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 EDWARD BASSETT, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, JOE CUEN, Pro Per Defendant, Real Party In Interest.	)	Arizona Court of Appeals No. 1 CA-SA 12-0283 Department B Maricopa County Superior Court No. CR-2011-008083-001

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

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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 a witness from the potential discomfort of being cross-examined by the accused. The Superior Court correctly concluded that a mere avowal by the State that an adult sex-crime victim fears the defendant is insufficient to curtail these two fundamental rights afforded those accused of crimes.

In reaching this conclusion, the Superior Court relied on a recent case from the Idaho Supreme Court, which concluded that the trial court's order requiring standby counsel to question a child sex-crime victim violated the defendant's right of self-representation and right to confront witnesses. *State v. Folk*, 256 P.3d 735, 745-47 (Idaho 2011). The Idaho court held, and the Superior Court in this case agreed, that, absent evidence that the witness 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 about the witness.

The State presented no such evidence in support of its motion to preclude the defendant from personally cross-examining three adult witnesses, arguing that the

nature of the crimes committed against these witnesses – all sex crimes – itself justified requiring standby counsel to conduct the questioning. The State's position would result in a rule that a victim of a sex crime may *never* be cross-examined by her alleged attacker, if the accused elects to represent himself at trial. Such a rule does not adequately protect the defendant's constitutional rights.

If the Court accepts jurisdiction over this special action, the Court should deny the State relief.

INTERESTS OF *AMICI CURIAE*

Amicus curiae Arizona Attorneys for Criminal Justice 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.

Amicus curiae Maricopa County Public Defender's Office ("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 almost 50,000 cases.

Amicus curiae Pima County Public Defender's Office ("PCPD") is the

second largest indigent defense law firm in Arizona with approximately 80 assistant public defenders providing indigent legal services in the Pima County Superior Court and appellate courts.

Amici offer this brief in support of Joseph Cuen 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. Prohibiting a Pro Se Defendant from Personally Cross-Examining Witnesses Without Adequate Justification Violates His Right to Self-Representation

A. The Right of Self-Representation Has Deep Historical Roots

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.

Denying a pro se defendant the ability to cross-examine witnesses personally would deprive him of the right to self-representation by transforming the trial into the Star Chamber procedure as described in *Faretta*. The defendant's ability to control examination of witnesses extends beyond the formulation of the questions to the pace and expressions of the examiner. Advisory counsel conducting a cross-examination, even with questions supplied by the defendant, would necessarily conduct himself according to his own strategy and tactics, rather than those of the defendant who is supposed to be controlling the direction of the case. This result violates the U.S. and Arizona Constitutions.

B. Cases Balancing the Right of Self-Representation Against the Rights of Witnesses Protect Pro Se Defendants' Right to Cross-Examine Witnesses Personally

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. Ct. 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.[1]

Even more recently, the Idaho Supreme Court addressed the same situation in *State v. Folk*, 256 P.3d 735 (Idaho 2011).[2] 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. *Id.* 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.

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[1] Like the *Nesmith* defendant, Cuen has not sought participation from his standby counsel and has objected to standby counsel asking questions at the trial. Appendix 5, Transcript.

[2] Although the Superior Court relied on *Folk*, the State has not addressed *Folk* in its petition for special action.

Folk recognizes that examination of witnesses includes not only the content of the questions but also the pacing of the questions and the mannerisms of the examiner. As the Superior Court noted in this case, 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. (Order at 2.) Such a procedure would multiply the duration of any cross-examination by ten or even twenty times and drastically decrease its effectiveness.

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 Cases Relied on by the State Are Not Persuasive

Although Kentucky has endorsed the procedure urged by the State, its cases are distinguishable from this case and its laws regarding counsel differ from Arizona's. *Partin v. Commonwealth* involved hybrid representation and is further distinguishable because the defendant acquiesced to the trial court's order and did not preserve the issue for appeal. 168 S.W.3d 23, 26 (Ky. 2005). *Depp v. Commonwealth* focused on whether the defendant had waived his right to counsel.

278 S.W.3d 615, 619 (Ky. 2009). 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.*

Moreover, as noted by the dissent in *Depp*, Kentucky provides for limited waivers of counsel such that defendants may conduct the trial as hybrid counsel. *Id.* at 623 (Minton, C.J., dissenting). There is no right to hybrid representation in Arizona. *See State v. Cornell*, 179 Ariz. 314, 325, 878 P.2d 1352, 1363 (1994). The Kentucky cases are thus not persuasive in this jurisdiction.

