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Protecting the Constitution While Protecting Victims: Challenges to Pro Se Cross-Examination

Katharine L. Manning

Protecting the Constitution While Protecting Victims

CHALLENGES TO *PRO SE* CROSS-EXAMINATION

Katharine L. Manning†

INTRODUCTION

In 2010, a woman set to testify in a rape case in Seattle instead ran from the courtroom and to the roof of the King County Courthouse, where she tried to jump.[1] What spurred her? She was about to be cross-examined in person by the same man she said had sexually assaulted her multiple times as a child.[2] Prosecutors ultimately dropped the charge so that she did not have to testify.[3]

In Florida, an eight-year-old boy watched as his father murdered his mother and sister.[4] The father then doused the boy

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† Katharine L. Manning is the President of Blackbird DC and author of THE EMPATHETIC WORKPLACE: FIVE STEPS TO A COMPASSIONATE, CALM, AND CONFIDENT RESPONSE TO TRAUMA ON THE JOB (2021). This article was developed in conjunction with the September 2021 symposium on The Role of the "Victim" in the Criminal Legal System sponsored by the Brooklyn Law School's Center for Criminal Justice, Fordham Law School's Stein Center for Law and Ethics, and the *Brooklyn Law Review*. I am indebted to the conference organizers and participants for their encouragement and critique, including Susan Bandes, Bennett Capers, Meg Garvin, Cynthia Godsoe, Bruce Green, Alexis Karteron, Kate Mogulescu, Tamara Rice Lave, Anna Roberts, Brandon Ruben, and Steven Zeidman. I am also grateful to the many practicing prosecutors, defense attorneys, and victim advocates who shared their thoughts and experiences with me, to Jonathan Kurland of AEquitas for his ideas and research, and to the editors of the *Brooklyn Law Review*, especially Danika Gallup, Kellie Van Beck, Crystal Cummings, and Alexa Cohn, for their thoughtful and valuable contributions to this piece.

[1] *Alleged Rapist's Rights vs. Accuser's Rights Debated After Suicide Attempt*, KREM (Nov. 6, 2010, 4:47 AM), https://www.krem.com/article/news/local/northwest/alleged-rapists-rights-vs-accusers-rights-debated-after-suicide-attempt/293-169427993 [https://perma.cc/SV8T-892Y].

[2] *Id.*

[3] Jennifer Sullivan, *Guilty Verdicts in Rape Trial Interrupted by Suicide Attempt*, SEATTLE TIMES: THE BLOTTER (Dec. 8, 2010, 1:25 PM), *archived at* https://perma.cc/JJ63-FW99 ("[T]wo charges involving one alleged victim were dropped after the distraught 21-year-old woman climbed to the roof of the King County Courthouse on Nov. 4 and threatened suicide."); *see also* Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, B.C. L. REV. 775, 777 n.14 (2014).

[4] Julian Mark, *A Boy Is the Sole Survivor of a Family Massacre. His Dad, the Suspect, Was Allowed to Question Him in Court*, WASH. POST (June 17, 2021, 7:13 AM), https://www.washingtonpost.com/nation/2021/06/17/ronnie-oneal-son-murder-trial-tampa/ [https://perma.cc/DJ4T-3K9Z].

in gasoline, lit him on fire, and stabbed him multiple times.[5] Three years later, the boy faced his father in court.[6] The father chose to represent himself in his trial and personally cross-examined his son, challenging his recollection of the horrific circumstances of the attack.[7]

In a courtroom in New York, a defendant on trial for rape was represented by counsel throughout the case.[8] When it came time for the testimony of the victim, however, he elected to proceed *pro se* so that he could cross-examine her himself, convinced that they had a "special relationship" despite having been strangers before the assault.[9] Upon learning that she was to be cross-examined personally by her assailant, the victim sank to her knees in the witness room, her sobs audible in the adjoining courtroom.[10] Because she could not bear to let the charge be dismissed due to her refusal to submit to his questioning, though, the victim took the stand.[11] The resulting display of power and intimidation by the defendant sickened the prosecutor, who later said, "I felt like we gave him a chance to victimize her again, in front of all of us."[12]

The right to represent oneself in criminal proceedings, as the defendants in the above instances chose to do, is intended to preserve the dignity and autonomy of the defendant.[13] The right to confront one's accusers aims to ensure accuracy and honesty.[14] Too often, though, those rights combine to create a scenario that achieves neither dignity nor accuracy. A defendant who proceeds pro se and personally cross-examines the victim is given a final opportunity to harass, bully, and control the victim. The victim is subject to retraumatization, which harms their ability to testify completely and accurately and makes it more likely that they will withdraw from testifying entirely. Instead of greater accuracy, testimony is clouded and sometimes destroyed solely due to the history and relationship between the questioner and the questioned.

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[5] *Id.*

[6] *Id.*

[7] *Id.* ("[A] jury listened to [the] 11-year-old boy describe what he survived three years ago: hearing his mother hit with a shotgun blast, seeing his sister stabbed in the head with an ax, and then feeling himself get soaked in gasoline and lit on fire."). The cross-examination itself can be viewed at 10 Tampa Bay, *Accused Killer Ronnie Oneal III Cross-Examines His Son at Murder Trial*, YOUTUBE (June 16, 2021), https://www.youtube.com/watch?v=1SDl2yFartY (last visited May 18, 2022).

[8] Interview with Prosecutor (Aug. 2, 2021) (notes on file with author).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See* Faretta v. California, 422 U.S. 806, 819–20 (1975).

[14] Maryland v. Craig, 497 U.S. 836, 846–47 (1990).

There is a better path. The constitutional rights to self-representation[15] and to cross-examination[16] are not absolute and may be limited to further an important state policy.[17] Those policies can include protecting children and other witnesses, preserving victims' rights, and ensuring that the interests of justice are met. Courts have recognized that in such circumstances, requiring the defendant to provide questions to standby counsel to ask the victim meets constitutional confrontation requirements, while also protecting victims from unnecessary retraumatization.[18] This article contains a roadmap for prosecutors and victims' attorneys[19] who seek to protect victims by limiting pro se cross-examination.[20]

Responsibility for protecting victims and witnesses, however, does not solely rest with prosecutors and victims' counsel. Courts have an affirmative obligation to protect witnesses from harassment during testimony.[21] In addition, victims have rights in criminal proceedings, including the right to protection from the accused and to be treated with respect for their dignity.[22] Courts are required to ensure that victims receive these rights in the criminal case.[23]

The court's role in protecting victims from retraumatization is especially important given that the prosecution's interests may not perfectly align with the victim's interests. Prosecutors may be reluctant to raise an objection that can create a constitutional issue on appeal, even where the potential for victim retraumatization is grave. In addition, the courtroom spectacle of a defendant

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[15] U.S. CONST. amend. VI.

[16] *Id.*

[17] *See infra* Parts I, II.

[18] *See infra* Part III.

[19] In some jurisdictions, but not all, victims may have attorneys represent them in criminal cases. *See, e.g.*, 18 U.S.C. § 3771(c)(2) ("The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a)."); LA. REV. STAT. ANN. § 46:1844(D)(1) (West, Westlaw through the 2021 Reg. Sess. & Veto Sess.) ("The victim or the designated family member shall have the right to retain counsel to confer with law enforcement and judicial agencies regarding the disposition of the victim's case.").

[20] Prosecutors generally have an affirmative obligation to ensure that victims receive their rights in the criminal case, including the right to protection from the accused. *See, e.g.*, 18 U.S.C. § 3771(a)(1), (c)(1) (respectively giving victims a right "to be reasonably protected from the accused" and prosecutors a duty to notify victims of and ensure their receipt of their rights).

[21] *See, e.g.*, FED. R. EVID. 611(a)(3) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: . . . protect witnesses from harassment or undue embarrassment.").

[22] *See, e.g.*, 18 U.S.C. § 3771(a)(1), (8) (granting victims the rights to be "reasonably protected from the accused" and "treated with fairness and with respect for the victim's dignity and privacy").

