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COMMENTS

THE SIXTH AMENDMENT: PROTECTING DEFENDANTS' RIGHTS AT THE EXPENSE OF CHILD VICTIMS

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INTRODUCTION

Mary, fifteen, had to be pushed inside the courtroom door.[1] She was to testify against Lewis Gonzalez, a twenty-seven year old family friend, who raped her repeatedly while living with her family.[2] In a similar case, a six year old girl experienced nightmares and reverted to sucking her thumb after her father, who sexually abused her, questioned her at a pre-trial hearing.[3] The irony of these two cases is not that these children had to testify in the presence of their abusers,[4] but that the abusers *themselves* were

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1. Jolayne Houtz, *When Children Face Attackers in Court—Advocates say Victims' Trauma Weighs Heavily*, SEATTLE TIMES, Aug. 4, 1991, at B1. Mary is a fictional name used because the victim did not want her real name disclosed. *Id.*

2. *Id.* After Mary's parents left for work, Gonzales forced Mary, who was 12 at the time, to have sex and threatened her not to tell. *Id.* At Gonzales's trial, while Mary was on the witness stand, Gonzales was very familiar with her, even calling her by her first name. *Id.* Mary focused on her thumbs while giving her testimony, but was extremely aware of her rapist's presence. *Id.* She said, "[i]t made it harder. He would give me that look and question me and dig into me." *Id.* "After a three day trial, Gonzales was convicted of four counts of second-degree child rape and sentenced to more than seven years in prison." *Id.*

3. *Id.*

4. For convenience purposes, any form of the word "abuser" will be used throughout this Comment when referring to a defendant or an accused who has *allegedly* physically or sexually abused a child. This Comment acknowledges that a defendant is presumed to be innocent until he is proven to be guilty. This Comment does not imply the guilt of the defendant or the accused by referring to him as the "abuser," but makes such a reference for convenience and consistency purposes only. However, when referring to notes one through three and accompanying text, the word "abuser" does not in those cases mean *alleged* abuser, because the defendants in those cases personally cross-examined the child victims and were found guilty.

allowed to personally cross-examine them.[5] As one child stated, "[i]t makes you feel like you're the victim again. It hurt a lot."[6]

The courts in these two cases permitted the defendants to personally question their victims because both defendants invoked their Sixth Amendment[7] right to self-representation.[8] When a defendant invokes his[9] self-representation right, he is proceeding pro se.[10] He acts as his own attorney, making his own motions, objections, arguments to the jury, and even cross-examinations.[11] The right to cross-examine witnesses is one element of a defendant's right of confrontation.[12]

When a child abuse victim[13] is the witness, however, and the defendant is proceeding pro se, should the defendant's right to personally cross-examine witnesses apply to the child or children whom he allegedly abused? Perhaps, if our system chooses to

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5. Houtz, *supra* note 1. Out of 330 child sexual abuse cases in Snohomish County, Washington each year, only one or two involve the situation where the attacker questions the child. *Id.* This is a rare situation, as most defendants do not represent themselves because of their lack of knowledge of the legal system, and because it is likely that they will alienate the judge and jury. *Id.*

6. *Id.*

7. U.S. CONST. amend. VI. The Sixth Amendment provides that,

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

8. Houtz, *supra* note 1.

9. For convenience purposes, this Comment uses the masculine pronouns — "he," "him," or "his" — when referring generally to a defendant or an accused.

10. *See* McKaskle v. Wiggins, 465 U.S. 168, 174 (1984) (referring to the defendant who invokes his right to self-representation as the pro se defendant). *Black's Law Dictionary* defines proceeding pro se as: "[f]or one's own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

11. *See McKaskle*, 465 U.S. at 174 (discussing a pro se defendant's right to conduct his own defense). In a criminal prosecution, the defendant possesses the right to control the execution of the defense. *Id.*

12. Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (plurality opinion).

13. For convenience purposes, this Comment uses the word "victim," when referring to a child whom a defendant or an accused has *allegedly* sexually or physically abused. This Comment does not imply the guilt of a defendant or an accused by referring to *alleged* victims as "victims." However, the word "victim," when referring to notes one through three and accompanying text, does not mean *alleged* victims, because the defendants in those cases personally cross-examined the victims and were found guilty.

"trample[] on victims in the name of defendants' rights."[14] Allowing the alleged abuser himself to cross-examine the child subjects the child to further victimization.[15]

A conflict arises where a defendant's rights to proceed pro se and to personally cross-examine witnesses intersect with society's interest in protecting the physical and psychological well-being of child victims and witnesses[16] of physical and sexual abuse. This Comment examines these competing interests and resolves the question of whether a defendant who proceeds pro se in a child physical or sexual abuse case should be permitted to *personally* cross-examine the child whom he has allegedly abused.

Part I of this Comment discusses the history of criminal defendants' Sixth Amendment rights to confrontation and to self-representation.[17] Part II examines the problem of child physical and sexual abuse victims as witnesses, and society's interest in protecting them from further trauma.[18] Part II also discusses the actions which state and federal governments have taken to guard against further trauma.[19] Part III examines the case law and statutory developments giving rise to this conflict of rights.[20] Part

14. Houtz, *supra*, note 1, at B1.

15. *See id.* (quoting a child who was raped by a 27 year old man). The child said, "[i]t makes you feel like you're the victim again . . . ." *Id.*

16. For convenience purposes, the content of this Comment focuses on the protection of child physical and sexual abuse victims; however, its application also extends to children who have witnessed violent physical or sexual crimes committed upon a third person. For example, in 1988, a five year old girl witnessed her father stab her mother to death. Houtz, *supra* note 1. The court permitted her father, the defendant, who was representing himself, to personally question the child. *Id.* Courts should also consider extending the same protections to adult victims of physical or sexual abuse. Examples of such situations are as follows: Colin Ferguson, accused of killing six and wounding 19 others on the Long Island Railroad in December 1993, proceeded pro se and personally cross-examined his victims. Robin Topping, *Crime & Courts; Law And Order; The Pitfalls of Self-Representation*, NEWSDAY, Feb. 1, 1995, at A29. One victim, who suffered three gunshot wounds, endured repeated questioning by Ferguson. Adam Tanner, *My Lawyer, Myself: Self-Defense Often Fails*, THE CHRISTIAN SCIENCE MONITOR, Feb. 10, 1995, at 3. Ferguson even made an insinuation that "the victim cowardly hid behind a woman during the gunfire." *Id.* The judge overruled the objection to this insinuation. *Id.* In another case, a convicted rapist questioned a his 28 year old victim during a subsequent trial for intimidating a witness. *See* Houtz, *supra* note 1.

17. See *infra* notes 25-43 and accompanying text for a discussion of the history of criminal defendants' Sixth Amendment rights to confrontation and to self-representation.

18. See *infra* notes 59-73 and accompanying text for a discussion of the problem of child physical and sexual abuse victims as witnesses, and society's interest in protecting them from further trauma.

19. See *infra* notes 74-90 and accompanying text for a discussion of state and federal action guarding against further trauma to child victims.

20. See *infra* notes 91-150 and accompanying text for an examination of the

III also discusses the current state of the law as to the constitutionality of procedures which legislatures and courts have implemented to protect child victims and witnesses of abuse[21] from further trauma.[22] Part IV analyzes the conflict between a defendant's constitutional right to proceed pro se and society's interest in protecting child victims and witnesses.[23] Part V proposes methods of protecting a defendant's pro se right while preventing child victims and witnesses from being personally cross-examined by their abusers.[24]

I. THE SIXTH AMENDMENT RIGHTS

To understand the evolution of the conflict between a defendant's constitutional rights and society's interest in protecting child abuse victims from further trauma, one must first examine the constitutional rights found within the Sixth Amendment. Section A discusses the right of confrontation. Section B examines the right to self-representation.

A. The Right of Confrontation

The Sixth Amendment to the Constitution of the United States of America provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[25] Courts often refer to this clause as the Confrontation Clause.[26] The United States Supreme Court has held that the right of confrontation affords defendants a face-to-face meeting with the witnesses testifying against them.[27] The right to confront witnesses

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case law and statutory developments giving rise to the conflict between defendants' rights and society's interest in protecting child victims.

21. The word "abuse," for the purposes of this Comment refers to both physical abuse and sexual abuse, unless otherwise specified.

22. See *infra* notes 96-108 and accompanying text for a discussion of the current state of the law with regard to the constitutionality of alternative procedures which courts have implemented to protect child victims from further trauma while testifying.

23. See *infra* notes 151-193 and accompanying text for an analysis of the conflict between a defendant's constitutional right to proceed pro se and society's interest in protecting child victims and witnesses.

24. See *infra* Part V, Sections A, B, and C, for proposals resolving this issue. Proposals include a model statutory provision, a model jury instruction, and a reconsideration of the United States Supreme Court decision of *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

25. U.S. CONST. amend VI. See *supra* note 7 for the Sixth Amendment text in full. In *Pointer v. Texas*, the U.S. Supreme Court held that the Fourteenth Amendment applied the Sixth Amendment right of confrontation, including the right to cross-examine witnesses, to the states. 380 U.S. 400, 403-04 (1965).

26. *See* Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988) (referring to the right of confrontation as the Confrontation Clause throughout the text of the opinion); *see also* Douglas v. Alabama, 380 U.S. 415, 417 (1965) (same).

27. *See Coy*, 487 U.S. at 1020-22 (holding that the defendant's Sixth

also includes the right to cross-examine those witnesses.[28]

In determining whether a defendant's Sixth Amendment right of confrontation has been violated, one must look at the purposes behind the Confrontation Clause. The United States Supreme Court has set forth the purposes of the Clause in many of its opinions.[29] To ensure the reliability of evidence by subjecting it to rigorous adversarial testing,[30] to promote the accuracy of the fact-finding process by assuring that the judge or jury has the opportunity to ascertain the truthfulness of the testimony,[31] and to allow a defendant to make a defense,[32] all help to describe the purposes behind the Confrontation Clause. These purposes are safeguarded by the combined effects of four elements: physical presence; testifying under oath; cross-examination; and the jury's observation of witnesses' demeanor as they testify.[33] In addition to the right of confrontation, the Sixth Amendment also grants a criminal defendant the right to represent himself.

Amendment right of confrontation had been violated where a screen separated the child victims and the defendant during the victims' testimony). In *Coy*, the screen blocked the defendant from the victims' sight, but due to lighting adjustments, allowed him "dimly to perceive" and hear them. *Id.* at 1014-15.

28. Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). *Ritchie* involved a defendant charged with sex offenses against his daughter. *Id.* at 43. The Court denied the defendant personal access to the records of a protective agency which investigates suspected child mistreatment and neglect, but agreed that an in camera inspection was necessary. *Id.* at 61. A plurality of the Supreme Court held that the defense attorney's cross-examination of the witnesses satisfied the defendant's Confrontation Clause rights, regardless of the nondisclosure of the agency's file. *Id.* at 54.

29. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 846 (1990) (finding that, "[t]he combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of [the witness'] demeanor by the trier of fact—serves the purpose of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to rigorous adversarial testing . . . "); Kentucky v. Stincer, 482 U.S. 730, 739 (1987) (finding that the right of cross-examination facilitates the judicial system's efforts of determining the truth); Faretta v. California, 422 U.S. 806, 818 (1975) (constitutionalizing the right to conduct a defense); California v. Green, 399 U.S. 149, 158 (1970) (identifying how the mechanisms of confrontation and cross-examination advance the pursuit of truth in criminal trials); Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion) (stating that the goal of the Confrontation Clause is to promote just outcomes from the fact-finding process).

