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ARIZONA SUPREME COURT

M.A., as Mother of J.D., and A.S., as Mother of Z.S., **Petitioners,** **vs.** **The Honorable José Padilla, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,** **Respondent Judge;** **State of Arizona, Chris A. Simcox, aka Christopher Allen Simcox,** **Real Parties in Interest.**	Arizona Supreme Court No. CV-15-0110-SA, CV-15-0112-SA (Consolidated) Court of Appeals, Division One No. 1 CA-SA 15-0087 Maricopa County Superior Court Case No. CR2013-428563-001 DT **PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS**

M.A., as Mother of minor victim J.D. ("Victim"), respectfully petitions this Court for review of a special action decision of the Arizona Court of Appeals, Division 1.

I. ISSUES PRESENTED FOR REVIEW

A. Issues decided by the Court of Appeals:

i. Does the Confrontation Clause of the Sixth Amendment guarantee to *pro se* criminal defendants a right to personally cross-examine their own victims?

ii. Does a *pro se* criminal defendant have the right to personally cross-examine his own child molestation victims, unless they submit to a *Maryland v. Craig* hearing? (May a trial court "exercise its discretion to restrict a self-represented defendant from personally cross-examining a child witness without violating a defendant's constitutional rights to confrontation and self-representation…only after considering evidence and making individualized findings that such a restriction is necessary to protect the witness from trauma"[1]?)

B. Additional issues presented, but not decided:

i. Does a child molestation victim's rights under the Victim's Bill of Rights—including her right to dignity, and to have the rules of criminal procedure protect those rights—and the important public policy of safeguarding a child sexual abuse victim's interests, require that her own molester not be allowed to personally cross-examine her, in every case? May the Court require a Victim to show any prejudice or likelihood of harm in order to invoke this, or any other right, under the Ariz.Const. art. II § 2.1, Victim's Bill of Rights?

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant Christopher Allen Simcox is charged with three counts of Sexual Conduct with a Minor, class 2 felonies; two counts of Child Molestation, class 2 felonies; and one count of Furnishing Harmful Items to Minors, a class 4 felony.[2] His victims are presently between seven and nine years old.[3] On February 12,

[1] Opinion of the Court of Appeals, ¶2.
[2] Appendix, Exhibit "E," APP075-76.
[3] *Id*., at pages APP076-77.

2015, Defendant filed a motion to represent himself, which was granted by the trial court.[4] Advisory counsel was appointed to assist Defendant with his defense.[5] On March 6th, 2015, the State filed a Motion for Victim Trial Accommodations, requesting that the trial court order advisory counsel to conduct the cross-examinations of the child victims in order to protect the victims' and Defendant's constitutional rights simultaneously.[6] The State filed letters from the victims' mothers describing the trauma caused by Defendant.[7] Respondent Judge denied the State's motion immediately after oral argument on April 2nd, 2015.[8] The State requested a stay of the trial court's order directly after Respondent Judge ruled from the bench.[9] The trial court denied the State's request for stay without argument and set jury selection to begin on Tuesday, April 7, 2015.[10] On April 3rd, the State filed a Petition for Special Action with the Court of Appeals, as well as a Request for Stay.[11] On April 6th, the Court of Appeals denied the State's Request for Stay and set a briefing schedule on the State's Petition.[12] An emergency special action requesting a stay was filed with this Court on April 8th, and granted on April 9th.[13] On May 8th, the Court of Appeals accepted jurisdiction over the special action, and denied relief.[14] On May 11th, the trial court held a status conference at

[4] Appendix, Exhibit "F" (APP090).
[5] *Id.*
[6] Appendix, Exhibit "E" (APP071).
[7] Appendix, Exhibit "B" (APP054).
[8] Appendix, Exhibit "A," APP045, lines 7 to 8.
[9] *Id.*, at APP045, lines 10 to 15.
[10] *Id.*, at APP045, lines 15 to 20.
[11] Appendix, Exhibit "K" (APP129).
[12] Appendix, Exhibit "J" (APP153).
[13] Appendix, Exhibit "N" (APP164).
[14] Opinion, attached, at ¶¶ 1, 2, 26.