[23] *See, e.g.*, *id.* § 3771(b)(1) ("In any court proceeding involving an offense against a crime victim, the court *shall* ensure that the crime victim is afforded the rights described . . . ." (emphasis added)).

harassing and intimidating the victim can create distaste in the jury and a greater willingness to convict. For instance, one prosecutor who handled a case where the defendant cross-examined his victim personally remarked that "you could see the pain on the jurors' faces as they watched it unfold."[24] He continued, "I hate to talk like this, but it was good for the case."[25]

Legislatures and court rules committees should also provide explicit protections for victims against pro se cross-examination. A court rule or victims' right that follows the constitutional strictures set forth by the Supreme Court would aid prosecutors and judges in considering the traumatizing effect of personal cross-examination on victims and ensuring appropriate protections are in place.

This article analyzes the Supreme Court's jurisprudence on the parameters of the rights to self-representation and cross-examination, then reviews lower court rulings applying this jurisprudence in instances of pro se cross-examination. This analysis aims to illuminate the path for the use of standby counsel to protect victims during cross-examination while ensuring defendants' constitutional rights are sufficiently safeguarded.

I. THE RIGHT TO SELF-REPRESENTATION

The Supreme Court first recognized a constitutional right to self-representation in *Faretta v. California*.[26] In *Faretta*, the defendant requested to represent himself because he believed the public defender's office to be overworked.[27] The trial court initially granted the request, but subsequently concluded that the defendant had not made an intelligent and knowing waiver of his right to assistance of counsel and that he had no constitutional right to conduct his own defense.[28] Following his conviction, the California Court of Appeals' affirmed the trial court's determination that there existed no state or federal constitutional right to self-representation, the California Supreme Court denied review, and the Supreme Court granted certiorari.[29]

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[24] Interview with Prosecutor, *supra* note 8.

[25] *Id.*

[26] Faretta v. California, 422 U.S. 806 (1975).

[27] *Id.* at 807–08. This concern is not unwarranted. *See, e.g.*, Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html (last visited Mar. 13, 2022) (discussing studies that found public defenders have "two to almost five times as many cases as they should").

[28] *Faretta*, 422 U.S. at 808–10.

[29] *Id.* at 811–12.

The Court ultimately found within the Bill of Rights a federal constitutional right to refuse the assistance of counsel:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.[30]

"Unless the accused has acquiesced in such representation," the Court continued, "the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense."[31]

In the same case, however, the Court held that the right to represent oneself is not without limits. The trial judge may halt pro se representation where the defendant "deliberately engages in serious" misconduct, and may appoint standby counsel, even over the defendant's objection, to assist the defendant and to be available to take over the representation if necessary.[32] In so limiting the right, the Court noted that "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."[33] In addition, because when a defendant directs his own defense, he gives up the benefits of the right to counsel, it is essential that the defendant's waiver of the right be knowing and intelligent.[34]

The Supreme Court further explored the limits of the right to self-representation in *McKaskle v. Wiggins*.[35] The defendant challenged the participation of standby counsel at his trial for robbery, arguing that it deprived him of his Sixth Amendment right to self-representation.[36] The Fifth Circuit

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[30] *Id.* at 819–20 (footnote omitted) (quoting U.S. CONST. amend. VI).

[31] *Id.* at 821. For more on the importance of defendant autonomy, see Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 731 (2018).

[32] *Faretta*, 422 U.S. at 834 n.46.

[33] *Id* at 835 n.46.

[34] *Id.* at 835 ("[H]e should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942))).

[35] McKaskle v. Wiggins, 465 U.S. 168, 168 (1984).

[36] *Id.* at 173.

agreed with the defendant, holding that "court-appointed standby counsel is 'to be seen, but not heard.' By this we mean that he is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only, to be used or not used as the defendant sees fit."[37]

The Supreme Court reversed.[38] There are two main facets of the right to self-representation, the Court found. The pro se defendant must be permitted to retain actual control over the defense, and the participation of standby counsel must not destroy the jury's perception that the defendant is representing himself or herself.[39]

The Court also noted that "it is important not to lose sight of the defendant's own conduct. A defendant can waive his *Faretta* rights," including by inviting the participation of counsel.[40] Specifically, "*Faretta* does not require a trial judge to permit 'hybrid' representation . . . ."[41] In addition, it does not infringe the right to self-representation where standby counsel assists with routine procedural and evidentiary issues.[42]

In resolving the defendant's argument, the Court found no violation of the right to self-representation in proceedings outside the presence of the jury because the defendant was able to present his positions to the court.[43] Furthermore, conflicts between the defendant and standby counsel on matters which would normally be left to counsel's discretion were resolved in favor of the defendant.[44] In proceedings before the jury, the Court held that the defendant's self-representation was "undermined primarily by his own, frequent changes of mind regarding counsel's role"[45] and consisted largely of technical legal advice on appropriate evidentiary procedure.[46]

Thus, Supreme Court jurisprudence both establishes a defendant's right to self-representation and holds that this right may be limited by the appointment of standby counsel over the defendant's objection so long as the underlying goals of the right are met—first, that the defendant preserve actual control over the defense, and second, that the participation of standby counsel not destroy the perception that the defendant is representing himself or herself.

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[37] *Id.* (quoting Wiggins v. Estelle, 681 F.2d 266, 273 (5th Cir. 1982)).
[38] *Id.*
[39] *McKaskle*, 465 U.S. at 178.
[40] *Id.* at 182.
[41] *Id.* at 183.
[42] *Id.*
[43] *Id.* at 181.
[44] *Id.*
[45] *Id.* at 182.
[46] *Id.* at 184.

II. THE RIGHT TO CROSS-EXAMINATION

In contrast to the right to self-representation, the defendant's right to cross-examine witnesses is explicit in the Sixth Amendment, which guarantees the accused the right "to be confronted with the witnesses against him."[47] The parameters of this protection were at issue in *Maryland v. Craig*.[48]

Defendant Craig was convicted based on the testimony of a six-year-old victim who testified by one-way, closed-circuit television (CCTV), as permitted by Section 9-102 of the Maryland Code of Courts and Judicial Procedure.[49] Prior to accepting the testimony, the trial court heard expert testimony that the child victims "would suffer 'serious emotional distress such that [they could not] reasonably communicate,' if required to testify in the courtroom."[50] Craig objected to the use of CCTV, arguing that the confrontation clause always requires a face-to-face encounter, in the courtroom, between a defendant and his accusers.[51]

While noting that "face-to-face confrontation enhances the accuracy of factfinding" and serves a "strong symbolic purpose,"[52] the Court nonetheless rejected Craig's claim. The Court held that although the confrontation clause "reflects a *preference* for face-to-face confrontation at trial," that preference "must occasionally give way to considerations of public policy and the necessities of the case."[53]

The Court next considered whether the procedure set forth in the Maryland rule provided sufficient "safeguards of reliability and adversariness" to pass constitutional muster when weighed against an important state interest.[54] Because the rule required that the child witness be competent to testify and the defendant retain full opportunity for contemporaneous cross-examination, and because the judge, jury, and defendant were all able to view the demeanor of the witness during the testimony, the Court held that the rule did provide sufficient procedural protections of the constitutional right.[55]

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[47] U.S. CONST. amend. VI; *see also* Crawford v. Washington, 541 U.S. 36, 42 (2004) ("We have held that this bedrock procedural guarantee applies to both federal and state prosecutions.").

[48] Maryland v. Craig, 497 U.S. 836, 840 (1990).

[49] *Id.* at 840–43.

[50] *Id.* at 842 (citation omitted).

[51] *Id.* at 843.

[52] *Id.* at 846–47.

[53] *Id.* at 848 (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

[54] *Id.* at 851–52.