30. *Craig*, 497 U.S. at 846.

31. *Dutton*, 400 U.S. at 89 (plurality opinion).

32. *Faretta*, 422 U.S. at 818.

33. *Craig*, 497 U.S. at 845-46 (citing *Green*, 399 U.S. at 158). The Court in *Craig* acknowledged that courtroom confrontation promotes fact-finding accuracy by exposing the witness and defendant to each other. *Id.* at 846-47. Additionally, the Court noted that symbolic reasons exist for making a witness testify in front of the defendant. *Id.* at 847.

B. The Right to Self-Representation

The Sixth Amendment also provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[34] This provision expressly grants criminal defendants the right to an attorney.[35] Although this Comment does not discuss defendants exercising their express right to assistance of counsel, self-representation is implicit within the right to assistance of counsel.[36] Courts refer to the right to self-representation as the

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34. U.S. CONST. amend. VI. In *Gideon v. Wainright*, the United States Supreme Court applied the Sixth Amendment right to the assistance of counsel to the states. 372 U.S. 335, 342 (1963). Two years later, in *Pointer v. Texas*, the Supreme Court applied the Sixth Amendment right of confrontation to the states as well. 380 U.S. 400, 403 (1965). The Supreme Court in *Gideon* held that an indigent client has a fundamental right to the assistance of counsel, which is essential to a fair trial. 372 U.S. at 339-40. The Court overruled *Betts v. Brady*, 316 U.S. 455 (1942). *Gideon*, 372 U.S. at 339.

35. See *supra* note 7 for the Sixth Amendment text in full.

36. *Faretta*, 422 U.S. at 819. See *supra* note 10 for a definition of "pro se." The Sixth Amendment's roots in English legal history reinforces the idea that a right of self-representation is implied in the amendment. *Faretta*, 422 U.S. at 821. In the vast history of British criminal common law, only one tribunal, the Star Chamber, ever required unwilling defendants to submit to the expertise of professional counsel. *Id.*

In the late 16th and early 17th centuries, the Star Chamber was a prominent and loathsome incarnation of British jurisprudence. *Id.* To this day, the Star Chamber is synonymous with judicial disregard of basic individual rights. *Id.* The Star Chamber routinely performed both executive and judicial functions, often ignored common-law precedents and usually focused on the adjudication of "political" offenses. *Id.* The Star Chamber forced counsel on all those brought before it. *Id.* Any answer to an indictment which lacked an attorney's signature was ignored. *Id.* In such a situation, the Star Chamber admitted all accusations within the indictment as if the accusations were confessions. *Id.* at 821-22.

The Long Parliament dismantled the Star Chamber in 1641, and the requirement of mandatory counsel ceased. *Id.* at 823. At one time, it was mandatory that every litigant "appear before the court in his own person and conduct his own cause in his own words." *Id.* (quoting 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1909)).

The "prohibition of the assistance of counsel" continued for centuries in prosecutions for treason and felonies, although the "right to counsel developed early in civil cases" as well as in cases of misdemeanor. *Id.* Trials for felonies occurred without any of the indicia that we now associate with a fair trial. *Id.* Inspired during a period of reform, the Treason Act of 1695 gave those accused of treason the right to a copy of the charge, required that all witnesses testify only under oath, and gave defendants the right "to make . . . full Defense, by Counsel learned in the Law." *Id.* at 824. The ban on counsel in felony cases, which was practically non-existent in practice, was not eliminated by statute until 1836. *Id.* at 825. "[The Treason Act] also provided for court appointment of counsel, *but only if the accused so desired.*" *Id.* at 824 (emphasis added). As the new rights evolved, the accused maintained the "established right 'to make what statements he liked,'" and the right to counsel was interpreted as "guaranteeing a choice between representation by counsel or . . . self-representation." *Id.* at 825. During this period, English

right to proceed pro se.[37] The United States Supreme Court first recognized a defendant's right to proceed pro se in *Faretta v. California*.[38] Thus, courts also refer to this right as the "Faretta Right."[39]

The right to self-representation includes the right of a defendant "to have his voice heard."[40] A court must permit the defendant "to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial."[41] In *McKaskle v. Wiggins*,[42] the United States Supreme Court explained that the right to self-

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law did not require counsel for criminal defendants. *Id.* at 825-26.

In the American Colonies, colonial charters and declarations of rights often guaranteed the right of self-representation. *Id.* at 828. "No State or Colony had ever forced counsel upon an accused, and . . . [i]f anyone had thought that the Sixth Amendment, as drafted, denied the right of self-representation," some debate on that issue would have occurred. *Id.* at 832. No such debate ever occurred. *Id.* "The Colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an 'assistance' for the accused," which he could use, if he so desired, for his defense. *Id.* "The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation." *Id.* Nothing in the history preceding our Constitution contradicts this conclusion. *Id.*

37. *See* McKaskle v. Wiggins, 465 U.S. 168, 170 (1984) (referring to the right to self-representation as the right to proceed pro se).

38. 422 U.S. at 807. The Court in *Faretta* guaranteed the right to proceed pro se if the defendant "voluntarily and intelligently elects to do so." *Id.* The defendant, Anthony Faretta, was charged with grand theft. *Id.* Faretta indicated that he "did not want to be represented by the public defender because he believed that that office" had too heavy a caseload. *Id.* In allowing Faretta to proceed pro se, the Court looked to *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). *Faretta*, 422 U.S. at 814. "In *Adams*, the Court recognized that the Sixth Amendment's right to the assistance of counsel implicitly embodies a 'correlative right to dispense with a lawyer's help.'" *Id.* (citing *Adams*, 317 U.S. at 279). The *Faretta* Court found, however, that *Adams* did not resolve the issue of whether the defendant may conduct his own defense. *Id. Adams* only held that "the Constitution does not force a lawyer upon a defendant." *Id.* (citing *Adams*, 317 U.S. at 279). In allowing the defendant to proceed pro se, the judge in *Faretta* informed him:

> [y]ou are going to follow the procedure. You are going to have to ask the questions right. If there is an objection to the form of the question and it is properly taken, it is going to be sustained. We are going to treat you like a gentleman. We are going to respect you. We are going to give you every chance, but you are going to play with the same ground rules that anybody plays. And you don't know those ground rules. You wouldn't know those ground rules any more than any other lawyer will know those ground rules until he gets out and tries a lot of cases. And you haven't done it.

Faretta, 422 U.S. at 808 n.2.

39. *See McKaskle*, 465 U.S. at 176 (referring to the defendant's right to conduct his defense pro se as his "Faretta Right").

40. *Id.* at 174.

41. *McKaskle*, 465 U.S. at 174.

42. 465 U.S. 168 (1984).

representation exists to affirm the defendant's individual dignity and autonomy, and thus it is important for the jury to perceive that the defendant is conducting his own defense.[43]

When a defendant asserts his pro se right in a child physical or sexual abuse case, serious implications of exercising that right arise under such sensitive circumstances. The child victim is placed in the position of being cross-examined by the abuser himself.

II. CHILD VICTIMS AND WITNESSES

The physical and psychological well-being of child victims and witnesses is at odds with a criminal defendant's Sixth Amendment self-representation right. A defendant's right to represent himself, and thereby personally cross-examine witnesses, puts a child victim at risk of being personally questioned by the one who abused her,[44] and exposing her to further trauma. Thus, one must examine the societal interest in protecting child victims from further trauma.

It is also necessary to explore the psychological and physical effects that testifying has upon child victims, as well as the laws which have been created in an attempt to prevent further adverse effects. Section A discusses government's long history of treating children and adults differently. Section B illustrates the effects that testifying has upon child abuse victims. Section C addresses both state and federal governmental responses to the problem.

A. Acknowledging That Children are Different

Nearly a century ago, the Illinois legislature formally acknowledged that children are different from adults, and thus should be treated differently.[45] Though in 1899 Illinois was the

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43. *Id.* at 176-78.

44. Though child victims may be either male or female, for convenience this Comment uses the feminine pronouns "her" and "she" when referring to child victims in general.

45. *See generally* CURT R. BARTOL & ANNE M. BARTOL, PSYCHOLOGY AND LAW 305 (1994) (discussing the Juvenile Court Act of 1899). The Juvenile Court Act of 1899 was the first codification of court procedures dealing with dependent, delinquent, and neglected children. *Id.* The Illinois legislature passed the Juvenile Court Act on the last day of the 1899 session. *Id.* The Illinois Juvenile Court Act served as a model for the rest of the nation. *Id.* When Illinois established the Juvenile Court Act, however, it was not a separate court system, but rather a special division of the then operating court system. *Id.*

> The Illinois Juvenile Court Act was . . . relevant to juvenile justice in four ways: (1) it refined the definition of juvenile delinquency; . . . (2) it removed . . . juvenile cases from adult criminal court; (3) it authorized . . . separate facilities [for juveniles], away from adult offenders; . . . and (4) it provided for a system of probation, allowing the state to su-

first state to establish a special division of the court system for children, by 1925 every state except two[46] had instituted juvenile courts.[47] As early as 1906 the federal court system had created a juvenile court in the District of Columbia, and by 1938, had developed a "national model" for federal juvenile justice.[48]

Implicit in the juvenile court system was the idea that children's constitutional rights differ from those of adults.[49] For example, the United States Supreme Court has held that there is no constitutional right to a jury trial in juvenile court.[50] The Court reasoned that it did not want juvenile proceedings to replicate criminal court proceedings; it wanted the juvenile court to maintain informality and focus on treatment rather than punishment.[51] Differences of this nature were justified on grounds that children lack both the mental and emotional maturity "to make important decisions for themselves and exercise those rights."[52] Therefore, the state, under the doctrine of "parens patriae,"[53] was authorized to act in the best interest of the child.[54] Our present juvenile justice system treats juvenile offenders differently by placing them in facilities separate from those of adult offenders, and not trying them in criminal courts.[55] If, and when, however, a criminal court

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pervise the child outside a facility or institution.
Id.

46. *Id.* By 1925, Maine and Wyoming were the only two states which had not established a special division of the court for children. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 305-06.

50. McKeiver v. Pennsylvania, 403 U.S. 528, 545-50 (1971). A state, however, may still permit jury trials in juvenile proceedings, but a juvenile defendant has no such constitutional right. *Id.* Juveniles tried in criminal courts, however, maintain the same constitutional rights to a trial by jury as do adult criminal defendants. *Id.*

51. *Id.*

52. BARTOL & BARTOL, *supra* note 45, at 306.

53. *Black's Law Dictionary* defines "parens patriae" as:

> "Parens patriae," literally "parent of the country," refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane .... It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents.
>
> *Parens patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants. In the United States, the *parens patriae* function belongs with the states.

BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

54. BARTOL & BARTOL, *supra* note 45, at 306.

55. *Id.* at 305. A child is tried as a minor unless the juvenile court judge waives authority over the case. *Id.* at 309. If the judge waives his or her authority, the juvenile is then tried as an adult in a criminal court. *Id.* There are serious implications in transferring a juvenile from juvenile court to criminal court, or from criminal court to juvenile court. *Id.* For example, the United States Supreme Court recognized the serious implications of transfer-

does try a child offender, the resulting sentence is less severe than the sentence an adult would receive.[56] "This may reflect a reluctance on the part of judges to sentence them to prison, where it is assumed they will be preyed upon."[57]

Our government has recognized that children are different than adults by creating a special court system for juvenile offenders.[58] Special protections are not only needed for juvenile *offenders*, but are also needed to prevent adverse effects upon child *victims* who must testify at trial.

B. Testifying: The Effects upon Child Victims of Physical and Sexual Abuse

In recent years, the problem of child physical and sexual abuse has become quite common.[59] As a result, child victims testi-

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ring a juvenile and "required procedural safeguards before a judge could waive his or her authority over a juvenile." Kent v. United States, 383 U.S. 541, 557-63 (1966). Minors tried as adults share not only the same constitutional rights as adults but also the same punishments, including capital punishment. BARTOL & BARTOL, *supra* note 45, at 309. A state may retain a juvenile who is heard in a juvenile court, only until the juvenile reaches the age of adulthood, which some states have extended to 21. *Id.* The main factors a judge considers when determining the waiver issue are the child's age and the seriousness of the crime. *Id.* Judges in most jurisdictions possess discretion concerning whether to transfer a case. *Id.*

56. BARTOL & BARTOL, *supra* note 45, at 309.

57. *Id.*

58. *Id.* at 305.

59. *See* Sharon Parker Brustein, Note, Coy v. Iowa*: Should Children Be Heard and Not Seen?*, 50 U. PITT. L. REV. 1187, 1189 (1989) (discussing the prevalence of child sexual abuse cases in the U.S.). Brustein's article focuses on *Coy v. Iowa*, 487 U.S. 1012 (1988), and the effect it has had on state efforts to implement changes in courtroom procedures. *Id.* at 1187. The author argues that the Court erred in reaching its decision by "ignor[ing] the youth of the witnesses," and failing to attend to the unique needs of children. *Id.* at 1188 (discussing the Court's errors which led to an incorrect decision).

In *Coy*, the defendant allegedly sexually assaulted two 13 year old girls while the girls camped-out in a neighbor's back yard. 487 U.S. at 1014. The two girls asserted that the attacker entered their tent while they were asleep. *Id.* According to their accounts, he wore a stocking over his head, and shined a flashlight in their eyes. *Id.* He allegedly told them not to look at him, thus neither girl could describe his face. *Id.*

At trial, a screen separated the victims from the defendant. *Id.* The screen visually shielded the girls from the alleged attacker as they testified. *Id.* at 1020. The record reveals that the screen was successful in this objective. *Id.* Although the victims could not see their alleged abuser, they were aware that the defendant could both see and hear their testimony. *Id.* at 1027 (Blackmun, J., dissenting).

The Iowa trial court permitted the use of the screen. *Id.* at 1014. The defendant objected, arguing that it violated his Sixth Amendment confrontation right, as well as his due process right, in that "the procedure would make him appear guilty and thus erode the presumption of innocence." *Id.* at 1015. The trial court rejected these arguments, and instructed the jury to refrain from inferring the defendant's guilt from the court's use of the screen. *Id.* The

fying in the courtroom about such abuse has also become commonplace.[60] Studies reveal that being forced to face the abuser is the most traumatic aspect of the legal process[61] for a child victim,

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Iowa Supreme Court affirmed the defendant's conviction. *Id.* The United States Supreme Court then reversed, after determining that the defendant's confrontation right was violated because there were no individualized findings that the witnesses in *Coy* needed special protection. *Id.* at 1020-22. *See also* KIM OATES, CHILD ABUSE-A COMMUNITY CONCERN 2 (1982) (discussing the public awareness of the problem of child physical and sexual abuse). Although both physical and sexual child abuse have existed in our society for hundreds of years, only since the 1960s and 1970s has public awareness of such abuse emerged. *Id.*; Brief for Amicus Curiae: American Psychological Association in Support of Neither Party at 2, Maryland v. Craig, 497 U.S. 836 (1990) (No. 89-478) [hereinafter APA Brief] (stating that in recent years there has been an increase in reports of child abuse).

60. *See* Brustein, *supra* note 59, at 1189 (stating that cases of child abuse have become common, and since the abused child is often the only witness to the abuse, the child must testify in order for the state to obtain a conviction). It therefore follows that where there are more cases of child abuse, there will be more children testifying.

61. *See* APA Brief at 9-10 (discussing the traumatic effect upon child victims who must face their abusers in court, and how that face-to-face confrontation is the most feared aspect of the legal system for a child).

Many children who fall victim to sexual abuse will later suffer from some degree of emotional distress. APA Brief at 5. Symptoms include fears, phobias, depression, guilt, shame, anger, disturbed eating and sleeping patterns, problems in school, running away, and Post-Traumatic Stress Disorder. *Id.* at 5-6. Sexually abused children frequently exhibit inappropriate sexual behavior. *Id.* at 6. Even though many sexually abused children will become well-adjusted adults, serious mental illness afflicts adults who were sexually abused more often than those who were not. *Id.*

Empirical studies of adults confirm many of the long-term effects of sexual abuse mentioned in the clinical literature. Adult women victimized as children are more likely to manifest depression, self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, a tendency toward revictimization, and substance abuse. Difficulty in trusting others and sexual maladjustment in such areas as sexual dysphoria, sexual dysfunction, impaired self-esteem, and avoidance of or an abstention from sexual activities have also been reported by empirical researchers, although agreement between studies is less consistent for the variables on sexual functioning. *Id.* at 6 (quoting Angela Browne & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCHOL. BULL. 66, 72 (1986)).

The research indicates that typically adults who were abused as children have more difficulties in the aforementioned areas than do adults who were not abused as children. *Id.* at 7. Testifying in court is also one of the strongest fears of adult rape victims. *Id.* (citing Karen S. Calhoun et al., *A Longitudinal Examination of Fear Reactions in Victims of Rape*, 29 J. COUNSELING PSYCHOL. 655, 659 (1982)). Children, however, may be more vulnerable than adults. *Id.* Childhood stress can "slow the course of normal cognitive and emotional development," thus preventing stressed children from developing at the same pace as unstressed children. *Id.*

Although adults may suffer as well from involvement with the legal system, their development is more complete than a child's, and thus the impact of such involvement with the courts is less significant. *Id.* at 8. Furthermore, lack of knowledge about the legal system is likely to result in additional stress

especially when the abuser is a family member.[62] This is particularly disturbing in light of the fact that an alarming 90.1% of child rape and sexual assault victims had a prior relationship with their abuser.[63] The dilemma is that often the child victim is the only witness to the abuse.[64] Thus, in order to obtain a conviction, the child usually must testify.[65]

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upon a child, whose cognitive development is not complete. *Id.*

> [C]hildren who must testify more than once, children who lack maternal support when the abuse was disclosed, children whose cases lack corroborative evidence (so that proof of the crime rests primarily on the child's testimony), children whose abuse was severe, and children who were particularly frightened of the defendant when they testified, are most likely to show adverse effects of testifying.

Id. at 11.

62. *Id.* "[T]he stereotype of children being molested mainly by strangers is not accurate." *Id.* at 14 (quoting J. HAUGAARD & N. REPPUCCI, THE SEXUAL ABUSE OF CHILDREN, 47-48 (1988)). Children who shared a closer relationship with the defendant suffer more distress as a result of testifying than children who lack a close relationship with the defendant. *Id.* at 11.

63. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 10 (1996) [hereinafter BUREAU OF JUSTICE]. The Bureau of Justice compiled statistics regarding the victim-offender relationship in 1991. *Id.* The statistics were based upon the percent of state prison inmates serving time for a violent crime, by relationship to their child victim. *Id.* The 90.1% represents inmates who had a prior relationship with their victim. *Id.* Prior relationship refers to either the inmate's own child, including step-children, other family member, acquaintance, boyfriend, or girlfriend. *Id.* The categorical breakdown for inmates who had a prior relationship with their child victim is as follows: Forcible Rape: 88.0%; Forcible Sodomy: 95.6%; Statutory Rape: 100.0%; Lewd Acts With Children: 93.2%; Other Sexual Assault: 88.6%. *Id.*; *see also* APA Brief at 14. (stating that most sexually abused children are abused by someone they know).

The accused "may be a parent, but more often a step-parent, a sibling, or another relative." APA Brief at 14. When not a family member, a child abuser often has a position of authority over the child, such as teacher, minister, or day-care provider. *Id.* "Greater trauma has been reported consistently when the abuser is a father or father figure, compared to all other perpetrators." *Id.* (citing Browne & Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCH. BULL. 66 (1986)).

64. Brustein, *supra* note 59, at 1189.

65. *See generally* Jacqueline Miller Beckett, Note, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials*, 82 GEO. L.J. 1605, 1621 (1994). Some researchers assert that talking about the abuse through court testimony serves as a means of coping for the child victim. L. Christine Brannon, Note, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. The Accused's Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439, 440-41 (1994) (citing John F. Tedesco & Steven V. Schnell, *Children's Reactions to Sex Abuse Investigation and Litigation*, 11 CHILD ABUSE & NEGLECT 267, 268 (1987)). However, this seems to be the case only for children who are receiving the necessary familial support. Brannon, *supra*, at 441. Considering that 90.1% of all prison inmates whose victim was a child had a prior relationship with that victim, chances are quite high that the abuser is a family member, and thus the child will lack the proper familial support. See BUREAU OF JUSTICE, *supra* note 63, at 10 for statistics indicating likelihood of close relationship between victimizer and victim. In reality,

Children who testify in the presence of their abusers suffer many emotional consequences.[66] A child may feel shame, guilt, and especially betrayal, if the abuser was someone the child once trusted.[67] Furthermore, facing the accused may trigger the feelings of helplessness that the child suffered during the abuse.[68] Distress can ruin the child's ability to give complete and accurate testimony.[69] Thus, researchers often label child witnesses as "unreliable and particularly suggestible."[70] Children who delay in revealing their abuse, or whose reports contain inconsistencies, should not, however, automatically be labeled as unreliable.[71] Such delays and inconsistencies may be a result of pressure from someone the child trusted and fear of the consequences she may suffer if she reveals the abuse.[72]

Because testifying and facing one's abuser can be traumatic for a child, courts and legislatures must take precautions and implement procedures to ensure that a child's testimony is given in the least harmful manner. In response to the risk of such traumatic effects upon children, both state and federal governments have acted in an effort to alleviate the risks associated with procuring the testimony of abused children.[73]

C. *Testifying: Responses to the Effects Upon Child Victims of Physical and Sexual Abuse*

In response to the growing concern for child victims who are forced to face their abusers while testifying, both state and federal governments have acted to provide for alternate, less traumatic, methods of procuring such testimony.[74] Such alternatives, which are used when the defendant is represented by counsel, consist of videotaped testimony and one-way or two-way closed-circuit television.[75]

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court testimony as a coping mechanism for child victims is likely to be the exception rather than the rule.

66. APA Brief at 15.

67. *Id.* at 15-16.

68. *Id.* at 16.

69. *Id.* at 13.

70. Margaret-Ellen Pipe & Gail S. Goodman, *Elements of Secrecy: Implications for Children's Testimony*, 9 BEHAVIORAL SCIENCES AND THE LAW 33, 39 (1991).

71. *Id.* at 39.