which it discussed the Court of Appeals ruling, and on May 15th it entered a minute entry setting a *Maryland v. Craig* evidentiary hearing for May 27th, 2015 at 11:00 a.m., as well as trial for July 6th, 2015 at 10:30 a.m.[15] On May 27th, the trial court continued the evidentiary hearing, without resetting a new date for it (on the grounds that the State's expert witness was not available until July, and also in order to allow Defendant time to retain his own expert). The trial was also continued to July 27th.

III. REASONS FOR GRANTING THIS PETITION.

No Arizona decision controls the points of law in question, and important issues of law have been incorrectly decided.

The Court of Appeals has parted ways with centuries of constitutional jurisprudence by incorrectly ruling that the Confrontation Clause guarantees to *pro se* criminal defendants a right to personally cross-examine their own victims. At paragraph 19 of its Opinion, the lower court held that "because a self-represented defendant has the right to personally cross-examine the witnesses…restricting a defendant from doing so is a restriction on his right to confrontation—and a significant one at that." On this basis, the Court of Appeals ruled that victims of child molestation must be personally cross-examined by their own molesters, unless they submit to an invasive *Maryland v. Craig* hearing—something previously reserved only for child victims that testify from outside the courtroom, clearly implicating the defendant's face-to-face confrontation right.

If the Court of Appeals' ruling stands, then every criminal defendant will be

[15] Appendix, Exhibit "O" (APP167).

guaranteed a near-absolute right under the Confrontation Clause to personally cross-examine their own victims, including in cases of sexual assault, stalking, or harassment—and regardless of whether it would cause harassment or undue embarrassment to the victim. *See Coy v. Iowa*, 487 U.S. 1012 (1988). This would be subject only to the established exception in *Maryland v. Craig* for child molestation victims, who would still have to submit to an elaborate evidentiary hearing to prove that they would individually be "traumatized" by cross-examination. *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

No appellate court to review this issue has ever reached the same conclusion as the Court of Appeals in this case,[16] because the issue of whether a criminal defendant can personally cross-examine his witnesses is universally viewed as being an issue only of the defendant's right to self-representation, and not his confrontation right. *Coronado v. State*, 351 S.W.3d 315, 330 n.83 (Tex. Crim. App. 2011)("[A] pro se defendant's right to personally cross-examine a victim-witness has been curtailed by requiring stand-by co-counsel to ask the defendant's cross-examination questions…**[a]t issue was the constitutional right of self-representation, not the right of confrontation**")(emphasis added); *Depp v. Com.*, 278 S.W.3d 615, 619 (Ky. 2009), as modified (Mar. 10, 2009)("A defendant 'confronts' an alleged victim by his presence during questioning, and has no constitutional right to intimidate a victim witness by personally questioning him or

[16] *See Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995); *Partin v. Commonwealth*, 168 S.W. 3d 23 (KY 2005); *Depp v. Commonwealth*, 278 S.W. 3d 615 (2009); *State v. Estabrook*, 68 Wash. App. 309, 319 (1993); *State v. Taylor*, 562 A.2D 445, 454 (R.I. 1989); *Contra Commonwealth v. Conefrey*, 410 Mass 1 (1991).

her. His interest is sufficiently protected when the judge asks questions that he has provided.") Further, every appellate court in the country to review this issue, both state and federal, has either indicated or expressly held that it is permissible to restrict a defendant's Sixth Amendment right to self-representation by preventing him from personally cross-examining his own child victim, and to direct the defendant's attorney to ask the defendant's questions of the witness instead of him (or even to allow the Court to do so).[17]