[55] *Id.*

It then considered the public policy advanced by the state's rule.[56] Maryland cited its "substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator."[57] The Court agreed that "a State's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one."[58] It further noted that a majority of states had adopted similar rules aimed at preventing the retraumatization of children testifying in child abuse cases, which attested to "the widespread belief in the importance of such a public policy"[59] and "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court."[60] The Court concluded that the state's interest in protecting child witnesses from the trauma of testifying is sufficiently important to justify special procedures that limit the defendant's face-to-face confrontation of a child witness.[61]

To protect the defendant's right to nonetheless confront the witness, the Court noted that the finding of necessity must be case-specific. The ruling should not be based on an overarching conclusion that child victims should be cross-examined exclusively over CCTV, but rather that the use of CCTV is necessary to protect the specific child in that case.[62] In addition, a court must find the use of CCTV necessary due to the trauma the child will likely incur by being in the presence of the defendant, not from the potential trauma that could arise from testifying in general.[63] In addition, the emotional distress the defendant's presence causes must be "more than *de minimis, i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'"[64] Though not deciding what showing of emotional trauma was required to satisfy this standard, the Court held that Maryland's statute met constitutional muster in that it required "serious emotional distress such that the child cannot reasonably communicate."[65]

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[56] *Id.* at 853.

[57] *Id.* at 852.

[58] *Id.* (citing, *inter alia*, Globe Newspaper Co. v. Superior Ct. of Norfolk Cty., 457 U.S. 596, 607 (1982)).

[59] *Id.* at 853.

[60] *Id.* at 855 (citing, *inter alia*, Brief for *Amicus Curiae* American Psychological Association in Support of Neither Party at 18–24, *Craig*, 497 U.S. 836 (No. 89-478)).

[61] *Id.*

[62] *Id.* ("The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.").

[63] *Id.* at 856 (noting that it must be "the presence of the defendant that causes the trauma").

[64] *Id.* (quoting Wildermuth v. State, 530 A.2d 275, 289 (1987)).

[65] *Id.* (quoting MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989)).

The Supreme Court in *Craig* therefore established that the right to cross-examine witnesses could be modified so long as the modifications provide safeguards of reliability and adversariness and are needed to further an important state interest.[66] As shown in the following Section, lower courts have applied this analysis to bar pro se cross-examination of victims as well.

III. PRO SE CROSS-EXAMINATION OF VICTIMS

Following *Craig*, many courts considered whether its reasoning and the test it set forth could apply to bar personal cross-examination of a victim by a defendant proceeding pro se. The Fourth Circuit, for example, reviewed this issue in *Fields v. Murray*.[67]

The defendant in *Fields* was charged with multiple counts of sexual abuse of minors.[68] Prior to trial, the defendant wrote to the presiding judge and requested to be appointed co-counsel with his court-appointed counsel.[69] He wrote that he wished to act as co-counsel so that he could "'question the witnesses [him]self' because he 'firmly [believed] these kids cannot look me in the eye and lie to me. They have been treated as if they were my own kids [and] call me dad. I know them well.'"[70] Continuing, the defendant asserted,

> I do not intend to try and intimidate the witnesses just to get them to say what they think I want them to say. In fact I will if you wish not approach them closer than three feet and I would request the courts [sic] permission if for some reason I needed to get closer.[71]

The defendant further added that he sought to represent himself because he was the only one with enough knowledge of the events culminating in his prosecution to sufficiently examine the witnesses.[72]

The trial court held a hearing on the defendant's request to represent himself and ultimately ruled that it would not allow the defendant to examine the minor victims.[73] Instead, the court decided that the defendant could write out his questions and give them to his lawyers if he chose.[74] On appeal, the defendant argued that this ruling violated his right to self-representation.[75]

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66 *See id.* at 850.
67 Fields v. Murray, 49 F.3d 1024 (4th Cir. 1995).
68 *Id.* at 1026.
69 *Id.*
70 *Id.* (alterations in original) (quoting letter from the trial court record).
71 *Id.* (alteration in original).
72 *Id.*
73 *Id.* at 1027.
74 *Id.*
75 *Id.* at 1028.

The Virginia Court of Appeals denied the appeal, finding that the defendant's waiver of counsel was not clear and unequivocal, as required by *Faretta*.[76] The Virginia Supreme Court declined review, and the defendant's habeas corpus petition filed in the Eastern District of Virginia was denied.[77] The case next landed in the Fourth Circuit.

The Fourth Circuit first considered whether the defendant's invocation of the right to self-representation was clear and unequivocal.[78] It found that there were sufficient facts in the record to support the state court's finding on this issue and thus, the right to self-representation was not violated.[79]

However, the court noted that even if Fields invoked his self-representation right clearly and unequivocally, the trial court did not err.[80] Noting that the defendant sought to invoke the right solely for the purpose of cross-examining his minor victims, the court held, "[b]ecause the trial court was not required to allow such personal cross-examination, Fields was denied nothing to which he was entitled."[81]

In reaching its conclusion, the Fourth Circuit looked to *Craig*:

> If 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. While the Confrontation Clause right is guaranteed explicitly in the Sixth Amendment, the self-representation right is only implicit in that Amendment. The self-representation right was only firmly established in 1975 in *Faretta*, and then only over the dissent of three justices. Moreover, it is universally recognized that the self-representation right is not absolute.[82]

The court next applied the *Craig* test to the matter before it, finding that the defendant's right to represent himself could be properly restricted if the purposes of the right are otherwise assured and the denial is necessary to further an important public policy.[83]

On the first prong, the court noted that the self-representation right is designed to let the defendant "affirm [his] dignity and autonomy and to present," in the defendant's view, "his 'best possible defense.'"[84] The right ensures that the

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[76] *Id.*
[77] *Id.*
[78] *Id.* at 1034.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* at 1035 (citations omitted).
[83] *Id.*
[84] *Id.* (alteration in original) (quoting McKaskle v. Wiggins, 465 U.S. 168, 176–78 (1984)).

defendant is able to direct his defense, including "controlling the organization and content of his own defense, making motions, arguing points of law, participating in the *voir dire*, questioning witnesses, and addressing the court and the jury at appropriate points in the trial."[85]

The court held that denying personal cross-examination "may have inhibited Fields' dignity and autonomy to some degree by affecting 'the jury's perception that [he was] representing himself,' but, as he would have conducted every other portion of the trial, his dignity and autonomy would have been 'otherwise assured.'"[86] In addition, preventing him from personally cross-examining the victims may have slightly limited the defendant's ability to control his own defense, but "he could have personally presented his defense in every other portion of the trial and could even have controlled the cross-examination by specifying the questions to be asked."[87] Thus, "the purposes of the self-representation right were better otherwise assured . . . [than in] *Craig* when the defendant was denied face-to-face confrontation with the witnesses."[88]

Regarding the second prong, whether the restriction was necessary to further an important public policy, the court held:

> The State's interest here in protecting child sexual abuse victims from the emotional trauma of being cross-examined by their alleged abuser is at least as great as, and likely greater than, the State's interest in *Craig* of protecting children from the emotional harm of merely having to testify in their alleged abuser's presence.[89]

In determining that the ruling was necessary to protect the minor victims in the case from further trauma, the court had before it the indictment itself, setting forth the nature of the abuse, and the defendant's letter to the court. In his letter, the defendant stated that he treated the victims as if they were his own children, that one of the victims had "'burst into tears' at a preliminary hearing . . . [and] 'had wet the bed repeatedly,'" and

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[85] *Id.* (alterations omitted) (quoting *McKaskle*, 465 U.S. at 174).

[86] *Id.* (alteration in original) (first quoting *McKaskle*, 465 U.S. at 174; then quoting Maryland v. Craig, 497 U.S. 836, 850 (1990)).

[87] *Id.*

[88] *Id.* at 1035–36 (internal quotation marks omitted). Indeed, the use of standby counsel to conduct cross-examination may be preferable to the use of CCTV in the examination of vulnerable witnesses, as it may be less intrusive than CCTV and it permits the defendant a greater opportunity for personal observation of the witness's demeanor.