72. *Id.*

73. *See generally* Maryland v. Craig, 497 U.S. 836, 855 (1989) (holding that a state statute providing for alternative means of procuring a child victim's testimony is constitutional); *see also* 18 U.S.C. § 3509 (1994) (providing alternatives to live in-court testimony by child victims and witnesses).

74. See *supra* note 73 and accompanying text for a brief discussion of such state and federal action.

75. *Craig*, 497 U.S. at 853-54.

With videotaped testimony,[76] a video monitor records the child's testimony, and presents it at trial.[77] During one-way closed-circuit testimony,[78] the judge, the jury, and the defendant remain in the courtroom, while the child, the prosecutor, and the defense counsel are in a separate room.[79] The child undergoes cross-examination while a video monitor records the testimony and displays it in the courtroom for the judge, jury, and defendant to view.[80] The child cannot see the defendant; however, the defendant can see the child and can electronically communicate with his attorney.[81] Defense counsel may object, and the judge will rule just as if the witness was testifying in the courtroom.[82]

Two-way closed-circuit television is similar to that of one-way, except that in two-way, a video monitor transmits the defendant's image, as well as the judge's voice, into the room from which the child is testifying.[83] Thirty-six states permit videotaped testimony

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76. Videotaped testimony potentially serves several important functions, including: (1) reducing the quantity of pretrial interviews that the child must undergo, lessening the chances of re-victimization of the child; (2) allowing the factfinder to observe the child's demeanor, which is often a sign of the truth or falsity of the child's assertions; (3) prompting the defendant to plead guilty, thus eliminating the need for the child to appear in court; and (4) increasing the accuracy of the child's testimony. NANCY WALKER PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS 164-65 (1991). As the forensic psychiatrist noted:

> [For the child who testifies] there is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.

Id. at 165 (quoting State v. Sheppard, 484 A.2d 1330, 1332 (1984)).

77. *See* Josephine Bulkley, Note, *Symposium on Child Sexual Abuse Prosecutions: The Current State of the Art*, 40 U. MIAMI L. REV. 5, 6-7 (1985) (discussing various procedures designed to reduce trauma to child victims).

78. One-way closed circuit testimony, by preventing the child witness from seeing the defendant, is aimed at preventing child victims from suffering serious emotional distress causing the children to be unable to reasonably communicate. *See generally Craig*, 497 U.S. at 842-43 (discussing the serious emotional distress that would result if the children whom the defendant abused were forced to testify in front of her).

79. *Craig*, 497 U.S. at 841.

80. *Id.*

81. *Id.* at 841-42.

82. *Id.* at 842.

83. 18 U.S.C. § 3509(b)(1)(D) (1994). The courts may use two-way closed-circuit television pursuant to the Child Victims' and Child Witnesses' Rights Statute where the court has made a finding that "the child is unable to testify in open court in the presence of the defendant," due to fear, a substantial likelihood of emotional trauma, some mental or other infirmity, or due to some conduct on the part of the defendant or defendant's counsel which renders the child unable to continue to testify. *See also* Scott M. Smith, J.D., Annotation, *Validity, Construction, and Application of Child Victims' and Child*

of sexually abused children,[84] twenty-five states have authorized one-way closed-circuit television,[85] and eight states allow two-way closed-circuit television.[86] The federal government has also enacted a statute affording such protection to child victims and witnesses by means of two-way closed-circuit television, and videotaped depositions.[87]

The constitutionality of these procedures, however, has not gone unchallenged.[88] State courts have been faced with the issue of whether the state statute permitting such procedures is constitutional.[89] Further, in some cases, the United States Supreme Court has ruled on the constitutionality of various state statutes permitting such procedures.[90]

Witnesses' Rights Statute (18 U.S.C. § 3509), 121 A.L.R. FED. 631 (1996) (quoting § 3509(b)(1)(B)) (discussing federal cases which have determined the validity, construction, and application of the Child Victims' and Child Witnesses' Rights Statute, which provides protections for child victims and witnesses).

84. Maryland v. Craig, 497 U.S. 836, 853 & n.3 (1990) (listing the states which allow videotaped testimony in sexual abuse cases). Since the *Craig* decision, one state has repealed its statute to that effect. *Compare id.* and TEX. CODE CRIM. PROC. ANN., Art. 38.071, § 4 (West Supp. 1997).

85. *Craig*, 497 U.S. at 853-54 & n.3 (listing 24 states which allow one-way closed-circuit televised testimony in child abuse cases). Since the *Craig* decision, two states have enacted statutes permitting one-way closed-circuit televised testimony in child abuse cases. DEL. CODE ANN. tit. 11 § 3514 (1974); WASH. REV. CODE § 9A.44.150 (Supp. 1997). One state has repealed its statute. *Compare Craig*, 497 U.S. at 853-54 & n.3 and TEX. CODE CRIM. P. ANN., art. 38.071, § 4 (West Supp. 1997).

86. *Craig*, 497 U.S. at 854 & n.4 (listing states which allow two-way closed-circuit televised testimony).

87. *See* 18 U.S.C. § 3509 (b)(1)(D)-(b)(2) (1994) (providing for two-way closed-circuit television and videotaped depositions as alternatives to face-to-face confrontation).

88. *See, e.g.*, *Craig*, 497 U.S. at 842 (challenging the constitutionality of a state statutory procedure permitting the use of one-way closed-circuit television to procure the testimony of an alleged child abuse victim); Coy v. Iowa, 487 U.S. 1012, 1014 (1988) (challenging the constitutionality of a state statute permitting the placement of a screen between the defendant and the children whom he allegedly sexually abused).

89. *See, e.g.*, *Coy*, 487 U.S. at 1022 (holding that placing a screen between the defendant and the alleged sexual abuse victims as the alleged victims testified violated the defendant's Sixth Amendment right of confrontation); Craig v. State, 560 A.2d 1120, 1127 (1989) (holding that upon a showing of "serious emotional distress," such that the child cannot "reasonably communicate," a court may use an appropriate alternative procedure to procure the child's testimony).

90. *See, e.g.*, *Craig*, 497 U.S. at 852 (stating that the use of one-way closed-circuit television does not infringe upon the truth-determining purposes underlying the Confrontation Clause where the procedure is necessary to advance an important state interest).

III. DEVELOPMENTS PROTECTING CHILD VICTIMS AND WITNESSES FROM FURTHER TRAUMA

The case law interpreting state statutes which provide alternative means to face-to-face confrontation is relatively settled where the defendant is represented by counsel. Upon a showing of necessity, the child victim may testify outside of the defendant's presence.[91] However, the case law interpreting the extent of a defendant's right to proceed pro se, and thus personally confront the child victim, by means of cross-examination, is not as settled.[92]

This Part explores the case law and statutory developments leading up to the issue of whether the defendant's right to proceed pro se guarantees that he, personally, may cross-examine the child victim. Section A addresses the landmark decision of *Maryland v. Craig*.[93] Section B discusses the Child Victims' and Child Witnesses' Rights Statute[94] that the federal government enacted in the wake of *Maryland v. Craig*. Section C focuses on the Fourth Circuit's decision in *Fields v. Murray*.[95]

A. Maryland v. Craig: *An Exception to Confrontation*

In *Maryland v. Craig*, the United States Supreme Court carved out an exception to the right of confrontation.[96] The Court

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91. *See id.* at 855 (holding that as long as the trial court has made a case-specific finding of necessity, use of one-way closed-circuit television to take a child abuse victim's testimony does not violate the Sixth Amendment Confrontation Clause). The Court admitted that "[a]lthough we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure." *Id.* at 860.

92. *See generally* Fields v. Murray, 49 F.3d 1024 (1995) (basing its decision on the defendant's failure to properly invoke his self-representation right, rather than basing it on the issue of whether a defendant in a child sexual abuse case should be allowed to personally cross-examine the child by invoking his self-representation right). The Fourth Circuit is the only federal appellate court which has heard this issue. *See id.* at 1036 (discussing state court decisions due to the lack of authority on the issue).

93. See *infra* notes 96-108 and accompanying text for further discussion of this case.

94. 18 U.S.C. § 3509 (1990) (codifying the Supreme Court's ruling in *Maryland v. Craig*). See *infra* notes 109-16 and accompanying text for further discussion of this statute.

95. 49 F.3d 1024, 1034 (holding that the defendant had not asserted his right to proceed pro se, and even if he had, the trial court properly precluded him from personally cross-examining the young girls who were his accusers). See *infra* notes 117-150 and accompanying text for a more detailed discussion of this case.

96. 497 U.S. 836, 857 (1990). The Court held that face-to-face confrontation is not an absolute constitutional requirement. *Id.* The U.S. Supreme Court has never insisted that face-to-face confrontation be present "in *every* instance" where testimony is given against an accused. *Id.* at 847. Instead,

upheld a state statute designed to protect children victimized by physical and sexual abuse.[97] The statute allowed the child victim to be cross-examined outside of the defendant's presence via one-way closed-circuit television.[98]

The grand jury indicted the defendant, Sarah Craig, for child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery.[99] The victim was a six year old girl, who, for almost two years, attended a kindergarten and pre-kindergarten center which Craig owned and operated.[100]

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the Court has consistently held that the Confrontation Clause allows the lower court to admit certain hearsay statements against defendants notwithstanding the lack of confrontation with the declarant. *Id.* at 847-48; *see also* Mattox v. United States, 156 U.S. 237, 240-44 (1895) (holding that a government witness's testimony at a former trial can be admitted against the defendant in a subsequent trial, where the government witness underwent complete cross-examination at the former trial, but died thereafter). The Court in *Mattox* stated that nothing could be more contrary to the letter of the Confrontation Clause than admitting dying declarations. *Id.* at 243. In explaining the admissibility of the testimony, the Court stated:

> [t]here is doubtless reason for saying that . . . if notes of [the witness'] testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. . . .

Id. at 243.

Thus, reading the Confrontation Clause literally would abolish almost every hearsay exception. Ohio v. Roberts, 448 U.S. 56, 63 (1980). The U.S. Supreme Court has rejected that result as "unintended," and "too extreme." *Id.* Under certain circumstances, a close examination of competing interests may warrant prohibiting confrontation of adverse witnesses at trial. Chambers v. Mississippi, 410 U.S. 284, 295 (1973). In *Bourjaily v. United States*, 483 U.S. 171, 183-84 (1987), the Supreme Court held that hearsay statements of co-conspirators who were not testifying at trial may be admitted at trial against an accused, notwithstanding the lack of face-to-face confrontation with the accused. Furthermore, in *United States v. Inadi*, 475 U.S. 387, 400 (1986), the Supreme Court held that a finding of the unavailability of a declarant was not required where the hearsay statement was the out-of-court statement of the co-conspirator.

As a result of the U.S. Supreme Court's hearsay rulings, the word "confronted," in the Confrontation Clause cannot only mean face-to-face confrontation. *Craig*, 497 U.S. at 849. If it did, the Clause would be contrary to the cases the Court has decided, and would prohibit a court from admitting hearsay statements which an absent declarant made, who is "as much 'a witness against'" the accused as a witness who testifies at the trial. *Id.*

97. *Craig*, 497 U.S. at 840-41.

98. *Id.* at 840-41 n.1. The state statute permitting one-way closed-circuit television was MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989).

99. *Craig*, 497 U.S. at 840.

