an evidentiary hearing and make a finding of necessity similar to that required in *Craig* …." *Id.* at 28; *accord Lewine v. State*, 619 So.2d 334, 336 n.1 (Fla. Dist. Ct. App. 1993) (trial court held hearing and found that the child victim "would suffer harm if she saw or heard [the defendant] during her testimony").

The State's citation to *Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009) (cited by State in Petition for Special Action, 3), reveals a shortcoming in the State's application of Kentucky cases to the Arizona. *Depp* focused on whether the defendant had waived his right to counsel. *Id.* at 619. Relying only on *Partin* and citing no federal authority, the court in *Depp* concluded that a trial judge would not abuse its discretion by requiring standby counsel to question a victim. *Id.* The dissent, however, reveals why Kentucky jurisprudence cannot be implanted into Arizona: Kentucky provides for limited waivers of counsel such that defendants may

conduct the trial as hybrid counsel. *Id.* at 623 (Minton, C.J., dissenting). In Arizona, though, there is no right to hybrid representation. *See State v. Cornell*, 179 Ariz. 314, 325, 878 P.2d 1352, 1363 (1994). Further, Simcox has clearly and explicitly asserted his right to control his defense and his understanding that standby counsel was not to act in a hybrid fashion. (Defendant's Response to State's request for Accommodations, pages 16-17, State's Appendix H). Thus, the Kentucky cases hold limited persuasive value in Arizona. However, to the extent the cases are applicable, they support the conclusion that "an evidentiary hearing" is necessary, a point the State has refused to acknowledge.

State v. Estabrook, 842 P.2d 1001 (Wash. App. 1993) (cited by State in Petition for Special Action, 3), also provides no substantive assistance for the State's assertion. In *Estabrook*, the transcript from the trial court's decision was not provided. *Id.* at 1004. Because the transcript was not provided and the appellate burden was on the party claiming error, the Court of Appeals did not know if the defendant ever objected. *Id.* Moreover, the defendant appeared to acquiesce to the method. *Id.* at 1006. Finally, the record provided evidence from which the trial court could have based its decision. *Id.* at 1004-05. Unlike *Estabrook*, the record clearly demonstrates Simcox has actively and persistently objected to any attempt by the State to violate his right to personally cross-examine all witnesses.

In *State v. Taylor*, 562 A.2d 445, 453 (R.I. 1989) (cited by State in Petition for Special Action, 3), the Rhode Island Supreme Court, like the Court in *Craig*, considered whether a state statute permitting child testimony by videoconference was constitutional in light of Justice O'Connor's concurrence in *Coy*. The court prefigured *Craig* both by finding that the statute did not violate the Confrontation Clause and by holding that "the right to confrontation will give way to exceptions *only upon a finding that, in the specific case at hand*, the exception is necessary to an important public policy." *Taylor*, 562 A.2d at 453 (emphasis added). To the extent that *Taylor* is relevant to the issue in this case, it again *supports* the conclusion that individualized evidentiary findings are required before a court can limit confrontation rights.

Notably, the State, while relying on these cases for support, still did not bring live witnesses to the evidentiary hearing, catching the Respondent Judge by surprise because the State's own favored cases still require an evidentiary hearing. *See* State's Appx. Exhibit A, at 10-11.

The State has also pointed out that a defendant's right to proceed pro se can be terminated if the defendant "engages in serious and obstructionist misconduct" or "abuse[s] the dignity of the courtroom." Petition for Special Action, 11-12 (citing *Faretta*, 422 U.S. at 834). *Faretta* indeed holds that a trial court may terminate a defendant's right if the defendant behaves improperly.

However, the State has presented nothing to indicate Simcox has behaved improperly or will behave improperly. Moreover, the State has produced no evidence to indicate Simcox will suddenly become irrational and direct misconduct toward the alleged victims. Rather, Simcox is aware that cross-examination of alleged victims is a "sensitive issue" and understands that misconduct directed toward alleged victims would not be to his benefit in the eyes of the jury. State's Appx. Exhibit A, 25, Exhibit H, 7-8.

Like these other courts, this Court should conclude that a pro se defendant has the right to cross-examine witnesses personally and that this right extends to alleged victims. At a minimum, a pro se defendant's right to cross-examine witnesses, including victims, can be limited only based on evidence to justify the limitations.