[89] *Id.* at 1036. The court cited similar holdings in *State v. Taylor*, 562 A.2d 445, 454 (R.I. 1989), and *State v. Estabrook*, 842 P.2d 1001, 1006 (Wash. Ct. App. 1993), and distinguished *Commonwealth v. Conefrey*, 570 N.E.2d 1384, 1390–91 (Mass. 1991), which "refus[ed] to reach [the] issue because [the] trial court failed to make [an] adequate finding that personal cross-examination would harm child victims."

that he would not approach the victims closer than three feet without the court's permission, from which the court inferred that the defendant's intention was to intimidate the victims.[90] The Fourth Circuit found this to be sufficient evidence that personal cross-examination by the defendant would lead to retraumatization:

> We think it reasonable for the trial court to have concluded on the basis of the facts before it that these eleven through thirteen-year-old girls who had experienced repeated sexual abuse would be emotionally harmed if they were personally cross-examined in open court by Fields, their alleged abuser. We therefore find adequate the trial court's determination that denial of this personal cross-examination was necessary to prevent emotional trauma to the girls.[91]

Numerous other courts have similarly followed the path laid out in *Craig* when considering a defendant's personal cross-examination of the victim—to circumscribe the right to self-representation, there must be assurances that the interests underlying the right are sufficiently otherwise protected and that the restriction is necessary to further an important state interest. In the following Sections, I will review those cases.

A. Procedural Protections

The victim of a crime may be one of the most important witnesses in the case. Thus, where a defendant has elected to represent himself and standby counsel will conduct the victim's cross-examination, it is essential that adequate protections are put in place to preserve both the defendant's ability to direct the defense and the jury's perception that the defendant is in control.

In terms of the first requirement, courts have generally found that the defendant's preparing the cross-examination questions and providing them to standby counsel to ask sufficiently protects the defendant's right to control the defense.[92] For instance,

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[90] *Id.* (quoting letter in the trial record) ("[D]espite Fields' protestations to the contrary, it can be inferred from this statement that Fields' intention in the cross-examination was to intimidate the girls, especially given their close relationship to him.").

[91] *Id.*

[92] *See, e.g.*, Partin v. Commonwealth, 168 S.W.3d 23, 29 (Ky. 2005); People v. Daniels, 874 N.W.2d 732, 739 (Mich. Ct. App. 2015) (noting that the defendant drafted the questions for the standby counsel to ask, conferred with counsel during the examination, and assisted in coordinating examination exhibits); Commonwealth v. Tighe, 184 A.3d 560, 571 (Pa. Super. Ct. 2018), *aff'd on other grounds*, 224 A.3d 1268, 1281–82 (Pa. 2019) (holding that requiring standby counsel to question the victim "did not affect the jury's perception that Appellant was representing himself, any more than the intrusions in *McKaskle* did. With the exception of this one witness, Appellant cross-examined all other witnesses, made opening and closing statements, and otherwise presented his own defense according to his wishes."); State v. John T., 146 N.Y.S.3d 352,

the Florida Court of Appeal in *Lewine v. State* noted that the defendant had "argued motions and evidentiary issues, gave opening and closing statements, conducted all cross-examination of state witnesses, conducted *voir dire*, and made at least one strategy decision regarding jury instructions."[93] It found that the sole restriction on the defendant "was that he was not allowed to question the child directly but was required to state his questions to standby counsel who in turn could voice the questions to the child," and that those questions were not screened by counsel or the court except for adherence to the rules of evidence.[94] The court concluded that this procedure protected Lewine's rights under the Sixth Amendment while also protecting the state interest in preventing harm and retraumatization to the child.[95]

In *State v. Estabrook*, the defendant did not have standby counsel, so the court itself examined the victim.[96] "During trial, the court gave Estabrook additional time after [the victim's] direct testimony to prepare his questions. In addition, the trial court allowed 'Mr. Estabrook to ask all the questions he needs to ask,' and refused to sustain any scope objections to Estabrook's proposed questions."[97] The Washington Court of Appeals found this sufficient to preserve Estabrook's control over his own defense.[98]

In addition to the defendant's actual control over the defense, the right to self-representation requires sufficient procedural safeguards to ensure the jury maintains its perception that the defendant controls the defense. As the Supreme Court noted in *McKaskle*, "the right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others."[99] That the jury observes the

356 (App. Div. 2021) ("[B]y conferring with counsel prior to and during the cross-examinations, respondent may still direct the nature of the cross-examinations and the strategy pursued during those cross-examinations on his behalf."); State v. Carrico, No. 38127–0–I, 1998 WL 372732, at *11 (Wash. Ct. App. July 6, 1998) (concluding defendant was sufficiently in charge of defense where standby counsel "was instructed to ask only those questions formulated by [the defendant]"). *Cf.* Jha v. Menkee, 833 S.E.2d 759, 760 (Ga. Ct. App. 2019) (holding that in hearing on family violence protective order, the trial court improperly denied the pro se defendant any ability to cross-examine the victim, either directly or through counsel); State v. Folk, 256 P.3d 735, 744–47 (Idaho 2011) (finding error where the trial court required both one-way CCTV and the use of standby counsel to conduct the cross-examination and no expert testimony was presented regarding the effect on the child victim of testifying in the presence of the defendant).

93 Lewine v. State, 619 So. 2d 334, 336 (Fla. Dist. Ct. App. 1993).

94 *Id.*

95 *Id.*

96 State v. Estabrook, 842 P.2d 1001, 1004 (Wash. Ct. App. 1993).

97 *Id.* (quoting trial court record).

98 *Id.* at 1006. The judge taking over questioning may be unnecessarily heavy-handed in terms of jury perceptions of the defendant and in terms of victim comfort with the questioning. To avoid the necessity, it would be wise for the court to appoint standby counsel as a precaution in any *pro se* case where a victim will testify.

99 McKaskle v. Wiggins, 465 U.S. 168, 177 (1984).

communication between the defendant and standby counsel can help to mitigate these concerns.[100] Some courts have also employed a jury instruction to address this issue. In *Estabrook*, prior to beginning to question the victim, the trial judge advised the jury,

> At this time, as I have told you, Mr. Estabrook has the right of cross-examination. But because of the fact that he is not represented by an attorney, I am going to be asking the questions that he has asked me to ask. . . . They are Mr. Estabrook's questions.[101]

On appeal, the Washington Court of Appeals noted with approval that the judge "carefully explained to the jury several times that Estabrook was representing himself, and indeed, that that was the reason why the judge was asking the questions prepared by the defendant."[102] This procedure was sufficient to preserve the jury's understanding that the defendant was representing himself.[103] Similarly, standby counsel in *Commonwealth v. Tighe* said to the victim prior to beginning questions, "I'm going to ask you some questions *on behalf of Mr. Tighe*."[104] In *State v. Carrico*, the court found that the jury's perception that defendant was directing his own defense was not destroyed where

> Carrico was ordered to write or whisper his questions to [standby counsel] in front of the jury as the cross examination progressed. The court explained that Carrico would ask questions "through" [counsel]. The jury would have clearly seen [counsel] as a subordinate and known that Carrico was still in charge of the defense.[105]

Thus, the procedural protections that courts have found sufficient to preserve the jury's perception that the defendant controls the defense include allowing the defendant to prepare the questions that standby counsel will ask and communicate with counsel during the cross-examination, as well as instructing the jury that the defendant is controlling the questions asked. Additional protections that a court might consider could include allowing extra breaks during the cross-examination so that the defendant can confer with standby counsel as the examination proceeds and

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[100] *See* Boyd v. Johnson, No. 18-965 (SDW), 2019 WL 316025, at *11 (D.N.J. Jan. 24, 2019) (finding no violation of the petitioner's constitutional rights where petitioner was able to ask questions through standby counsel and "jury would have observed [Petitioner]'s extensive notes as the cross-examination was proceeding, and the fact that standby counsel was asking questions given to her by [Petitioner]" (alterations in original)).

[101] *Estabrook*, 842 P.2d at 1004 (alteration in original).

[102] *Id.* at 1006.

[103] *Id.*

[104] Brief for *Amici Curiae* 23 Organizations Dedicated to Improving Societal Responses to Sexual Violence in Support of Appellee at 18, Commonwealth v. Tighe, 224 A.3d 1268 (Pa. 2020) (No. 57 MAP 2018) (quoting trial court transcript).

[105] State v. Carrico, No. 38127-0-I, 1998 WL 372732, at *11 (Wash. Ct. App. July 6, 1998).

advising standby counsel on the importance of asking the questions that the defendant has submitted, in the manner and order provided by the defendant.