100. *Id.* Craig allegedly abused a number of other children. *Id.* at 842.

Before the trial, the State of Maryland sought to invoke a statutory procedure which allows a child abuse victim to testify by one-way closed-circuit television.[101] In order to invoke the procedure, the trial judge must first make a finding that courtroom testimony by the child victim will result in serious emotional distress to the child, thus preventing the child from reasonably communicating.[102] The Supreme Court, however, did not specify what constituted the minimum showing of emotional trauma required to implement the special procedure.[103] Rather, the Court found that Maryland's statutory requirement of "serious emotional distress such that the child cannot reasonably communicate," clearly meets constitutional standards.[104]

The Court concluded that where it is necessary to protect a child witness from trauma caused by testifying in the physical presence of the defendant, the Confrontation Clause does not prohibit the use of alternative procedures, despite the lack of face-to-face confrontation.[105] So long as the reliability of the evidence is ensured by "subjecting it to rigorous adversarial testing and thereby preserv[ing] the essence of effective confrontation," the

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101. *Id.* See *supra* notes 78-82 and accompanying text for an explanation of one-way closed-circuit television.

102. Maryland v. Craig, 497 U.S. 836, 840-41 (1990) (citing MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989)). The State of Maryland's evidence that the children whom Mrs. Craig abused, including the named victim, indicated that the children would suffer "serious emotional distress such that [they could not] reasonably communicate," if they were to testify in the courtroom. *Id.* at 842 (quoting Craig v. State, 560 A.2d 1120, 1128-29 (Md. Ct. App. 1989)).

The expert testimony regarding each child indicated that each child would experience some or considerable difficulty testifying in the presence of the defendant, Mrs. Craig. *Id.* The expert said that for one child, most anxiety would result from being forced to testify in Mrs. Craig's presence, and that the child would be unable to effectively communicate. *Id.* The expert said that another child would withdraw, curl up, and probably stop talking. *Id.* Yet another would become extremely agitated, refuse to talk, and choose the subject regardless of the questions that will be asked. *Id.* Finally, another child would become very shy and unwilling to talk. *Id.*

103. *Craig*, 497 U.S. at 856.

104. *Id.* (quoting § 9-102(a)(1)(ii)). The Maryland Court of Appeals concluded that:

> [u]nder § 9-102(a)(1)(ii), the operative 'serious emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and [state constitution] confrontation purposes, 'in the courtroom in the presence of the defendant.' Unless prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right.

Id. at 843 (quoting Craig v. State, 560 A.2d 1120, 1127 (Md. Ct. App. 1989)).

105. *Id.* at 857.

Constitution permits the alternative procedure.[106] Here, the child testified under oath, was subject to full cross-examination, and the judge, jury, and the defendant observed her while she testified.[107] Thus, as long as the trial court made a proper finding of necessity, admitting the testimony was consistent with the Confrontation Clause.[108] This decision was a substantial step in the advancement of child victims' rights.

B. *The Child Victims' and Witnesses' Rights Statute: The Aftermath of* Maryland v. Craig

The 1990 decision of *Maryland v. Craig* had a profound effect.[109] Later that same year, as a result of the decision, the federal government enacted the Child Victims' and Child Witnesses' Rights Statute[110] as a part of the Crime Control Act of 1990.[111] Congress enacted the statute in an effort to provide protection to child victims of physical or sexual abuse, exploitation, or witnesses to a crime committed upon another.[112] The statute provides for two alternatives to live, in-court testimony where the defendant is represented by counsel: live testimony by two-way closed-circuit television and videotaped depositions.[113]

The statute's legislative history indicates Congress's concern about the rising number of child abuse cases.[114] Although Congress acknowledged that most cases of this nature would proceed through the state courts, Congress found it necessary to "keep pace with the states' enactment of procedural innovations" dealing with the problems of child abuse prosecutions.[115] Unfortunately, neither the federal statute, nor the state statutes, which provide protections for procuring children's testimony, address the issue in *Fields v. Murray*:[116] whether courts should permit pro se defendants in child physical and sexual abuse cases to *personally* cross-examine the children whom they have allegedly abused.

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106. *Id.*
107. *Id.*
108. Maryland v. Craig, 497 U.S. 836, 857 (1990).
109. *See generally* 18 U.S.C. § 3509 (1990) (codifying the U.S. Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990)).
110. 18 U.S.C. § 3509 (1994).
111. Smith, *supra* note 83, at 631.
112. *Id.*
113. 18 U.S.C. §§ 3509(b)(1)-(2) (1994). The Child Victims' and Child Witnesses' Rights Statute also provides other protections including: appointment of a guardian ad litem, a child's right to be accompanied by an adult while testifying, and extension of the statute of limitations for child physical or sexual abuse. Smith, *supra* note 83, at 631.

The annotation compiles and analyzes the federal cases which have construed, applied, and determined the validity of the statute's protections. *Id.*
114. *Id.*
115. *Id.*
116. 49 F.3d 1024, 1028 (1995).

C. Fields v. Murray

In cases where the witness is a child victim of physical or sexual abuse, or has witnessed a crime committed upon another, courts may make exceptions to face-to-face confrontation.[117] Where an alleged abuser puts himself in the position of *personally* cross-examining his own victim by invoking his self-representation right, a court's ability to make exceptions to that right has not yet been clearly resolved. The United States Court of Appeals for the Fourth Circuit faced this issue in *Fields v. Murray*.

1. *Factual Background of* Fields v. Murray

Gary Fields engaged in a "sickening routine"[118] of sexual abuse.[119] Deanna, Fields's twelve year old daughter, and a group of her young girlfriends spent a lot of time at Fields's home, including many sleep-overs.[120] The girls became so closely acquainted with Fields that they even called him "Dad."[121] During the sleep-overs, Fields gave each girl a handful of pills.[122] He told the girls that the pills were vitamins, though they were actually a mixture of vitamins and sleeping pills.[123] As the girls started to fall asleep, he gave them backrubs and fondled their private areas.[124] In the middle of the night, Fields would go into the room where the girls were sleeping and fondle them some more, often taking one of the girls to his bedroom and raping her.[125]

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117. *See generally* Maryland v. Craig, 497 U.S. 836, 857-58 (1990) (upholding the constitutionality of exceptions to face-to-face confrontation where a case specific finding of necessity occurs).

118. Fields v. Murray, 49 F.3d 1024, 1026 (4th Cir. 1995).

119. *Id.*

120. *Id.* at 1025. During the time period relevant to this case, Fields was divorced. *Id.* He lived in a two-bedroom trailer with his mother and 12 year old daughter, Deanna. *Id.* Fields occupied one bedroom, and his mother occupied the other. *Id.* His daughter, Deanna, slept in the living room. *Id.* Deanna was popular with her peers, thus her friends spent a lot of time at her home. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* At trial, Fields' daughter, Deanna, testified that she found the bottle from which Fields took the pills, and the label on the bottle indicated that they were sleeping pills. *Id.* at n.1.

124. *Id.* at 1025. Deanna testified that she had been sexually abused by her father, Fields. *Id.* at 1026. On one occasion, Fields, purporting to explain to Deanna about "the birds and the bees," took off Deanna's clothes and raped her. *Id.* In another instance, Fields fondled her private areas. *Id.* There was another occasion which Deanna attempted to explain; however, she had difficulty recalling the details as she had apparently taken sleeping pills which Fields had given her. *Id.*

125. *Id.* at 1025-26. Three of the girls testified that Fields raped them during the sleep-overs. *Id.* at 1026. One girl indicated that Fields raped her many times over a three month period. *Id.* Another girl stated that Fields raped her nine or ten times. *Id.* Three other girls stated that Fields fondled

Fields's routine was finally discovered when a ten-year-old boy refused to take the sleeping pills which Fields offered.[126] The boy was awake to witness Fields fondling the boy's two sisters.[127] The boy told an adult what happened, and at least six others corroborated his story.[128]

2. *Procedural Background and Examination of* Fields v. Murray

Fields was found guilty of five counts of aggravated sexual battery.[129] He appealed to the Court of Appeals of Virginia, contending that the trial court violated his Sixth Amendment right to self-representation by refusing to allow him to proceed pro se and personally cross-examine the children.[130] The Virginia Court of Appeals rejected this contention, stating that Fields did not "knowingly waive his right to counsel by a clear and unequivocal assertion of the right of self-representation," which is essential to exercising that right.[131] Fields petitioned the Supreme Court of Virginia for review and the court refused.[132] He then filed a habeas corpus petition in the Eastern District of Virginia asserting the same arguments.[133] The district court, upon the recommendation of a magistrate judge, denied the petition.[134] It was this habeas petition that the Fourth Circuit was faced with.[135]

The Fourth Circuit affirmed the district court's denial of the petition, thereby preventing Fields from personally cross-examining the children.[136] The court held that Fields failed to in-

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them during the sleep-overs, one indicating that it happened 10 or more times. *Id.*

126. *Id.* at 1026. Fields was baby-sitting for Mrs. Shackleford, whose husband was dying in the hospital, when Fields sexually abused two of her three children. *Id.* He abused her 10 year old girl and her 12 year old girl. *Id.* Fields did not abuse the 10 year old boy, as he refused to take the sleeping pills. *Id.*

127. *Id.*

128. *Id.* The boy's two sisters, and at least four others who had attended sleep-overs at Fields' home, corroborated the boy's story. *Id.*

129. *Id.* at 1028. The grand jury also indicted Fields on six counts of aggravated sexual battery, one count of forcible sodomy, and one count of rape. *Id.* at 1026. Fields was acquitted on the counts of sodomy and rape, and the sixth count, aggravated sexual battery, was stricken from the indictment. *Id.* at 1028 n.6

130. Fields v. Murray, 49 F.3d 1024, 1028 (4th Cir. 1995) (citing Fields v. Commonwealth, No. 1697-88-1, slip op. at 3 (Va. Ct. App. Aug. 21, 1990)).

131. *Id.* The state courts found that "Fields' letters and verbal communications taken as a whole do not manifest an unequivocal demand for self-representation." *Id.*

132. *Id.*

133. *Id.*

134. *Id.* After a *de novo* review of Fields' contention, the district court found the magistrate judge's analysis of the facts and the law to be correct, and thus denied Fields' petition upon the Magistrate Judge's recommendation. *Id.*

135. *Id.* at 1028.