C. The State's tremendous reliance upon *Fields v. Murray* is misplaced.

The State relies almost exclusively on *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995), in which the court upheld a trial court's refusal to allow a defendant represented by counsel the opportunity to personally cross-examine child witnesses. There are two reasons the State's reliance upon *Fields* is misplaced. First, *Fields* supports the proposition that evidence must exist justifying the limitation of a pro se defendant's right to cross-examine witnesses. *Fields* merely found the evidence through a different manner. Second, to the extent *Fields* even discussed confrontation, *Fields* was wrongly decided.

First, *Fields* does not depart from the legal requirement that the trial court must reach factual findings, based upon evidence, that suggest a witness will be uniquely harmed or the defendant poses a substantial risk of behaving improperly. In *Fields*, the trial court expressly found that limitation of cross-examination "was necessary to protect the girls from emotional trauma." *Id.* at 1036. While not the product of an evidentiary hearing, the finding was premised upon evidence in the trial court's possession. *Id.* The evidence included multiple letters in which the defendant disclosed embarrassing and harassing details about the victims the defendant intended to reveal. *Id.* Applying a deferential standard of review, the Fourth Circuit found adequate support for the trial court's factual determination. *Id.*

Moreover, the nature of the request bolstered the trial court's determination. Five years later, Judge Murnaghan, who sat on *Fields*, again discussed *Fields* and noted that the defendant's insincere attempt to insert himself just into the cross-examination suggested an improper motive:

> The defendant in *Fields*, furthermore, was not genuinely interested in conducting his entire defense on his own. All he really wanted was the opportunity to participate in one discrete area of the trial: the cross-examination of the children he was accused of assaulting. *Id.* at 1034. In this sense, his request to proceed pro se was really just a pre-text for a different agenda. Because the court held that the defendant had no right to cross-examine the children personally, it denied his request for self-representation, given that his pro se motion was parasitic on his desire to engage in the forbidden cross-examination. *Id.*

United States v. Frazier-El, 204 F.3d 553, 570 (4th Cir. 2000) (Murnaghan, J., dissenting).

The factual determination in this case was that the State had not satisfied its burden of proving the alleged victims would be uniquely harmed. Notably, this Court also applies a similarly deferential standard of review, abuse of discretion. *E.g. State v. Peters*, 189 Ariz. 216, 218, 941 P.2d 228, 230 (1997) (suppression motion); *Forino v. Arizona Dept. of Transp.*, 191 Ariz. 77, 81, 952 P.2d 315, 319 (App. 1997).

The State had presented letters from the mothers of the alleged victims. *See* State's Appx. B, attachments to motion. However, these letters failed to actually indicate what harm would be suffered uniquely from the process of cross-examination by Simcox, a point not lost on the trial court. *See* State's Appx. A, 15 ("But again, the testimony or evidence we have here is a letter from mom saying that these kids are traumatized, not that they are going to be traumatized, but they have been traumatized, and there is no distinction between past trauma and current trauma."). In light of this apparent shortcoming, the State did not call the mothers to the stand to testify about expected trauma. The State did not call a psychologist who had counseled the children to talk about expected trauma. Instead, the State relied solely upon a generalized expectation of fear – a standard below that required by *Craig* and below what was observed in *Fields*. Moreover, Simcox has made no such attempt to limit his involvement to just the cross-examinations of the alleged victims,

as was noted in *Frazier-El*. Thus, the presumptions exercised in *Fields* do not apply in this case.

However, to the extent *Fields* might support the State's argument that evidence is not necessary, *Fields* was wrongly decided. First, and most importantly, Fields never made a request to proceed pro se, and thus never triggered the *Faretta* inquiry in the first place. 49 F.3d at 1028, 1033. Second, in reaching the question whether even a pro se defendant could be denied the right to personally cross-examine his accusers, the tone of the majority opinion exuded a clear and unmistakable disdain for the defendant and a failure to approach the legal issue objectively. *Id*. at 1026 ("This sickening routine continued for a number of months."), 1036 (charged … with raping, sodomizing, and sexually battering these girls …. it can be inferred from this statement [in his letter to the court] that Fields' intention in the cross-examination was to intimidate the girls ….''). Third, the court stated that the right of face-to-face confrontation is more important than the right to confront by cross-examination, which is contrary to every other case addressing that issue. *See e.g. Crawford*, 541 U.S. at 61; *Craig*, 497 U.S. at 845; *Coy*, 487 U.S. at 1017; *Ritchie*, 480 U.S. at 51; *Van Arsdall*, 475 U.S. at 678; *Davis*, 415 U.S. at 316; *Carlson*, 547 F.2d at 1357.