B. Important State Interest

Even where adequate protections can be put in place to protect the dignity and autonomy interests at the core of the defendant's right to self-representation, courts should not restrict this right unless an important state interest compels it. This Section considers the state interests that may be implicated, including the protection of children from trauma, the protection of witnesses from harassment, victims' rights to protection and to be treated with dignity, and the interests of justice.

1. Protection of Children

Courts commonly find that the state's need to protect children from trauma justifies limiting pro se cross-examination, and for good reason. The negative effects of testifying on children can be significant and long-lasting.[106]

> Face-to-face confrontation is often considered necessary for justice: In theory, facing one's accuser compels the witness to speak the truth. Yet, facing a defendant, especially one who threatened or harmed a victim, or to whom loyalty is felt, can be traumatic. Adults can at least reason about justice and weigh, somewhat rationally, the need for their testimony against their experienced distress while doing so. However, developmental constraints in reasoning about the legal system, in legal knowledge and in coping may limit children's understanding of why they must testify and possibly increase their anxiety about doing so.[107]

The Supreme Court's recognition of the need to protect child victims was central to its holding in *Craig*.[108] As support for its conclusion that protecting children from added trauma during court testimony is an important state interest, the Court noted that many other states had enacted similar statutes aimed at protecting child witnesses from retraumatization when testifying against their abusers, including statutes permitting the use of CCTV and videotaped testimony.[109] It held:

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[106] Jodi A. Quas & Gail S. Goodman, *Consequences of Criminal Court Involvement for Child Victims*, 18 PSYCH., PUB. POL'Y, & L. 392, 400 (2012).

[107] *Id.* at 394–95.

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

[109] *Id.* at 853–54.

> Given the State's traditional and "transcendent interest in protecting the welfare of children," and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying.[110]

The Fourth Circuit in *Fields* relied on the state's interest in protecting children when it required cross-examination by standby counsel, remarking that "[w]e have little trouble determining, therefore, that the State's interest here was sufficiently important to outweigh Fields' right to cross-examine personally witnesses against him if denial of this cross-examination was necessary to protect the young girls from emotional trauma."[111] Other courts have reached similar conclusions.[112]

2. Protection of Witnesses

It is not only children, however, whom the state has an interest in protecting. Courts have a broad obligation to protect all witnesses from harassment, a responsibility they should consider when a defendant seeks to cross-examine a victim personally.[113]

In *People v. Daniels*, the Michigan Court of Appeals reviewed the lower court's decision to deny the defendant's request to cross-examine his victim.[114] In doing so, it looked not to *Craig*, but rather to Michigan's rule on witness harassment.[115] "MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault."[116]

The same rule should be utilized to protect adults from the intense trauma that can result from personal cross-examination by the defendant. The cases where such cross-examination has been denied have generally involved rape or intimate partner violence, and the detrimental effects of

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[110] *Id.* at 855 (citations omitted).

[111] Fields v. Murray, 49 F.3d 1024, 1036 (4th Cir. 1995).

[112] *See, e.g.*, People v. Daniels, 874 N.W.2d 732, 739 (Mich. Ct. App. 2015) ("The court must balance the criminal defendant's right to self-representation with 'the State's important interest in protecting child sexual abuse victims from further trauma.'" (quoting *Fields*, 49 F.3d at 1037)); Applegate v. Commonwealth, 299 S.W.3d 266, 273 (Ky. 2009) ("Particularly in the case of sexual abuse, courts have widely held that it is not error to restrict a defendant from personally questioning the victim.").

[113] *See, e.g.*, FED. R. EVID. 611(a)(3) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment.").

[114] *Daniels*, 874 N.W.2d at 739.

[115] *Id.*

[116] *Id.*

testifying on survivors of these crimes is difficult to deny.[117] The added trauma of direct questioning by the alleged assailant can be significant. In *Henderson v. Capozza*, for instance, the pro se defendant in a rape trial "used his cross-examinations of the victims in a most heinous fashion to further psychologically intimidate and victimize the women."[118]

State v. John T. was a New York civil commitment proceeding where the respondent had sought to cross-examine his rape victims personally.[119] Once the court granted the respondent's request to represent himself, the state requested either that standby counsel conduct cross-examination of the victims or that cross-examination be conducted by CCTV.[120] The court denied the request for standby counsel to conduct the examination, but granted the request for CCTV, and both sides appealed.[121]

The appellate court overturned the lower court's ruling, and instead found that the defendant's right to self-representation "does not entitle him to personally conduct the cross-examinations of the victim witnesses whom he was adjudicated or alleged to have victimized."[122] The state "has a compelling interest in protecting the victim witnesses from any possible retraumatization resulting from respondent personally conducting cross-examinations of them."[123]

Similarly, in *Partin v. Commonwealth*, the Kentucky Supreme Court upheld the trial judge's order requiring cross-examination of the intimate partner violence victim by standby counsel.[124] "In certain cases, the intimidation of the witness during cross-examination and the tactical advantage gained by it may exceed what the Constitution and fundamental fairness in the adversarial process require."[125] As held by the court in

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[117] *See* Fan, *supra* note 3, at 785–86 ("Many studies have found that the very pursuit of criminal justice can aggravate the harms of suffering violent crime or sexual assault."); *id.* at 785 n.60.

[118] Henderson v. Capozza, No. 2:18-cv-666, 2019 WL 95824, at *7 (W.D. Pa. Jan. 2, 2019) (citing respondents' exhibits).

[119] State v. John T., 146 N.Y.S.3d 352, 354 (App. Div. 2021).

[120] *Id.*

[121] *Id.* at 354–55.

[122] *Id.* at 356–57.

[123] *Id.* at 356; *see also* Depp v. Commonwealth, 278 S.W.3d 615, 619 (Ky. 2009) (holding that refusal to allow defendant to cross-examine rape victim "was a decision well within the trial court's discretion"); Boyd v. Johnson, No. 18-965 (SDW), 2019 WL 316025, at *11 (D.N.J. Jan. 24, 2019) (upholding trial court's decision not to allow the defendant in a rape case to cross-examine victim personally).

[124] Partin v. Commonwealth, 168 S.W.3d 23, 29 (Ky. 2005).

[125] *Id.* (also noting Kentucky Rule of Evidence 611's admonition that courts protect witnesses from harassment); *see also* State v. Carstarphen, No. A-2950-16T4, 2019 WL 1111453, at *1, *4 (N.J. Super. Ct. App. Div. Mar. 11, 2019) (denying defendant the ability to personally cross-examine his ex-wife in case charging him with the attempted murder of her).

Depp v. Commonwealth, a defendant "has no constitutional right to intimidate a victim witness by personally questioning him or her."[126]

Trauma is, of course, not limited to victims of sexual assault and domestic violence. Stalking victims, for instance, frequently experience anxiety, intrusive recollections and flashbacks, and thoughts of suicide.[127] Human trafficking victims are subject to high rates of physical and psychological control by their traffickers, resulting in depression, self-blame, rage, and sleep disturbances.[128] Even a fraud case can involve high levels of control by the perpetrator, making a defendant's personal cross-examination of the victim particularly traumatizing.[129] No matter the type of offense, the government and courts should be alert to the potential for harassment and retraumatization where the defendant proceeds pro se and the victim may testify, and should thus employ standby counsel to conduct cross-examination where appropriate.

3. Victims' Rights

The federal government, the government of every state, and many tribal governments have enacted legislation to protect the rights of victims in criminal cases.[130] Thirty-five states have also codified victims' rights in their state constitutions.[131] Kentucky's victims' rights constitutional amendment recently passed with more than 63 percent of the votes.[132] In Wisconsin, a

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[126] *Depp*, 278 S.W.3d at 619.

[127] Michele Pathé & Paul E. Mullen, *The Impact of Stalkers on Their Victims*, 170 BRIT. J. PSYCHIATRY 12, 12 (1997).

[128] Elizabeth Hopper & Jose Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUM. RTS. L. REV. 185, 192 (2006).

[129] *See* Craig Clough, *Avenatti Brings Ex-Client to Tears During Cross-Examination*, LAW360 (Aug. 3, 2021, 11:21 PM) (reporting that in attorney's federal trial for embezzlement, victim began sobbing so hard during pro se cross-examination that a recess was called and as she stepped down from the stand, the victim fell to her knees and required assistance exiting the courtroom).