136. *Id.* at 1037. The Fourth Circuit concluded that the trial court's deter-

voke his Sixth Amendment right to self-representation clearly and unequivocally.[137] This seemed to be the court's preliminary basis for denying Fields the opportunity to personally cross-examine the children. The court, however, went on to state that even if Fields had invoked his self-representation right clearly and unequivocally, because his sole purpose in representing himself was to personally cross-examine the victims, the state trial court did not err.[138]

In determining whether the state trial court in *Fields* was constitutionally required to allow Fields to personally cross-examine the child victims, the Fourth Circuit applied the United States Supreme Court's analysis in *Maryland v. Craig*.[139] The first prong of the analysis asks whether the purposes of the self-

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mination, that denying personal cross-examination was necessary to prevent the girls from suffering emotional trauma, was adequate. *Id.* The trial court had before it the indictment, charging Fields with rape, sodomy, and sexual battery of several 11-13 year old girls. *Id.* One of the victims was Fields's own daughter. *Id.*

The trial court also had a letter which Fields had written to the court stating that the girls "'call[ed] him dad,' and that he had treated them 'as if they were [his] own kids.'" *Id.* In the letter, Fields indicated that one of the girls had "'burst into tears' at a preliminary hearing 'because she was embarrassed.'" *Id.* The same letter admitted that the girl also "wet the bed repeatedly." *Id.* In this letter, Fields said that while cross-examining the girls, he would not get any closer than three feet from them, and that if he needed to get closer, he would ask the court's permission. *Id.* From the letter, the Fourth Circuit inferred that Fields's purpose of cross-examining the girls was to intimidate them, especially considering their close relationship. *Id.* On the basis of these facts, it was reasonable for the trial court to conclude that the girls would be emotionally traumatized if Fields, their alleged abuser, personally cross-examined them. *Id.*

137. *Id.* at 1034. The court further stated that other courts which have examined this record "strongly bolster" its conclusion. *Id.* "Three different courts have conducted four independent *de novo* reviews of Fields'[s] contention," namely, the Court of Appeals of Virginia, the Supreme Court of Virginia, and the United States District Court for the Eastern District of Virginia, where both a magistrate judge and a district judge reviewed the record. *Id.* at 1034 & n.12. All of these courts found that Fields did not clearly and unequivocally invoke his pro se. *Id.* at 1034.

138. *Id.*

139. *Id.* The U.S. Supreme Court's reasoning in *Maryland v. Craig* consisted of a two-pronged analysis. *Id.* (discussing *Craig*, 497 U.S. 836 (1990)). On the first prong, the *Craig* Court found that the state statute at issue "adequately ensured" the reliability of the child witnesses' testimony. 497 U.S. at 851. The Court reasoned that while the statute eliminated the defendant's face-to-face confrontation with the witnesses, it preserved the other elements of the confrontation right, namely, oath, cross-examination, and the jury's observation of the witness' demeanor. *Id.* On the second prong of the analysis, the Court in *Craig* determined that "a state's interest in the physical and psychological well-being of child abuse victims" was "sufficiently important to outweigh . . . a defendant's right to face his or her accusers in court," if denying such confrontation was necessary to protect the child victims from "emotional trauma." *Id.* at 853-55.

representation right are preserved.[140] A defendant's self-representation right can be properly restricted by preventing him from personally cross-examining witnesses against him, so long as the purposes of the self-representation right are "otherwise assured."[141]

The *Fields* court found that all of the elements of the self-representation right were present except for the right to personally cross-examine the child victims.[142] In fact, the court further stated that the right to personal cross-examination lacks the fundamental importance of the right of face-to-face confrontation which the Court in *Craig* denied the defendant.[143] Here, Fields was able to confront the child witnesses face-to-face, and he "could even have controlled the cross-examination by specifying the questions to be asked."[144] The only restriction upon Fields was that he, personally, could not question the victims.[145] The court found that because Fields would have conducted every other aspect of the trial, his dignity and autonomy would have been "otherwise assured."[146]

The second prong of the *Craig* analysis requires the court to determine whether a state's interest in the physical and psychological well-being of a child is sufficiently important to outweigh a defendant's right to face his accusers in court.[147] The Court held that such an interest is sufficiently important where denial of face-to-face confrontation is necessary to protect child victims and witnesses from "emotional trauma."[148]

The *Fields* court had little trouble determining whether the State's interest was sufficiently important to outweigh Fields's right to personally cross-examine the child victims.[149] In finding

140. *Fields*, 49 F.3d at 1034.

141. *Craig*, 497 U.S. at 850.

142. *See Fields*, 49 F.3d at 1035 (stating that the court only denied Fields one element of his self-representation right—the right to question the witness, and that he retained all other elements of the right).

143. *Id.* at 1035-36. The court stated that the purposes of the self-representation right were better preserved here, despite the lack of personal cross-examination, than was the purpose of the Confrontation Clause in *Craig*, where the Court denied the defendant face-to-face confrontation with his adverse witnesses. *Id.*

144. *See id.* at 1036-37 (stating that the right denied Fields was the right to personally cross-examine witnesses, which lacks the fundamental importance of the right to face-to-face confrontation with adverse witnesses). This implies that the trial court did not deny Fields's right to face-to-face confrontation with his adverse witnesses.

145. *Id.* at 1035.

146. *Id.*

147. *Id*; *see also* Maryland v. Craig, 497 U.S. 836, 853 (1990) (concluding that a state's interest can outweigh a defendants right to face-to-face confrontation).

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

149. *Id.*

that denial of such cross-examination was necessary to protect the girls from emotional trauma, the court reasoned that the State's interest in protecting children from the emotional trauma of being personally questioned by their abusers is "at least as great as, and likely greater than" the State's interest in protecting children from merely testifying in the presence of their alleged abusers.[150]

Protecting child abuse victims from further emotional trauma, and protecting the rights of criminal defendants, are both necessary to the interests of justice. Because of the importance attached to these interests, it is necessary to analyze the conflict that results when a defendant's right to self-representation puts an abused child at risk of being personally questioned by the abuser himself.

IV. THE RIGHT TO SELF-REPRESENTATION VERSUS THE PROTECTION OF CHILD VICTIMS: AN ANALYSIS OF THE CONFLICT

The issue presented in *Fields v. Murray* is sure to arise more often in the future, as defendants become more sophisticated in manipulating adverse witnesses. This Part analyzes the conflict between defendants' rights and the need to protect child victims and witnesses from further trauma. Section A discusses whether limitations on defendants' Sixth Amendment rights preserve the purposes behind those rights, and are thus constitutional. Section B weighs the competing interests of defendants' Sixth Amendment rights with the societal interest in protecting child victims from further traumatization.

A. *Limitations on a Defendant's Sixth Amendment Rights Do Not Undermine the Purposes Behind Those Rights*

The *Fields* court was correct in denying the defendant the right to personally cross-examine the children whom he had sexually abused. The court, however, was able to decide the case on the fact that the defendant had not clearly and unequivocally invoked his right to self-representation.[151] The court further stated

150. *Id.*

151. *See id.* at 1034 (holding that the district court did not err in finding that Fields's right to self-representation was not violated and denying Fields's habeas petition). In determining whether a defendant has clearly and unequivocally invoked his self-representation right, the court looks to the words he speaks, the way he speaks them, and "his manner and demeanor when he is speaking, . . . [as] the same words can express different degrees of certainty depending on how they are spoken." *Id.* at 1031.

The Court went on to say that any potential a state court may have for being biased against the defendant does not pose an increased risk to the defendant's constitutional rights. *Id.* The determination is not one where a resolution in the defendant's favor will increase his chances of an acquittal, as is a determination of whether a confession is voluntary or not. *Id.* Here, a determination in favor of the defendant "means that he represents himself,

that because Fields conceded that his sole purpose in representing himself was to be able to personally cross-examine the victims, the trial court committed no error.[152]

The result in *Fields*, however, should not be limited to times when the defendant *concedes* that his sole purpose for representing himself is so that he, personally, may cross-examine the child victim. This would put the risk of manipulation of the child victim at a maximum.

As evidenced by the Bureau of Justice statistics, ninety percent of the time that a child is physically or sexually abused, the abuser is a parent, a family member, or an acquaintance.[153] This increases the risk that the child victim would be subject to cross-examination by someone with whom she had a close relationship. Testifying is especially traumatic for a child when the victimizer was someone whom the child knew and trusted.[154] After the *Fields* decision it is highly unlikely that a defendant will concede that his reason for invoking his self-representation right is so that he may personally cross-examine the child. Further, the law does not require that a defendant give his reasons for proceeding pro se, but only that he "knowingly and intelligently" forgo his right to counsel and that he is able and willing to abide by the rules of procedure and courtroom protocol.[155]

Courts should not permit defendants in child physical or sexual abuse cases to personally cross-examine the child victims or witnesses under any circumstances. As long as the purposes be-

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which, if anything, is more likely to result in a conviction." *Id.* *See also* McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) (stating that where the self-representation right is exercised, it increases the likelihood of a trial outcome which is unfavorable to the defendant).

152. *Fields*, 49 F.3d at 1037. The court seemed to be limiting its ruling to cases in which the defendant *concedes* that his sole purpose of invoking his Sixth Amendment right to self-representation is so that he, personally, may cross-examine the victim. *See id.* at 1034-37 (stating that Fields conceded that he desires to proceed pro se for one purpose only: to personally cross-examine the young girls). The trial court refused to allow Fields to personally cross-examine the abused children, but offered instead that Fields could write out the specific questions he wished to ask the girls and have a lawyer read them. *Id.* at 1034. In commenting on the trial court's actions, the *Fields* court stated that "[b]ecause the trial court was not required to allow such personal cross-examination, Fields was denied nothing to which he was entitled." *Id.*

153. BUREAU OF JUSTICE, *supra* note 63, at 10.

154. *See generally* APA Brief at 11 (explaining that abused "children who are more closely related to the defendant are . . . more distressed as a result of testifying" than are abused children "who are less closely related" to the accused).

155. *See* Faretta v. California, 422 U.S. 806, 835-36 (1975) (specifying only that the defendant "knowingly and intelligently forgo" his right to counsel, and that he abide by procedural rules and courtroom protocol). The absence of any other requirements in the Court's opinion indicates that the defendant is not required to give reasons for his choice to proceed pro se. *See generally id.*

hind the Sixth Amendment rights are preserved, there is no reason to preclude exceptions to a right which was drafted by adults, and most likely for adults, over 200 years ago.[156]

1. The Purpose Behind the Confrontation Clause Is Preserved

Although the Sixth Amendment affords a criminal defendant the right to confront the witnesses against him,[157] the Supreme Court has held that "the right to confront is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[158] The Court has repeatedly stated that the Confrontation Clause "reflects a *preference* for face-to-face confrontation," which may be overcome where a close examination of "competing interests" so warrants.[159]

Protecting defendants' constitutional rights, and protecting child victims of physical or sexual abuse from further trauma, are indeed competing interests. A close examination of these competing interests has revealed that limiting a defendant's right of confrontation will not jeopardize the purpose behind the Confrontation Clause.[160] That purpose is to ensure that evidence admitted against an accused is reliable and subject to rigorous adversarial testing.[161]

In *Craig*, the element of physical presence was missing, and the Court determined that the purpose of the defendant's confrontation right was "otherwise assured" where one element of the

156. In 1791, the states ratified the Bill of Rights, which included the Sixth Amendment. *See* JAMES Q. WILSON, UNIVERSITY OF CALIFORNIA, LOS ANGELES, AMERICAN GOVERNMENT 22 (1990) (discussing the evolution of the Bill of Rights). In 1788, nine states had ratified the Constitution, thus making it law. *Id.* However, the Bill of Rights, which the Framers had promised, came later. *Id.* James Madison introduced to the First Congress a set of proposals for the Bill of Rights which was based on the Virginia Bill of Rights. *Id.* Congress approved 12, 10 of which the states ratified. *Id.* The ten which the States ratified are known as the Bill of Rights. *Id.* The Bill of Rights limited the federal government's power over its citizens. *Id.*

Later, the United States Supreme Court interpreted the Fourteenth Amendment to extend many guarantees of the Bill of Rights to state governmental actions as well. *Id.* See *supra* note 34 for case law applying the Sixth Amendment rights to confrontation and the assistance of counsel to the states.