Finally, allowing a criminal defendant to personally cross-examine his own child molestation victims violates the victim's right to dignity under the Arizona Constitution. Victims have the express constitutional right to have all rules governing criminal procedure protect their rights, including Rule 611(a)(3), Ariz.R.Evid., which provides that the court "should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to…protect witnesses from harassment or undue embarrassment." Because it is permissible under the United States Constitution to restrict a criminal defendant from personally cross-examining his own victim, this is not a situation where the state and federal constitutions are in irreconcilable conflict, and where the federal Constitution must prevail. Finally, victims may not be required to show any prejudice or likelihood of harm to invoke their rights under the Victim's Bill of

[17] See the authorities cited in footnote 16, above. Even the one "adverse" authority on the subject—*Com. v. Conefrey*, 410 Mass. 1, 13 (1991)—simply questioned whether the trial judge's "mere belief" that the child could be intimidated or harmed was sufficient to justify the restriction on cross-examination, absent a more formal proof; but the court still believed that a restriction on the defendant's right to self-representation could be constitutionally permissible: "[i]f it had been formally established…that the defendant would or could not conduct a proper examination without interfering with the rights of the complainant or distorting the truth-seeking function of the trial, the judge might have been correct in limiting the form of the defendant's cross-examination..."

Rights—which would be the essential purpose of conducting a *Maryland v. Craig* hearing. The Arizona Victim's Bill of Rights requires the result that in every case of child molestation, a self-represented defendant must not be allowed to personally cross-examine his own victims, as a matter of law.

A. The Confrontation Clause does not guarantee to criminal defendants a right to personally cross-examine their own victims

In ruling that the Confrontation Clause guarantees to *pro se* criminal defendants a right to personally cross-examine their own victims, the Court of Appeals incorrectly decided an important issue of law. (Opinion at ¶¶ 18, 19.) Nowhere is this supposed right to be found in any of the cases that have come to define what the Confrontation Clause means, and that have uniformly described the Confrontation Clause as requiring that a criminal defendant be given only the "opportunity" to cross-examine the witnesses against him. *See e.g. Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination," and "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety….[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.*, 475 U.S. at 679 (internal quotations omitted). In *Delaware v. Van Arsdall*, the United States Supreme Court found that the defendant's cross-examination was rendered "ineffective" for

Confrontation Clause purposes where the trial court prevented "*all* inquiry" into a particular line of cross-examination of an adverse witness. *Id.* In subsequent cases, the United States Supreme Court has found cross-examination to be "ineffective" for Confrontation Clause purposes only where there the trial court imposed a limitation on the actual scope of cross-examination. *See Delaware v. Fensterer*, 474 U.S. 15, 19 (1985); *see also Coy v. Iowa*, 487 U.S. at 1016 (citing *Delaware v. Fensterer*). The Supreme Court has never found that a limitation on the "mode" of cross-examination, such as is proposed here, rendered a cross-examination "ineffective" for Confrontation Clause purposes; since it is hard to imagine a case in which such a restriction could rise to the level of "effectively emasculat[ing] the right of cross-examination itself," as is required to state a true violation of the defendant's confrontation right. *Fensterer*, 474 U.S. at 19. Finally, Confrontation Clause errors are subject to a harmless-error analysis. *Id.*, 475 U.S. at 684.

"The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987)(citing *Delaware v. Fensterer*). The Defendant's right to a face-to-face confrontation with his victims is not at issue here. Therefore, the Court of Appeals's ruling that preventing a defendant from personally cross-examining his victims "is a restriction on his right to confrontation," must be based on some determination that it would violate his right to conduct an effective cross-examination, by "effectively emasculat[ing]" his right of cross-examination. *Fensterer*, 474 U.S. at 19. The Court of Appeals erred because merely requiring

Defendant's advisory counsel to ask Defendant's questions of an adverse witness does not render his cross-examination "ineffective" for Confrontation Clause purposes, or "effectively emasculate the right of cross-examination," as a matter of law.

i. Requiring a defendant's standby counsel to question an adverse witness does not render the cross-examination "ineffective" for purposes of the Confrontation Clause

In general, the notion that requiring a defendant's lawyer to question an adverse witness somehow violates his confrontation right, and results in an "ineffective" cross-examination, leads to an absurd result—because then every defendant who is represented by a lawyer suffers a violation of his confrontation right, when his lawyer questions an adverse witness instead of him. Clearly, having a lawyer ask questions on the defendant's behalf of adverse witnesses is considered to be an "effective" form of cross-examination, and does not in and of itself violate the Confrontation Clause.