[130] For a full listing of victims' rights law by state see *Victim Law*, OFF. OF JUST. PROGRAMS, www.victimlaw.org/victimlaw [https://perma.cc/6QJD-F8WZ].

[131] ALA. CONST. art. I, § 6.01; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. 1, § 13(b); KAN. CONST. art. 15, § 15; KY. CONST. § 26A; LA. CONST. art. I, § 25; MD. CONST. Declaration of Rights, art. 47; MICH. CONST. art. I, § 24; MISS. CONST. art. 3, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8A; N.J. CONST. art. I, para. 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; N.D. CONST. art. I, § 25; OHIO CONST. art. I, § 10a; OKLA. CONST. art. 2, § 34; OR. CONST. art. I, §§ 42, 43; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; S.D. CONST. art. VI, § 29; TENN. CONST. art. I, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, §28; VA. CONST. art. I, § 8-A; WASH. CONST. art. 1, § 35; WIS. CONST. art. 1, § 9m.

[132] WHAS11 News Staff, *Marsy's Law Takes Effect in Kentucky*, WHAS11 ABC (Nov. 20, 2020, 2:54 PM), https://www.whas11.com/article/news/kentucky/marsys-law-takes-effect-kentucky-crime-victims-election-2020/417-dc3afcd6-9b66-4d29-acb0-509299b13647 (last visited Mar. 15, 2022).

similar measure passed with 76 percent of votes.[133] In 2004, the federal Crime Victims' Rights Act passed quickly and nearly unanimously.[134]

These protections are strong evidence that states have an interest in protecting victims in criminal proceedings that goes beyond the protection from witness harassment contained in court rules. Most jurisdictions provide victims both a right to be treated with respect for their dignity and a right to protection from the accused.[135] California, for instance, gives victims a constitutional right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process."[136] In New Jersey, "[a] victim of crime shall be treated with fairness, compassion and respect by the criminal justice system."[137]

Unfortunately, courts have often been reluctant to uphold a victim's rights where they appear to conflict with a defendant's federal constitutional rights. For instance, the Arizona Court of Appeals in *State ex rel. Montgomery v. Padilla* disagreed with the government's argument that the victims' right to be free from intimidation, harassment, and abuse proscribed pro se cross-examination.[138] "If victims' rights conflict with a defendant's constitutional rights, the defendant's rights must prevail."[139]

However, the question need not be a simple balancing of the defendant's and victim's rights. The Court in *Craig* held that a defendant's rights may be circumscribed where an important state interest is at stake.[140] The broad passage of victims' rights laws across the country indicates a strong interest in protecting

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[133] Laura Schulte & Molly Beck, *Marsy's Law Constitutional Amendment Passes Overwhelmingly in Wisconsin, Giving More Rights to Victims of Crime*, MILWAUKEE J. SENTINEL (Apr. 13, 2020, 8:00 PM), https://www.jsonline.com/story/news/politics/elections/2020/04/13/marsys-law-additional-rights-for-crime-victims-amendment-article-1-constitution/5132745002/ [https://perma.cc/X4WB-QYYY].

[134] *See* Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 593 (Fall 2005).

[135] *See, e.g.*, 18 U.S.C. § 3771(a)(1), (8) (the "right to be reasonably protected from the accused" and the "right to be treated with fairness and with respect for the victim's dignity and privacy"); WIS. CONST. art. 1, § 9m (providing victims reasonable protection from the accused throughout the criminal justice process); HOPI CODE § 1.5.8 (2012), https://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf [https://perma.cc/6YYQ-WUAY] (giving victims the right "to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process").

[136] CAL. CONST. art. I, § 28(b)(1).

[137] N.J. CONST. art. I, § 22.

[138] State *ex rel.* Montgomery v. Padilla, 349 P.3d 1100, 1106–07 (Ariz. Ct. App. 2015).

[139] *Id.* at 1106.

[140] *See* Maryland v. Craig, 497 U.S. 836, 853 (1990).

victims, both among legislatures and the people they serve. Surely, if a court rule is sufficient to show a state interest in the protection of witnesses from harassment, a state constitutional amendment should be evidence that the state has an interest in protecting victims from the accused and ensuring that victims are treated with respect throughout the criminal justice process.

The existence of this interest does not end the inquiry, of course; sufficient procedural protections for the defendant's rights are necessary, along with particularized findings that the restriction is needed to advance the state interest. However, prosecutors and courts should take note of these rights and the interests they protect where a defendant seeks pro se cross-examination. When the potential for retraumatization of victims is likely, the use of standby counsel to conduct cross-examination may be appropriate.

In addition, legislatures should consider specific victim protections from pro se cross-examination. Some states already grant victims, for instance, the right "[t]o refuse an interview, deposition, or discovery request by the defendant . . . and to set reasonable conditions on the conduct of any such interview to which the victim consents."[141] A provision that allows for the challenging of pro se cross-examination where the procedures set forth in *Craig* are followed could ensure that prosecutors and courts consider the victims' rights to protection and dignity in this context. In addition, such a law would normalize the use of standby counsel for this purpose and thus mitigate any concerns about negative juror perceptions when standby counsel conducts cross-examination.

4. Interests of Justice

Limits on pro se cross-examination can also help to ensure that the interests of justice are met, both in the individual case and in the larger context of the criminal justice system itself.

The Supreme Court has said that the right to cross-examination is "designed to promote reliability in the truth-finding functions of a criminal trial."[142] It is difficult to obtain reliable testimony, though, where the relationship between the

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[141] CAL. CONST. art. 1, § 28(b)(5); *see also* ALA. CODE § 15-23-70 (Westlaw through Act 2022-46 of the 2022 Reg. & 1st Spec. Sess.) (giving victim the right "to refuse a request by the defendant, the attorney of the defendant, or by any other person acting on behalf of the defendant, for an interview or other communication with the victim").

[142] Kentucky v. Stincer, 482 U.S. 730, 737 (1987); *see also* Tennessee v. Street, 471 U.S. 409, 415 (1985) (noting the Confrontation Clause, as recognized by the Court, has at its foundation "advanc[ing] 'the accuracy of the truth-determining process in criminal trials'" (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).

witness and the person conducting the examination is characterized by a history of trauma and fear.

Studies have shown that the high level of stress that children experience while testifying can result in reduced accuracy, inconsistent statements, a general lack of responsiveness, and less effective communication.[143] As anyone who has experienced a blank mind when faced with a final exam or a panel of judges can attest, it is not only children whose memory is negatively affected by stress.[144]

The court in *John T.* noted that "counsel-conducted cross-examinations would likely aid, rather than impair, the truth-seeking process."[145] But for some defendants, this suppression of truth appears to be part of the aim. In *Partin v. Simpson*, the court noted that

> at a psychological level, the petitioner's desire personally to cross-examine the victims may have been related to a desire to maximize face-to-face confrontation, and not merely a desire to represent himself, i.e., control the legal strategy and line of defense presented at trial. Indeed, commentators have observed that cross-examination of certain victim-witnesses has great potential for trauma, intimidation, harassment, and embarrassment, and at times, these factors can result in tactical advantage to the defense.[146]

Further, the intimidation and harassment of a pro se cross-examination, or even the threat of one,[147] can occasionally lead to

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[143] Helen M. Milojevich et al., *Children's Participation in Legal Proceedings: Stress, Coping, and Consequences*, *in* 1 ADVANCES IN PSYCHOLOGY AND LAW 185, 189–91 (Monica K. Miller & Brian H. Bornstein eds., Springer 2016); Rebecca Nathanson & Karen Saywitz, *The Effects of Courtroom Context on Children's Memory and Anxiety*, 31 J. PSYCHIATRY & L. 67, 71–72 (2003).

[144] *See, e.g.*, Lars Schwabe et al., *Stress Effects on Memory: An Update and Integration*, 36 NEUROSCIENCE & BIOBEHAVIORAL REVS. 1740, 1741 (2012) (noting that "[i]n contrast to memory consolidation, memory retrieval seems to be impaired by stress").