II. Prohibiting a Pro Se Defendant from Personally Cross-Examining a Witness Without an Adequate Basis Violates the Confrontation Clause

Curtailing a defendant's right to cross-examination based solely on the nature of the charge violates the Sixth Amendment's Confrontation Clause. *See Maryland v. Craig*, 497 U.S. 836, 845 (1990). The right to cross-examine is at the heart of the Confrontation Clause, and "[w]hen a defendant appears pro se, the right to confront witnesses includes the right to cross-examine adverse witnesses." *People v. Lofton*, 740 N.E.2d 782, 794 (Ill. 2000). Under certain circumstances, for example, when a court finds after an evidentiary hearing that it is "necessary to protect a child witness from trauma," some limitations may be placed on confrontation rights. *Craig*, 497 U.S. at 857. But any such limitations require adequate justification and must be tailored to address the individualized findings of

the court.

A. The Right to Cross-Examine Is the Core of the Confrontation Clause

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 "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).[3] Even though other elements – such as the

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[3] Arguably, the Arizona constitutional provision protecting the right of confrontation is broader than the federal provision and could be interpreted to allow personal cross-examination by a criminal defendant even if the federal provision did not:

> In criminal prosecutions, the accused shall have the right to appear and *defend in person*, and by counsel, . . . [and] to meet the witnesses against him *face to face* . . . .

Ariz. Const. art. II, § 24 (emphasis added); *see Coy*, 487 U.S. 1012, 1024 (1988) (O'Connor, J., concurring) ("I would permit use of a particular trial procedure that called for something *other than face-to-face* confrontation if that procedure was necessary to further an important public policy.") (emphasis added). Other states whose constitutions protect a right to "face to face" confrontation have rejected *Craig* on state law grounds. *See, e.g.*, *People v. Fitzpatrick*, 633 N.E.2d 685, 688 (Ill. 1994) ("Unlike its Federal counterpart, however, article I, section 8, of the Illinois Constitution clearly, emphatically and unambiguously requires a 'face to face' confrontation. Based upon this distinction, the United States Supreme Court's reasoning in *Craig* should not be applied to the instant case.") (superseded by constitutional amendment); *Commonwealth v. Ludwig*, 594 A.2d 281 (Pa. 1991)

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." *Craig*, 497 U.S. at 845. To protect the confrontation right, the means are more important than the

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(same); *see also Commonwealth v. Spear*, 686 N.E.2d 1037 (Mass. Ct. App. 1997) ("Any arrangement that allows the witness to testify quite comfortably and naturally without ever having the accused in [his] field of vision is impermissible.") (citation and internal quotation marks omitted).

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.

B. The *Craig* Limits on Confrontation Rights Are Exclusive to Child Witnesses and Require Individualized Findings Based on Evidence

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 have applied *Craig* almost exclusively in cases involving child witnesses, and have required findings, 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). On the other hand,

other courts, like the California Court of Appeal, have concluded that allowing an adult victim to testify behind "what amounts to a plexiglass window" violates the Confrontation Clause because neither party had "identified any authority recognizing or establishing that the state has 'transcendent' or 'compelling' interest in protecting adult victims of sex crimes from further psychological trauma that might result from testifying face-to-face with a defendant." *People v. Murphy*, 132 Cal. Rptr. 2d 688, 693 (Ct. App. 2003).

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.

C. Prohibiting a Pro Se Defendant from Conducting His Own Cross-Examination Limits His Confrontation Rights

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 the parent in Justice Scalia's hypothetical the same rights without even requiring the procedural safeguards outlined by the *Craig* majority.

"[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). Thus, pro se

defendants have the right to conduct their own cross-examinations, and "[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.").

The Superior Court wrote that it "shares the concerns voiced in *Folk*" and quoted the opinion regarding the restrictions the proposal would place on the right to cross-examine witnesses: "Cross-examination is often a fluid process, and the person forming the questions must be able to concentrate on the answers and what further questions are necessary to elicit the desired information." (Order at 2–3.) Otherwise, the cross-examination will not achieve its constitutional goals.