The Court of Appeals's conclusion that the Defendant's Confrontation Clause rights would be violated in this case must therefore have something to do with the additional requirement that the defendant remain in control of the questions asked, and that his lawyer ask the questions that he (the defendant) wants to ask, as required by his exercise of the right to self-representation. *See McKaskle v. Wiggins,* 465 U.S. 168, 176 (1984). In practice, this probably means that the defendant must write down the questions for his lawyer to ask. And this, it seems, is the true object of the lower court's concern, as suggested

by the quotation of *State v. Folk*, 256 P.3d 735, 745 (Idaho 2011) at ¶ 19 of its Opinion: "Cross-examination is often a fluid process, and the person forming the questions must be able to concentrate on the answers and what further questions are necessary to elicit the desired information."[18] But this quotation, and in fact the entire *State v. Folk* decision, are of dubious value. In *Folk*, the defendant was directed to write down questions for his lawyer to ask his victims, much as Petitioners have suggested be done here. *Folk*, 256 P.3d at 745. However, the defendant complained that he could not concentrate while his witness was still answering his last question, because he said that he would already be writing down his next question. *Id*. There was no reason why the defendant in *Folk* could not simply wait to listen to each witness's answer before writing out his next question—since a good lawyer always listens to his witness's answer before asking his next question, or in this case writing down his next question to be asked. This was really just a result of the *pro se* defendant's ineptitude at cross-examination, and not of some inherent and insurmountable problem with this manner of questioning—much less a problem that would rise to the level of "effectively emasculat[ing] the right of cross-examination itself." *Fensterer*, 474 U.S. at 19. Further, even if the defendant were personally questioning the witness, he would still have to take notes during the witness's testimony—which would also takes away from his "concentration," but in an entirely permissible, necessary and normal way.

The *Folk* court also expressed a concern that having the defendant write

[18] At ¶19 of its Opinion.

down questions for his attorney "would extend the time it would take to cross-examine [the] Child." *Id.*, 256 P.3d at 745. "This is particularly significant with a young child who may have a short attention span." *Id.* While it may be true that having the defendant write down questions for his attorney can—and probably will—extend the time for cross-examination, this could hardly be said to result in a cross-examination that is so "ineffective" as to violate the defendant's rights under the Confrontation Clause. If the condition of having a possibly distracted or bored witness, or jury, were enough to state a Confrontation Clause violation, then the majority of criminal trials would be subject to reversal. A slight delay in questioning is no more prejudicial than a lawyer who is slow to ask questions of the witness – something that has certainly never been held to constitute a Confrontation Clause violation, much less any other genuine concern.

B. The Victim's Bill of Rights requires that a criminal defendant not be allowed to personally cross-examine his own child molestation victim, in every case—as a matter of law

The Victim's Bill of Rights provides that a victim has the right "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process," as well as the right to "[t]o have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights." Ariz. Const. art. II, § 2.1(A)(1),(11) "Arizona has been a national leader in providing rights to crime victims, and courts should conscientiously protect those rights provided by law,"

and "safeguarding the victim's interests is especially important in cases of child sexual abuse." *State ex rel. Montgomery v. Chavez ex rel. Cnty. of Maricopa*, 234 Ariz. 255, 258, 321 P.3d 420, 423 (2014); *State v. Krum*, 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995). Finally, "it would be difficult to imagine a scenario where [the judge's] discretion had been abused when the judge did not allow an alleged perpetrator to question an alleged victim of a sexual assault directly." *Depp*, 278 S.W. 3d at 615.