[145] State v. John T., 146 N.Y.S.3d 352, 356 (App. Div. 2021); *see also Craig*, 497 U.S. at 857 ("Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal. *See, e.g.*, [Coy v. Iowa, 487 U.S. 1012,] 1032 [(1998)] (Blackmun, J., dissenting) (face-to-face confrontation 'may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself') . . . .").

[146] Partin v. Simpson, No. 5:09CV-00138-R, 2010 U.S. Dist. LEXIS 145198, at *6–7 (W.D. Ky. Feb. 9, 2010) (citing William F. Lane, *Explicit Limitations on the Implicit Right to Self-Representation in Child Sexual Abuse Trials*, 74 N.C. L. REV. 863 (1996)). With thanks to Greg Hunter for the suggestion, an additional protection that courts could consider to limit the physical intimidation of witnesses is requiring counsel or pro se litigants to conduct cross-examination from the podium or counsel table, rather than walking around the courtroom. At a human trafficking trial in Chicago, the pro se defendant used the opportunity of handing an exhibit to the testifying victim to slide his finger down hers. The move was invisible to the rest of the courtroom, but a clear communication of ownership and control to the victim. Email from Victim Advocate to author (Nov. 2, 2021, 11:26 AM) (on file with author).

[147] *See* Sullivan, *supra* note 3.

reduction of charges or their dismissal entirely. For example, in a rape case in Washington, D.C., the pro se defendant repeatedly asked the victim questions like "Do you think the defendant is handsome?,"[148] "[Y]ou actually liked the defendant, correct?,"[149] and "Do you consider yourself an emotional female?"[150] The defendant's conduct ultimately led to a mistrial.[151] The prosecutor subsequently chose to downgrade the charge from a felony to two misdemeanors.[152] "The sole reason for the misdemeanor charges is to avoid having a repeat of his conduct in front of a jury," the prosecutor said.[153] It is difficult to see the justice of a result where the defendant's bullying and harassment of the victim lead to the reduction or dismissal of charges against him or her.

The use of pro se cross-examination and the potential trauma it causes also has an impact on the criminal justice system as a whole. The court in *John T.* considered the difficulty in prosecuting cases where defendants' pro se cross-examination causes witnesses to refuse to testify fully, or at all, as relevant to its decision to require cross-examination by standby counsel.[154] It found that the state's ability to sustain its burden of proof could be impaired by allowing the defendant to cross-examine the victims personally "by causing the witnesses to back out of testifying or by causing a 'chilling effect' on their testimony."[155]

In addition, providing greater protection from personal intimidation and harassment by the defendant may encourage more victims to report crime and cooperate with the investigation. According to RAINN, the national sexual assault resource and advocacy organization, more than two-thirds of rapes are not reported.[156] The most common reason given for not

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[148] Keith L. Alexander, *D.C. Man Who Represented Himself at Rape Trial—Asking Alleged Victim 'Do You Think the Defendant Is Handsome?'—Will Face New Trial on Lesser Charges*, WASH. POST (Nov. 30, 2019), https://www.washingtonpost.com/local/public-safety/dc-man-who-represented-himself-at-rape-trial—asking-alleged-victim-do-you-think-the-defendant-is-handsome—will-face-new-trial-on-lesser-charges/2019/11/29/800c56da-1159-11ea-b0fc-62cc38411ebb_story.html [https://perma.cc/4Y3M-N5ML].

[149] Transcript of Trial (on file with author).

[150] Alexander, *supra* note 148.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *See* State v. John T., 146 N.Y.S.3d 352, 356 (App. Div. 2021); *see also supra* text accompanying notes 119–123.

[155] *Id.*

[156] *See The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/5WPJ-6CJ3] (relying on data from the Department of Justice's National Crime Victimization Survey 2015-2019 (2020), the Federal Bureau of Investigation's National Incident-Based Reporting System, 2012-2016 (2017), and the Department of Justice's Felony Defendants in Large Urban Counties, 2009 (2013)).

reporting the crime was fear of retaliation.[157] The spectacle of a defendant personally challenging his rape victim in front of a forced audience certainly exacerbates this concern. Providing more protections from harassment throughout the criminal justice system, including the use of standby counsel to conduct cross-examination when a defendant exercises their right to proceed pro se, could help.

C. Particularized Showing

There is a final step in the analysis that determines whether pro se cross-examination should be denied in a certain case. Where there are procedural protections in place and an important state interest at stake, the court must make a particularized finding as to the need for the restriction of the right in order to protect the important state interest that has been identified.[158]

The Arizona Court of Appeals held that pro se cross-examination could not be limited absent a specific finding that such cross-examination would cause trauma to the minor victim.[159] The state argued in *Padilla* that "a defendant charged with sex offenses against children may be categorically barred from personally cross-examining the child witnesses."[160] In the hearing before the trial court to address the state's request that standby counsel conduct the cross-examination, the court had before it emails from the victims' mothers expressing outrage about the potential for pro se cross-examination and their belief that it would hinder the victims' recovery, but the state declined to present any further evidence, "arguing that evidence was unnecessary."[161] The trial court, relying on *Craig*, denied the state's motion, finding that "an order restricting a defendant's right to confront a child witness had to be 'case-specific' and that the court must hear evidence to determine whether the restriction is necessary to protect the particular child."[162]

The Arizona Court of Appeals agreed. Noting that the trial court understood the mothers' emails "to explain the general

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[157] *Id.* (citing U.S. DEP'T OF JUST., FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 (2013)).

[158] Maryland v. Craig, 497 U.S. 836, 855 (1990) ("The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.").

[159] *See* State *ex rel.* Montgomery v. Padilla, 349 P.3d 1100, 1102 (Ariz. Ct. App. 2015).

[160] *Id.* at 1103.

[161] *Id.*

[162] *Id.*

trauma the children were suffering from [the defendant's] alleged actions and the trial," the court found that, "general trauma is not sufficient to restrict cross-examination; the trauma must be caused specifically by the personal cross-examination."[163]

On remand, the trial court held an evidentiary hearing, where the court heard from the victims' mothers, an expert on the trauma suffered by children who testify in court, and a victim's psychologist.[164] The trial court nonetheless denied the state's request that stand-by counsel conduct the cross-examination of the minor victims and ordered that the examination proceed by CCTV instead.[165]

In considering the state's petition for review, the Court of Appeals took issue with the trial court's statement that "[s]o long as Defendant exercises his right of self-representation and he complies with court rules and decorum, this Court must allow it, to do otherwise would be a violation of constitutional proportion and therefore reversible error."[166] It reversed,[167] holding:

> Because [the defendant's] confrontation rights, even as a *pro se* defendant, are not absolute, the trial court erred in concluding *any* restriction of his right to personally cross-examine witnesses would be "a violation of constitutional proportion" and "reversible error." Given the court's inaccurate assessment of the law, we cannot conclude the court considered whether the evidence of the risk of trauma was sufficient to restrict Simcox's right to personally cross-examine the Children. Therefore, we vacate the trial court's order and remand for redetermination.[168]

The court reiterated the significance of restricting a defendant's right to confrontation and emphasized that "the State must make an individualized and case-specific showing" that restricting the right is necessary to prevent further trauma to the minor victim.[169] It held that due to the constitutional significance of limiting the defendant's right to personally cross-examine witnesses, the heightened review standard of clear and convincing evidence should apply.[170]

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[163] *Id.* at 1104.

[164] State *ex. rel.* Montgomery v. Padilla, 371 P.3d 642, 644 (Ariz. Ct. App. 2016).

[165] *Id.*

[166] *Id.* at 644–45.

[167] *Id.* at 645.

[168] *Id.* (quoting trial court order).

[169] *Id.*

[170] *Id.*; *see also id.* at 645–46 ("This is consistent with at least ten other states whose statutorily crafted accommodations for minor victims of sexual crimes . . . require clear and convincing evidence of harm be proffered by the State to establish the necessity of an accommodation." (citing, *inter alia*, ARK. CODE ANN. § 16–43–1001(a)(1); CAL. PENAL CODE § 1347(b)(1) (West))); Commonwealth v. Tighe, 224 A.3d 1268, 1279 (Pa. 2020) (declining to decide whether the use of standby counsel to conduct cross-examination could be upheld where "there was no evidence presented to the trial court indicating [the victim]

While not every court has required particularized findings of trauma,[171] it seems wise to do so given the constitutional rights at stake. It is worthwhile to consider what sufficed to make a particularized showing in the cases where pro se cross-examination was properly barred.