157. Coy v. Iowa, 487 U.S. 1012, 1015 (1987). See *supra* notes 25-33 and accompanying text for a more detailed discussion of the Confrontation Clause.

158. *See id.* at 1024 (O'Connor, J., concurring) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

159. *Id.* at 1024. (O'Connor, J., concurring) (quoting Ohio v. Roberts, 448 U.S. 56, 63-64 (1980)) (emphasis added).

160. *See* Maryland v. Craig, 497 U.S. 836, 852 (1990) (finding that a limitation on a defendant's confrontation right, by "use of a one-way closed circuit television procedure, did not impinge upon the truth-seeking . . . purpose of the Confrontation Clause").

161. *Id.* at 846.

right was denied, but the others were preserved.[162] In *Fields*, none of the confrontation elements were missing.[163] The children were to testify in the defendant's presence, under oath, subject to cross-examination, and the trier of fact could observe the witnesses' demeanor.[164] The only restriction on such cross-examination being that the defendant, *personally*, could not question the children.[165] This restriction leads to the inquiry of whether the purpose of the self-representation right is preserved in the absence of such personal cross-examination.

2. *The Purpose Behind the Self-Representation Right Is Preserved*

The only limitation on Fields's constitutional rights was that the trial court did not allow him to *personally* cross-examine the child victims.[166] This limitation upon the manner of cross-examination is a limitation upon the right to self-representation.[167]

The dissent in *Fields* asserts that the majority ignores the purpose behind the self-representation right, to affirm a defendant's dignity and autonomy.[168] The majority, however, does recognize this purpose.[169] In fact, the court's analysis concluded that since Fields would have enjoyed all other elements of the self-representation right, the purpose behind that right was preserved.[170] Furthermore, he could have even controlled the cross-examination by writing out the specific questions to be asked of

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162. *Id.* at 850-51.

163. *See generally* Fields v. Murray, 49 F.3d 1024, 1035 (4th Cir. 1995) (indicating that the only limitation upon the defendant was that he could not personally conduct the cross-examination of the child, which is a limitation upon the self-representation right, not upon the confrontation right).

164. *Id.*

165. *Id.*

166. *Id. But cf.* Comment, *Explicit Limitations on the Implicit Right to Self-Representation in Child Sexual Abuse Trials:* Fields v. Murray, 74 N.C. L. REV. 863, 896 (1996) (asserting that "the *Fields* court seemingly extinguished many of the pro se defendant's rights"). The *Fields* court did not, however, extinguish many of the pro se defendant's rights, it merely denied one element of the self-representation right—the element of personal cross-examination of certain witnesses. *Fields*, 49 F.3d at 1035. Although the court did not allow the defendant to personally cross-examine the child victims, the defendant could have specified questions for the children which someone else could have then asked. *Id.* at 1034.

167. *See generally* McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) (stating that an accused has a Sixth Amendment right to self-representation, which includes the right to conduct his own defense by cross-examining witnesses); *see also* Maryland v. Craig, 497 U.S. 836, 842 (1990) (stating that the right of confrontation includes the right to cross-examine witnesses).

168. *Fields*, 49 F.3d at 1046-47 (Ervin, C.J., dissenting).

169. *See id.* at 1035-36 (analyzing whether the purposes behind the self-representation right would have been "otherwise assured").

170. *Fields*, 49 F.3d at 1035.

the children and having an attorney read them.[171]

Allowing the defendant to write out the questions he desires to ask the children is a very fair way of procuring accurate testimony from child victims and witnesses, as well as ensuring that the defendant is permitted to conduct his own defense. In fact, the dissent seemingly admits that if a judge, rather than an attorney reads the defendant's questions, the self-representation right will be preserved.[172] Although the court will not allow the defendant himself to question a child abuse victim, the presence of the other self-representation elements will allow a jury to perceive that the defendant is representing himself, as well as ensure the reliability of the testimony.

When the witness is a child, allowing a limitation upon the defendant's right to personally cross-examine the child is unlikely to jeopardize the truth of the child's testimony.[173] For a child, being in a courtroom setting, testifying under oath, and being surrounded by judges, attorneys, and other adults, is enough to emphasize the importance and the seriousness of the proceedings. These factors *alone* are enough to scare a child. Therefore, allowing defendants themselves to question the child victims is not necessary to further the Sixth Amendment's truth-determining goal, and would only serve to intensify the fear and humiliation of the children.[174]

B. Society's Interest in Protecting Child Victims and Witnesses from Further Traumatization Outweighs a Defendant's Right to Self-Representation

Society's interest in affording protection to child physical and sexual abuse victims and witnesses mandates the result reached in *Fields*.[175] It is unclear, though, whether the court reached its result solely by Fields's failure to properly invoke his self-

171. *Id.* at 1027.

172. *Id.* at 1047 n.4 and accompanying text.

173. *See* APA Brief at 3-4 (stating that in some cases, requiring child victims-witnesses to submit to face-to-face confrontation with their alleged abusers actually thwarts the Confrontation Clause's truth-seeking purpose). Although this *APA Brief* only discusses the effect that face-to-face confrontation may have on child victims, its logic extends to situations where the alleged abuser is not only confronting child victims face-to-face, but is personally cross-examining them.

174. *See* APA Brief at 13-15 (stating that the distress associated with face-to-face confrontation often adversely affects the completeness and accuracy of a child's testimony and re-arouses fear). Because face-to-face confrontation often results in incomplete and inaccurate testimony as well as fear, it follows that where the alleged abuser is not only present, but is personally cross-examining the child, the results would be the same, if not worse.

175. See *supra* notes 129-50 and accompanying text for a discussion of the *Fields* result.

representation right.[176] A fair reading of the *Fields* opinion indicates that if Fields had properly asserted his self-representation right, the court would have only denied him that right if he *conceded* that his sole purpose in asserting it was to personally cross-examine the children.[177]

Courts should not consider a defendant's motives for proceeding pro se in determining whether he may personally cross-examine a child victim. This would be futile, as any well-advised defendant will be careful to not express any motives such as manipulation and intimidation.

1. State Legislation Evidences Society's Interest In Protecting Child Victims From Further Trauma

The *Fields* Court arrived at a just decision; however, courts and legislatures should take the result one step further. Courts should not, under *any* circumstances, allow criminal defendants in child physical and sexual abuse cases to *personally* cross-examine the child victims whom they have allegedly abused.

Society has expressed its concern for child abuse victims and witnesses. In response to such a growing concern, both state and federal governments have taken action which United States courts, including the Supreme Court, have consistently held to be constitutional.[178] Such actions consist of the enactment of state and federal statutes providing for alternative methods of procuring accurate testimony from child victims and witnesses of physical and sexual abuse.[179]

Alternative methods[180] of procuring testimony protect the constitutional rights of defendants while protecting child victims and witnesses of abuse from further trauma, by creating special rights for children where before there were none.[181] The fact that almost

176. *See Fields*, 49 F.3d at 1034 (holding that the district court did not err in finding that Fields failed to properly invoke his self-representation right, and stating that even if he did properly invoke his self-representation right, the state trial court did not err).

177. *Id.* at 1034. Fields conceded that he desired to proceed pro se for one purpose only, and thus, the trial court did not err. *Id.*

178. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 857-60 (upholding a Maryland state statute that permitted a child to testify by one-way closed circuit television); *see also* United States v. Garcia, 7 F.3d 885, 888 (1993) (holding that the procedures used pursuant to 18 U.S.C. § 3509, as alternatives to live, in-court testimony, are constitutional).

179. See *supra* notes 84-86 and accompanying text for state statutes employing alternative methods of procuring testimony from child victims. *See also* 18 U.S.C. § 3509 (providing alternative methods of procuring testimony from child victims and witnesses).

180. See *supra* notes 74-90 and accompanying text for a discussion of alternative procedures for procuring children's testimony.

181. *See* Maryland v. Craig, 497 U.S. 836, 857-58 (holding that upon a showing of necessity, state statutes providing for alternative methods of pro-

every state, as well as the federal government, has enacted statutes involving one or more of these procedures evidences the need for, and importance of, such protections for child victims and witnesses.

2. *Preventing Defendants Accused of Child Physical or Sexual Abuse From Personally Cross-Examining the Child Victims Ensures Just Adjudication*

Where the alleged abuser, who is likely to be someone whom the child once trusted,[182] is cross-examining the child, the risk that the alleged abuser will manipulate and intimidate the child by his questioning is quite great.[183] Despite this risk, the *Fields* dissent argues that preventing such cross-examination prevents the defendant from "conduct[ing] cross-examination in the way he [sees] fit."[184] The United States Supreme Court, however, has made it very clear that although the Confrontation Clause does guarantee defendants "an *opportunity* for effective cross-examination," it does not guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[185]

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curing children's testimony will be upheld).

182. *See* BUREAU OF JUSTICE, *supra* note 63, at 10 (indicating that 90% of the time that a child is physically abused, the abuser is a parent, a family member, or an acquaintance).

183. *See* APA Brief at 15-16 (stating that child victims who know the defendant often have a sense of powerlessness which is worsened by "coercion and manipulation" during the course of the abuse). Thus, when the defendant confronts the child, those feelings of powerlessness may be rekindled and the child will still be afraid that the defendant will hurt her. *Id.* at 16. The fact that a child who has been coerced and manipulated during the course of the abuse still fears the abuser suggests that permitting the abuser to personally question the child would allow the abuser to continue manipulating and coercing the child.

184. *Fields*, 49 F.3d at 1045.

185. Delaware v. Fensterer, 474 U.S. 15, 20 (1985). *Fensterer* involved a murder trial in which the defendant was convicted for the murder of his fiancee. *Id.* at 16. The Delaware Supreme Court reversed the defendant's conviction on the ground that the inability of the prosecution's expert to recall the basis for his opinion, violated the defendant's Sixth Amendment right to confrontation of witnesses. *Id.* The United States Supreme Court, however, reversed the State Supreme Court's decision. *Id.* at 23. In so doing, the Court held that since the Delaware court imposed no restrictions on the extent or subject matter of the defense counsel's cross-examination, the defendant's Sixth Amendment right of confrontation was not violated. *Id.* at 19. Although a memory lapse may preclude one defense method of impeaching a witness, such a memory lapse does not deny the defendant his Confrontation Clause right. *Id.* In deciding whether the defendant's right to cross-examination was preserved, the Supreme Court noted that the trial court was able to observe the witness (1) under oath (2) during cross-examination (3) in front of the defendant. *Id.* at 20. Under such circumstances, the witness's faulty memory was immaterial. *Id.*

In *Fensterer*, the defense counsel cross-examined Special Agent Robillard of the Federal Bureau of Investigation. *Id.* at 16. During cross-examination,

Preventing defendants from personally cross-examining the child victims whom they are accused of abusing will ensure just adjudication. Such a limitation on the self-representation right protects child victims from any "subtle signals"[186] that their abusers may attempt to convey to them, without undermining the purposes behind the defendant's constitutional rights. For example, the abuser may use a certain word, tone of voice, gesture, or facial expression that he used during the course of the abuse, to remind the child of any threat he may have made.[187] This will likely revive the child's fear and belief that the threat is still very real, and may still be carried out.[188] By allowing a defendant to write out the questions to ask the child, the defendant is in control of the cross-examination, the only limitation being from whose mouth the questions may come.[189]

A defendant need not be incredibly sophisticated to use a word, tone of voice, gesture, or expression that only the victim herself would notice or understand. The defendant's mere emphasis on a certain syllable could be used to threaten the child.