Moreover, as *Fields* is not binding on this court, it is extremely noteworthy that *Fields* was decided by a 7-5 vote and that the dissenting opinion chides the

majority for "focusing on the moral depravity of Fields' actions [and] ignor[ing] the defendant's clear and unequivocal expression of a desire to represent himself at trial." 49 F.3d 1024, 1037 (Ervin, C.J., dissenting).

But the *Fields* dissent goes far beyond criticizing the tone of the majority. Chief Judge Ervin lays out a fuller history and cites a third letter from Fields in which he clearly invoked his right to self-representation. *Id*. at 1038-39 (Ervin, C.J., dissenting). Accusing the majority of selective citation to the record, the dissent then lays out the entirety of the discussion that demonstrates that the trial court had paid no mind to the attempt to invoke the right to self-representation. *Id*. at 1039-40 (Ervin, C.J., dissenting).

Then, in moving to the issue of personally cross-examining the child witnesses, Chief Judge Ervin strongly attacked the majority for addressing the issue in this manner:

> I am most disturbed by the court's decision to use this case as the vehicle by which it could reconsider the scope of the Sixth Amendment's right to self-representation…. The constitutional discussion undoubtedly comes as a complete surprise to the parties in this case. The issue was not raised in the original briefs and, although we asked for supplemental briefing, the court did not ask the parties to include a discussion of the constitutional question. As a result, the parties' briefs focus on the questions originally debated, i.e., whether Fields invoked his *Faretta* right and what standard of review should be employed in answering that question. Furthermore, the extent to which Confrontation Clause analysis should be applied to the self representation [sic] setting was dealt with only briefly at oral argument. Nevertheless, with no briefing and virtually no oral argument on this

> point, the court has taken upon itself to raise and answer a constitutional question not necessarily implicated by the facts of this case.
>
> …
>
> In one sweeping sentence, the majority collapses the distinction between rights under the Confrontation Clause and the right to self-representation. Nowhere in its discussion of the Confrontation Clause does the majority acknowledge the most glaring difference between *Maryland v. Craig* and *Fields v. Murray*—that only one of these defendants wished to proceed with the benefit of counsel. Craig was never in jeopardy of losing his right to cross-examine witnesses. His attorneys were present to conduct such an examination on his behalf. As a result, his rights under the Confrontation Clause could never be completely eviscerated. The worst-case scenario for Craig was not being allowed to *face* his accusers personally. Denying Fields the right to proceed pro se, however, not only meant that his right to represent himself would not be respected, but also meant that he would not be permitted to conduct cross-examination in the way he saw fit. The trial court's repudiation of Fields' Sixth Amendment right to self-representation had a domino effect unparalleled in the *Craig* setting. The stark differences between *Craig* and this case make it difficult for me to understand how the majority can assert so boldly that "[i]f a defendant's Confrontation Clause right can be limited in the manner provided in *Craig*, we have little doubt that a defendant's self-representation right can be similarly limited." *Majority Opinion*, at 1035. The most troubling aspect of this assertion is that it appears to be based on little more than the fact that *Faretta* did not garner the vote of more than six justices and that self-representation rights are not explicitly provided for by the Sixth Amendment, as are Confrontation Clause rights. *Id.*

Id. at 1044-45 (Ervin, C.J., dissenting).

From there, the dissent engaged a lengthy analysis of how the majority opinion completely misread *Faretta* and *McKaskle* and failed to appreciate the critical distinctions between *Craig* and *Fields*, ultimately based on the flawed

foundational premise that the right of self-representation is of lesser value among the panoply of constitutional rights. *Compare id*. at 1036-37 (opinion of the court) ("the right denied here, that of cross-examining witnesses personally, lacks the fundamental importance of the right denied in *Craig*, that of confronting adverse witnesses face-to-face."), *with id*. at 1046-47 (Ervin, C.J., dissenting).