- In *Daniels*, the trial court held a separate hearing "at which it heard considerable evidence that defendant's personal cross-examination would cause [the minor victims] significant trauma and emotional stress."[172] In addition, at the preliminary examination of the victims, there was evidence both of witness intimidation by the defendant and "great emotional discomfort" by the witnesses.[173]
- In *Estabrook*, the court considered evidence showing that the victim had previously been abused, had behavioral problems, "and that in general, she was a fragile and disturbed child."[174] In addition, evidence showed that following the abuse at issue in the case, she had received mental health treatments and had "been confined for a year in mental institutions," that she was developmentally disabled, and that she had "testified to her fear of" the defendant.[175]
- In *Carstarphen*, the court denied personal cross-examination on the basis of the existence of a restraining order between the victim and the defendant and the circumstances surrounding the attack that constituted the crime.[176]
- In *Carrico*, the court, when denying pro se cross-examination, noted that at the pretrial interview, the child victim cried and fled because she associated standby counsel with her father, the defendant.[177]

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would be traumatized if questioned by appellant directly" as required by the Court in *Craig*, though upholding use of standby counsel on other grounds).

[171] *See, e.g.*, Partin v. Commonwealth, 168 S.W.3d 24, 28–29 (Ky. 2005) (noting that it would have been better for the trial court to hold an evidentiary hearing and make a finding of necessity, but nonetheless upholding denial of personal cross-examination); *see also* Boyd v. Johnson, No. 18-965 (SDW), 2019 WL 316025, at *10-11 (D.N.J. Jan. 24, 2019) (upholding trial court's denial of personal cross-examination over defendant's objection that such a ruling should not be made without a hearing and a showing of particularized need).

[172] People v. Daniels, 874 N.W.2d 732, 740 (2015).

[173] *Id.*

[174] State v. Estabrook, 842 P.2d 1001, 1004 (Wash. Ct. App. 1993).

[175] *Id.*

[176] State v. Carstarphen, No. A-2950-16T4, 2019 WL 1111453, at *3–4 (N.J. Super. Ct. App. Div. Mar. 11, 2019).

[177] State v. Carrico, No. 38127-0-I, 1998 WL 372732, at *12 (Wash. Ct. App. July 6, 1998).

- In *Boyd*, the trial court made no particularized finding, which the appellate court held was a procedure that "should not ordinarily be employed," but that given the overwhelming forensic evidence against the defendant in this rape case, there was no error in the denial of pro se cross-examination.[178] The trial judge found it "'unreasonable' to expose the victim to the psychological impact of direct examination by a man which DNA evidence establishes [to have been her] rapist."[179]
- In *Partin*, the trial judge's refusal to permit personal cross-examination of domestic violence victims was upheld following the court's receipt of an *ex parte* letter from a victim advocate reporting the victims' fear arising from the defendant's prior threats.[180] Though noting that "it would have been the better course to hold an evidentiary hearing and make a finding of necessity," the appellate court noted that "the trial court did not conjure his decision out of thin air."[181] The record reflected that the court had considered, "the victim's advocate's letter, Appellant's prior history of criminal assaultive behavior (rape, robbery), and the allegation in this case that Appellant threatened to kill both his wife and his stepson while holding a gun to their heads."[182]
- In *People v. Jones*, pro se cross-examination was properly denied where a teen witness "was cognitively impaired and attended special education classes" and had trouble sleeping after the alleged sexual assault by the defendant, demonstrating that she was a vulnerable witness and thus "the trial court did not abuse its discretion by prohibiting Jones from personally examining her at trial to protect her from further trauma."[183] A second witness likewise suffered cognitive and developmental deficits sufficient to show that she "was a vulnerable witness who was likely to be adversely impacted by being questioned directly by Jones, the person she claimed had sexually abused her."[184]

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[178] Boyd v. Johnson, No. 18-965 (SDW), 2019 WL 316025, at *10–11 (D.N.J. Jan. 24, 2019).

[179] *Id.* (alteration in original) (quoting lower court ruling).

[180] Partin v. Commonwealth, 168 S.W.3d 23, 28–29 (Ky. 2005).

[181] *Id.* at 28.

[182] *Id.*

[183] People v. Jones, Nos. 333572, 335157, 2018 WL 442322, at *4 (Mich. Jan. 16, 2018).

[184] *Id.* at *4.

A final consideration with respect to particularized findings is whether expert testimony is required. As demonstrated in the list above, many courts have barred pro se cross-examination even without expert testimony.[185]

State v. Crandall provides a helpful analysis.[186] In *Crandall*, a child victim was permitted to testify via CCTV over the defendant's objection.[187] In its review of that decision, the New Jersey Supreme Court noted that "several jurisdictions require, either as a matter of statutory preference or state constitutional law, expert testimony to establish the requisite mental or emotional harm to the child."[188] However, "the vast majority of jurisdictions" with child witness protection procedures "have concluded that expert testimony is not necessarily required to justify use of the statutory procedure."[189] In the absence of expert testimony, the court held,

> [O]ther factors may enable a court to determine the likelihood that a child will suffer severe emotional or mental distress from testifying in open court. Those include: the commission of the offense was especially heinous; the child is particularly susceptible to harm because of a pre-existing mental condition; the defendant occupied a position of authority with respect to the child witness; the offense or offenses charged were part of an ongoing course of conduct committed by the defendant against the child over an extended period of time; a deadly weapon or dangerous instrument was allegedly used during the commission of the crime; the defendant had inflicted serious physical injury upon the child; the defendant expressly or impliedly threatened harm to the child or a third person if the child were to report the incident; the defendant was living in the same household with, has ready access to, or was providing substantial financial support for, the child; or the child has previously been the victim of abuse or incest.[190]

The court advised that courts should thoroughly interview the child face-to-face in order to make findings regarding "the child's objective manifestations of fear."[191] If the court cannot make such a determination, "it may then appoint an expert to evaluate the child."[192]

Due to the constitutional protections at stake, courts should generally hold evidentiary hearings on motions to limit cross-examination by a pro se defendant. While expert testimony is not

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[185] *See, e.g.*, *Partin*, 168 S.W.3d at 28–29 (upholding the denial of personal cross-examination without an evidentiary hearing); State v. Carrico, No. 38127-0-I, 1998 WL 372732, at *11–12 (Wash. Ct. App. July 6, 1998) (same).

[186] State v. Crandall, 577 A.2d 483, 489–90 (N.J. 1990).

[187] *Id.* at 484.

[188] *Id.* at 489.

[189] *Id.* (collecting cases and other authorities).

[190] *Id.* at 490.

[191] *Id.*

[192] *Id.*

required, the court should make a finding based upon the evidence regarding the particularized need for such a limitation to protect the witness from trauma that would arise due to the defendant's cross-examination. This serves to protect vulnerable witnesses while also safeguarding a defendant's constitutional rights.

CONCLUSION

Personal cross-examination of a victim by a pro se defendant may bring significant trauma for the victim while also resulting in a miscarriage of justice in the particular case and thus, in criminal justice system as a whole. There are important constitutional interests at stake in limiting such cross-examination, including the defendant's right to control his own defense and to confront the witnesses against him. However, ample precedent demonstrates that these interests may be preserved while guarding against the potential dangers of such cross-examination through the use of standby counsel. Prosecutors and victim counsel should move for the protection of victims from such personal cross-examination where necessary to avoid trauma, and courts should approve the use of standby counsel to conduct cross-examination where the requirements of *Craig* are met. In addition, state legislatures and court rules committees should make explicit the permission to use standby counsel for cross-examination in appropriate cases, through victims' rights legislation or court rules. Using standby counsel to conduct cross-examination will preserve the dignity interests at stake in the right to self-representation and the justice interests at stake in the right to confront witnesses, while also reducing the risks of harassment, intimidation, and trauma presented by a defendant seeking to undertake pro se cross-examination of their victims.