D. The State Has Cited No Cases Addressing the Confrontation Clause That Support Its Position

The State cites only two cases that address confrontation rights in similar contexts, but neither of those cases supports the result advocated for by the State in this case. In *Depp v. Commonwealth*, in which the primary issue was the defendant's waiver of his right to counsel, the Kentucky Supreme Court conducted only a cursory confrontation analysis and cited no federal authority on the issue.

278 S.W.3d at 619. The court conflated the four elements of confrontation outlined in *Craig*, stating that "[a] defendant 'confronts' an alleged victim by his presence during questioning." *Id.* *Depp*'s conclusion that the trial judge posing questions provided by the defendant "is within the judge's sound discretion" is utterly at odds with *Craig* and the guarantee that an accused may confront witnesses against him. *See id.*

In *State v. Taylor*, 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 v. Iowa*, 487 U.S. 1012 (1988).[4] 562 A.2d 445, 453 (R.I. 1989). 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 *supports* the conclusion that individualized evidentiary findings are required before a court can limit confrontation rights.

E. Balancing the Competing Interests Favors the Confrontation Right

[4] *Coy* involved a state statute that permitted a screen to be placed between a child sex-crime victim and the defendant during the victim's testimony.

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 at 17.) 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.[5] 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).

III. If the Victim's Bill of Rights Conflicts with a Defendant's Constitutional Rights, the Defendant's Rights Must Prevail

[5] Whether the interests of crime victims are, in fact, served by limiting the defendant's confrontation rights cannot be accepted as a truism as the State suggests. On occasion, crime victims may prefer to face the accused in order to gain closure. *See, e.g.*, Carolyn McCarthy, *Order in the Court*, N.Y. Times, Jan. 12 1998, *available at* http://www.nytimes.com/1998/01/12/opinion/order-in-the-court.html (last visited Dec. 31, 2012) ("it took tremendous courage for his victims to look him in the face and say, 'I know it was you, I saw you shooting at me and my neighbors,'" by adhering to constitutional principles "in the end we felt the integrity of the court was preserved throughout the trial.").

"[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 Victim's Bill of Rights 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 Victim's Bill of Rights ("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. 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.

IV. If the Court Accepts Review and Holds That a Defendant May Be Restricted From Personally Cross-Examining a Victim, The Court Should Articulate a Standard to Apply in Similar Cases That Would Require an Evidentiary Hearing and Particularized Findings Justifying Limiting the Defendant's Constitutional Rights

Restrictions on a pro se defendant's right to conduct his own cross-examination of witnesses cannot be based solely on the nature of the charge against him. Nor is a mere assertion by the government that an adult witness fears the defendant enough to curtail the defendant's constitutional rights. *Amici* assert that the preference for a witness to be cross-examined by advisory counsel or standby counsel instead of by the defendant personally must always give way to the defendant's assertion of his Confrontation rights under *Faretta* and *Coy*. Assuming, *arguendo*, that some circumstances could justify imposing restrictions on a pro se defendant's right to personally cross-examine witnesses, the Court should articulate clear standards for trial courts to apply in future cases. At a minimum, the trial court must hold an evidentiary hearing at which the witness seeking the accommodation testifies in open court and explains to the court, in the presence of the accused, why such an accommodation is necessary. The trial court

must then make individualized findings, on a witness-by-witness basis, that an important state interest requires the accommodation. *See Craig*, 497 U.S. at 895.

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, 630-31 (Wis. Ct. App. 2005). In its review of the record, the appellate court found no evidence supporting the trial judge's finding that the defendant had acted inappropriately. *Id.* at 634.

Similarly, in *Conefrey*, the court appointed standby counsel to cross-examine the child victim, over the pro se defendant's objection. 570 N.E.2d at 1388. 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. . . .
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> . . .
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> 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. Ct. 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*, 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 at 26. 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. *See also Fields v. Murray*, 49 F.3d 1024, 1036 (4th Cir. 1995) (upholding conviction after trial court refused to allow pro se defendant to cross-examine child witnesses when trial court made findings based on the content of a letters received from the defendant, some of which was corroborated by

testimony about the severe impact the questioning would have on the victims); *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").

Without evidence before it justifying limitations on an accused's self-representation and confrontation rights, a trial court cannot prohibit a pro se defendant from personally cross-examining witnesses without violating those rights.

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 adult witnesses. If this Court accepts review of this special action, the Court should 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 3rd day of January 2013.

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