Looking at these two opinions twenty years later, it is evident that Chief Judge Ervin's opinion is the more well-reasoned, the more faithful to the important constitutional right of self-representation, and the one that has been accepted by other courts in posterity. As discussed in more depth above, courts evaluating the question after *Fields* have consistently required the production of evidence, including *Folk*, *Seymer*, *Partin*, and *Spear*.

III. The Victims' Bill of Rights does not alter a pro se defendant's right to personally cross-examine witnesses.

As the State points out, being subjected to cross-examination can be a difficult experience, whether the questioning is conducted by the defendant or by counsel. Petition, 17-18. The Supreme Court, however, long ago balanced the interests of crime victims to be free from potentially damaging cross-examination against the Sixth Amendment rights of the accused and found that the Sixth Amendment prevailed. Writing that abiding by the Confrontation Clause "may, unfortunately, upset the truthful rape victim or abused child," the Court held that such consequences

cannot trump constitutional rights, noting that "[i]t is a truism that constitutional protections have costs." *Coy*, 487 U.S. at 1020.

Furthermore, the Supreme Court has long balanced the rights of witnesses against those of defendants, and found that, except in particular circumstances not alleged here, the defendants' rights prevail. Despite its costs, therefore, preserving the right to cross-examination "is critical for ensuring the integrity of the fact-finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

Arizona's Victims' Bill of Rights (VBOR) does not alter this conclusion. "[I]f, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, the victim's rights must yield. The Supremacy Clause requires that the Due Process Clause of the U.S. Constitution prevail over state constitutional provisions." *State v. Riggs*, 189 Ariz. 327, 330-31, 942 P.2d 1159, 1162-63 (1997) (internal citations omitted); *see also Romley*, 172, Ariz. at 236, 836 P.2d at 449 ("[W]hen the defendant's constitutional right to due process conflicts with the [VBOR] in a direct manner ... then due process is the superior right.").

This Court has already considered several times the interplay between a criminal defendant's confrontation and due process rights and the VBOR. In *S.A. v. Superior Court*, a victim who had been subpoenaed by the State failed to appear for trial. 171 Ariz. 529, 530, 831 P.2d 1297, 1298 (App. 1992). The victim argued that

the VBOR permitted her refusal to testify. *Id.* This Court noted that "[t]he protection afforded a defendant by the Confrontation Clause is a trial right which usually is satisfied if the defendant is permitted sufficient latitude in the cross-examination of witnesses at trial." *Id.* at 531, 831 P.2d at 1299. Thus, the Court concluded that if a victim could invoke the VBOR to avoid testifying in court, "a defendant's rights under the United States and Arizona Constitutions would be jeopardized." *Id.*

Division Two of this Court came to a similar conclusion in *State ex rel. Dean v. City Ct.*, 173 Ariz. 515, 844 P.2d 1165 (App. 1992). In *Dean*, the defendant subpoenaed the victim to testify at a probable cause hearing. *Id.* at 516, 844 P.2d at 1166. The Court rejected the State's argument that the VBOR was intended "to spare victims from all exposure to adversarial contact with defendants or their attorneys until the time of trial." *Id.* The defendant's right to due process had to take priority over any rights of the victim. *Id.* at 517, 844 P.2d at 1167.

This Court also dealt with the conflict between confrontation rights and the VBOR in *State v. Blackmon*, 184 Ariz. 196, 908 P.2d 10 (App. 1995). In that case, the defendant sought to cross-examine a victim after the victim gave an unsworn statement at the time of sentencing. *Id.* at 197, 908 P.2d at 11. The Court concluded that "basic concepts of fairness, justice and impartiality mandate that the defendant be allowed, at an aggravation and mitigation hearing, to cross-examine the victims in order to bring out mitigating circumstances." *Id.* at 198, 908 P.2d at 12 (quoting

State v. Asbury, 145 Ariz. 381, 386, 701 P.2d 1189, 1194 (App. 1984)). *See also State v. Warner*, 168 Ariz. 261, 264, 812 P.2d 1079, 1082 (App. 1990) ("[T]he substantive right involved is the right to confront and cross-examine the witnesses against the real parties in interest, that is, the victims. The [VBOR] does not affect that right ….").