A defendant who succeeds in employing such intimidation tactics is likely to elicit testimony which is untrue, or at least diluted, and quite favorable to his position, as he has now reminded

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Robillard's inability to recall the theory upon which his opinion was based became apparent to the jury. *Id.* at 20. In closing, the defense counsel argued that Robillard had relied upon a unsubstantiated theory. *Id.* The Confrontation Clause requires nothing more. *Id.*

186. *See* Houtz, *supra* note 1 (stating that allowing the attacker to question the child provides the defendant with "the opportunity to use some subtle signal—a word, a threat or what have you—to remind the child of what he said would happen if they [sic] testified").

187. *See generally id.* Inferentially, the defendant may use other subtle signals in addition to a word or a threat such as a tone of voice, gesture, or facial expression to remind the child of the consequences she may suffer as a result of her testimony.

188. *See* APA Brief at 20 (explaining that many victimized children can be easily silenced when the abuser tells them not to tell anyone). When the defendant confronts the child in court, the child may relive feelings of helplessness which accompanied the abuse. *Id.* at 16. The child may remain fearful of being abused, anew, by the defendant, despite assurances to the contrary. *Id.* Logic dictates that where a child's emotions are rekindled by mere confrontation with the abuser they will also be rekindled where a defendant personally cross-examines the child. The difference is that when the defendant is the one questioning her, he is, in a sense, in control of her. Thus it seems even more likely that a child's fear will be rekindled where a defendant has more mediums through which to convey fear. When a court permits a defendant to personally cross-examine a child victim, he not only has his presence as a medium through which to instill fear, but also his voice. By the subtle use of certain words or a certain tone, the defendant could remind the child of any threats he may have made to her. Houtz, *supra* note 1.

189. *See generally Fields*, 49 F.3d at 1034-35 (stating that the only limitation upon the defendant's self-representation right is that he may not personally question the witnesses).

the child of what will happen if she proceeds to tell what happened to her.[190] She will be less likely to tell the truth for fear that the defendant will follow through with the threat. The child will then feel that the court is not stopping the victimization, but rather allowing her to be victimized again.

When a defendant threatens the child victim by use of these subtle signals, the child is under the defendant's control again—just as she was when the abuse happened. Without the defendant personally cross-examining the child, the child will be more likely to tell the truth.[191] A child will sense the seriousness of the proceedings by the other elements of the trial. She will take an oath to tell the truth, she will speak with the judge, the jury, and in most cases, the defendant too will be watching. Yet she will be more able to give truthful testimony when she is under the control of the court, and not of the alleged abuser.

Because children are vulnerable by nature, the need to protect them while testifying is great. Where truthful testimony can be obtained without subjecting the child to personal cross-examination by the abuser, society's interest in protecting child victims outweighs the defendant's right to personally cross-examine the child. A single limitation upon an adult defendant's pro se right is minor compared to the trauma that will result to a child who must undergo questioning by the one who abused her. Further, "[t]he law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."[192]

V. PROPOSALS FOR EFFECTUATING DUAL OBJECTIVES

As the number of child abuse cases increase, so does society's

190. *See* Houtz, *supra* note 1, at B1 (stating that when the defendant questions the child, the child's ability to be truthful may be adversely affected). If the defendant's questioning in itself can detract from the truthfulness of a child's testimony, a defendant's use of such subtle signals in his questioning will be even more likely to detract from the truth of the child's testimony. *See also* APA Brief at 21 (explaining that where children confront the defendant while testifying the resulting testimony is less accurate and less complete). Where a child is not able to testify in front of the defendant, the State may fail to uncover testimony that could convict guilty defendants. *Id.* at 22. Although this *APA Brief* does not speak to the issue of pro se defendants, it follows that where a defendant is in the position of questioning a child, the same effect, if not a worse effect, is likely.

191. Houtz, *supra* note 1, at B1; *see also* APA Brief at 19 (explaining that the defendant's mere presence may affect a child's willingness or ability to give accurate testimony). This *APA Brief* does not discuss the issue of a pro se defendants right to personally cross-examine his alleged victims. However, the idea that the defendant's mere presence could cause a child to give inaccurate testimony strongly indicates that the same result would occur where a defendant personally cross-examines his alleged victim.

192. Mattox v. United States, 156 U.S. 237, 243 (1895).

awareness that child abuse victims need protections to prevent further emotional trauma while testifying. On the other hand, it is important to ensure that such protections for child abuse victims do not unnecessarily infringe upon alleged abusers' constitutional rights.

The following proposals are aimed at meeting these dual objectives. Section A proposes a model statutory provision. Section B proposes a model jury instruction. Section C proposes a re-evaluation of the United States Supreme Court decision in *McKaskle v. Wiggins*.[193]

A. A Model Statutory Provision

Both state and federal legislatures should enact statutes to the following effect: no pro se defendant in child physical or sexual abuse cases shall personally conduct the cross-examination of any child whom he has allegedly abused. The pro se defendant may, however, write out the questions he would like to ask the child; then the judge or another attorney can read them.

A statute to this effect will ensure that child victims are not re-victimized while testifying by eliminating any possibility that a defendant will use subtle signals to threaten the child. The child's testimony will be more accurate where she is not afraid of the consequences of her testimony.

Further, this statute safeguards a defendant's right to self-representation, as it permits him to maintain control over his defense by conducting all aspects other than personal cross-examination. The defendant may even specify the questions he wishes to ask the child. The statute would only prevent the defendant from asking the questions himself. A statute to this effect accomplishes the dual objectives of protecting defendants' constitutional rights and protecting child abuse victims from further traumatization.

B. A Model Jury Instruction

At the defendant's request, a court should employ a jury in-

193. 465 U.S. 168 (1984). *McKaskle* involved a defendant in a robbery trial who proceeded pro se, but the trial court appointed standby counsel to assist him. *Id.* at 170. The Court examined the role of standby counsel when the defendant objects to such assistance. *Id.* The Court squarely rejected the notion that the trial court must allow some sort of "hybrid representation." *Id.* at 183. The *McKaskle* Court concluded that:

> [a] defendant does not have a constitutional right to choreograph special appearances by counsel. Once a pro se defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel by silenced.

Id.

struction to the following effect:

> A defendant proceeding pro se in a child physical or sexual abuse case may not personally cross-examine the alleged victim. The fact that the defendant may not personally conduct such cross-examination does not imply that he is guilty. Rather, this is a standard measure taken to more easily procure accurate testimony from child abuse victims and to eliminate the risk of further victimization. The defendant is presumed to be innocent of the charge(s) against him, and the fact that the defendant was not permitted to personally cross-examine the child must not be considered by you in any way in arriving at your verdict.

A jury instruction to this effect will eliminate any question as to the defendant's pro se status, as well as ensure the jury's awareness that the defendant is conducting his own defense. Because the judge will instruct the jury as to the standard nature of the proceeding, the jury will not associate the defendant's lack of personal cross-examination with guilt. Since this instruction will be used only if the defendant so desires, he may use the instruction if he believes it will be beneficial, and he may discard it if he feels that it will only draw attention to his lack of personal cross-examination of the child.

Furthermore, where a defendant chooses to write out the questions for the judge or an attorney to read to the child, the judge shall inform the jury that the defendant, himself, determined the questions to ask the child. This will further clarify to the jury that the defendant is in control of his defense.

C. *A Re-Evaluation of the United States Supreme Court Decision in* McKaskle v. Wiggins

One obstacle in preventing a pro se defendant from personally cross-examining the child victim he has allegedly abused is the United States Supreme Court's decision in *McKaskle v. Wiggins*.[194] This decision emphasized the importance of the jury's perception of a defendant's pro se status.[195] This obstacle, however, can be overcome.

Where a defendant conducts every other aspect of his defense, a jury is very likely to recognize that the defendant is representing himself, especially if the judge issues a jury instruction similar to the one proposed.[196] Even if a jury does not perceive that a defendant is conducting his own defense, this will not prejudice a defendant. It is rare for defendants to choose self-representation, and

194. 465 U.S. 168 (1984).

195. *See id.* at 178 (stating that standby counsel's participation, must not corrupt the jury's perception of the defendant's pro se status without the defendant's consent).

196. *See supra* Part V, Section B (proposing a jury instruction alerting the jury to the defendant's pro se status).

even more rare for a judge or a jury to acquit those defendants.[197] Furthermore, the *McKaskle* Court did not consider that the witness may be a child abuse victim and the defendant the abuser. Thus, the defendant's right to have the jury perceive that he is conducting his own defense seems to be overrated, and the Supreme Court should consider re-evaluating the importance of that right.

CONCLUSION

Courts should not, under any circumstances, permit pro se defendants in child physical or sexual abuse cases to *personally* cross-examine the child victims whom they have allegedly abused. The high risk that such cross-examination will subject a victimized child to re-victimization and result in emotional trauma mandates this result.

Children are different from adults, and the American criminal justice system recognized this difference by creating special courts for juvenile offenders.[198] It is ironic that juvenile offenders are provided with special protections,[199] yet juvenile victims are subject to re-victimization. Child victims are forced to undergo the same cross-examination that often serves to confuse even the most sophisticated of adult witnesses.[200]

Preventing such cross-examination eliminates the risk that child abusers will subject their victims to further victimization, and ensures defendants' constitutional rights by allowing them to maintain control over their defense by conducting all other aspects of the trial, including specifying the questions to be asked of the child. Additionally, any erosion of the jury's perception that the defendant is conducting his own defense can be restored by issuing the proposed jury instruction to that effect.[201]

Government can protect child victims from further trauma by enacting statutes with provisions similar to the one proposed.[202] If emotional trauma will result where a child testifies in the mere presence of the defendant, there is no doubt that emotional trauma will result where the defendant himself questions the child.[203]

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197. Topping, *supra* note 16.

198. See *supra* notes 45-58 and accompanying text for a more detailed discussion of the juvenile justice system.

199. See *supra* notes 55-58 and accompanying text for a more detailed discussion of the special protections provided for juvenile offenders.

200. *See* PERRY & WRIGHTSMAN, *supra* note 76, at 172. (discussing the criminal justice system as one designed for adults).

201. *See supra* Part V, Section B (proposing a jury instruction alerting the jury to the defendant's pro se status).

202. *See supra* Part V, Section A (proposing a statutory provision preventing pro se defendants from personally cross-examining child physical and sexual abuse victims).

203. *See* Fields v. Murray, 49 F.3d 1024, 1036 (4th Cir. 1995) (stating that it

Preventing such cross-examination protects the psychological well-being of child victims without unnecessarily infringing upon a defendant's constitutional rights. Completely eliminating the possibility of a child being cross-examined by her abuser, eliminates not only humiliation and intimidation, but also any subtle signals that the abuser may use to threaten her.

Child physical and sexual abuse victims who must testify in court need special protections to ensure that they do not suffer further trauma. As our legal system was designed with the testimony of adult witnesses in mind,[204] it is time for courts and government to act upon the long acknowledged fact that children are different by extending the protection of children not only to offenders, but to child victims as well.

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is much easier to conclude that a child sexual abuse victim will suffer emotional trauma if her abuser personally questions her than if she is only required to testify in his presence).

204. PERRY & WRIGHTSMAN, *supra* note 76, at 172.