Where there has been a conflict between victims' rights and a defendant's Confrontation and due process rights, a defendant's rights have prevailed. Put simply, cross-examination does not constitute "intimidation, harassment or abuse." *See* Ariz. Const. Art. 2, § 2.1(A)(1). Even if the VBOR were to be interpreted to provide victims the rights to bar pro se defendants from cross-examining them, the defendant's constitutional rights would supersede it.

Rather, endorsement of the State's proposal could actually have a greater negative impact on the alleged victims. In *Folk*, the Idaho Supreme Court noted one effect of the same process proposed by the State was that the examination lasted drastically longer. 256 P.3d at 745. Like in *Folk*, the State's proposal would require advisory counsel to ask a question of a witness, receive an answer, and then confer with the defendant to determine whether the next planned question should be asked or if changes should be made. Such a procedure would multiply the duration of any cross-examination by ten or even twenty times and drastically decrease its effectiveness. However, this extended duration would also force alleged victims to

be subject to cross-examination for a longer duration. Simcox understands that it is not in his best interest to harass, belittle, or degrade the alleged victims. State's Appx. A, 25. Subjecting these alleged victims to a drastically longer cross-examination process may also create a traumatic environment.

IV. In this case, the trial court correctly ruled that the State had not presented sufficient evidence to justify infringing upon Simcox's right to personally cross-examine witnesses.

A. The trial court gave the state the opportunity to present evidence. The state refused this opportunity.

At the beginning of the hearing, the trial court asked the State to call its first witness. State's Appx. A, 10-11. The State indicated a desire to proceed just on oral argument. *Id.* at 11. The trial court then made clear, if the State was not going to present evidence, that it would deny the motion because it had not presented sufficient evidence. *Id.* at 11-12. The trial court drew guidance specifically from *Craig*'s direction to hold an evidentiary hearing. *Id.* at 14. Throughout this entire discussion, the State never called a witness. Throughout this discussion, the State never asked for a continuance to call a witness. Instead, the State attempted to proceed just upon the content of three letters.

The trial court explained why the letters were insufficient. *Id.* at 15, 18-19. Again, the State did not call a witness or request a continuance.

B. Without any reliable evidence, the trial court legitimately found the State had not carried its burden.

The State proposes that the nature of the charges merits the requested change in the conduct of trial. They made no particularized showing that Simcox either intended to engage in witness harassment or that the witnesses would be particularly harmed by the experience of being cross-examined by Simcox. Instead, they relied primarily on the criminal allegations in this case, coupled with speculation by the guardians as to what kind of harm may result. Curtailing a defendant's right to cross-examination based solely on the nature of the charge violates the Sixth Amendment's Confrontation Clause. *See Craig*, 497 U.S. at 845.

As discussed above, the court gave detailed reasons why it was seeking evidence and why the evidence in this case (the letters and the nature of the charges) was lacking. The court, having given the State a chance to meet its burden and even guidance on what it believed it needed, correctly found that burden had not been met.

CONCLUSION

The Superior Court correctly concluded in this case that the State had not made the legal or factual showing required to prohibit the defendant from personally cross-examining the child witnesses.

This Court should accept review of this special action, deny relief to the State, and clarify that any limitations on a pro se defendant's right to cross-examine

witnesses can be imposed only after an evidentiary hearing after which the trial judge makes particularized findings justifying the limitations.

RESPECTFULLY SUBMITTED this 14th day of April, 2015.

PIMA COUNTY PUBLIC DEFENDER'S OFFICE

By /s/ David J. Euchner

David J. Euchner
33 N. Stone Ave. #2100
Tucson, AZ 85701

MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE

Mikel P. Steinfeld & Amy Kalman
620 W. Jackson, Suite 4015
Phoenix, AZ 85003

OSBORN MALEDON, P.A.

Kathleen E. Brody
2929 N. Central Ave., Suite 2100
Phoenix, AZ 85012-2793

Attorneys for *amici curiae*
Arizona Attorneys for Criminal Justice, Maricopa County Public Defender's Office, and Pima County Public Defender's Office