Every crime is in some sense an offense against the dignity of its victim, but only certain crimes—like harassment, stalking, sexual assault, or child molestation—*are* that offense against a victim's dignity, which the law serves specifically to discourage. The offender's motive in committing these crimes is not to cause physical harm to his victim or their property, and oftentimes he does not; but rather, it is to have intimacy and control over his victim, to shame them, to subvert their will, and to destroy their dignity and esteem in the eyes of others.

A skilled litigator knows that the purposes of an effective cross-examination are much the same. A good cross-examiner controls the witness's answers, and induces the witness to share their most intimate secrets with him, in an effort to show that the witness is not worthy of being trusted or believed, and to lower their esteem in the eyes of the jury.

The basic problem before the Court is that the process of cross-examination affords to a *pro se* child molester the opportunity, and in fact a compulsory process, of accomplishing the very thing that his crime is intended to discourage – obtaining personal intimacy with his child victim, having direct control over her,

weakening and debasing her.

In requiring a child sexual abuse victim to submit to their own molester's personal cross-examination, the victim's right to dignity under the Arizona Constitution is *per se* violated, as a matter of law.

In order for a victim to exercise her rights under the Victim's Bill of Rights, including the right to dignity, the victim may not be required to show that she would be prejudiced by the failure to grant that right—which is the essential purpose of a *Maryland v. Craig* hearing. This is because it is the conduct of the cross-examination itself that violates the victim's right to dignity, and not some other subsequent or collateral substantive harm. Ironically, the United States Supreme Court's analysis of the defendant's own right to self-representation provides a helpful framework for understanding when a right to "dignity" is violated; since the constitutional right to self-representation is likewise premised on the defendant's right "to affirm [his own] dignity." *McKaskle*, 465 U.S. at 177. "The right is either respected or denied; its deprivation cannot be harmless." *Id.*, 465 U.S. at 177 f. 8. So the ultimate question is whether public policy may allow for that violation of dignity—or must safeguard against it. The Victim's Rights Act has resolved the question in this instance by expressing an overriding public policy that favors the dignity of child molestation victims—a policy that the Sixth Amendment right to self-representation is easily able to accommodate.[19]

Finally, it is important for the Court to recognize that a *Maryland v. Craig* hearing or other showing of harm must not be required of the Victim, because in

[19] See fn. 16, supra.

the very process of having to make that showing, the Victim's rights are further violated. For example, Victim's medical professionals and family—or even the minor Victim herself—will have to publicly testify regarding the trauma that has been and will be caused by Defendant to her—all in the presence of Defendant and the general public, compounding the harm. Airing these kinds of private matters is one of the most egregious violations of a victim's right to dignity, and clearly runs contrary to the explicit legislative intent of assisting crime victims with "healing of their ordeals" that underlies enforcement of the Victim's Bill of Rights. *Champlin v. Sargeant*, 192 Ariz. 371, 375, 965 P.2d 763, 767 (1998).

IV. CONCLUSION

For all the reasons above, Petitioners ask the Court to grant this petition for review.

RESPECTFULLY SUBMITTED this 1st day of June, 2015.

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ARIZONA SUPREME COURT

M.A., as Mother of J.D., and A.S., as Mother of Z.S., **Petitioners,** **vs.** **The Honorable José Padilla, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,** **Respondent Judge;** **State of Arizona, Chris A. Simcox, aka Christopher Allen Simcox,** **Real Parties in Interest.**	Arizona Supreme Court No. CV-15-0110-SA, CV-15-0112-SA (Consolidated) Court of Appeals Division One No. 1 CA-SA 15-0087 Maricopa County Superior Court Case No. CR2013-428563-001 DT **APPENDIX TO PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS**

TABLE OF CONTENTS

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. CHRIS ALLEN SIMCOX, Defendant.	)	CR 2013-428563

PHOENIX, ARIZONA
April 2, 2015

BEFORE THE HONORABLE JOSE S. PADILLA

TRANSCRIPT OF PROCEEDINGS
(Motion for Accommodations)

Hilda E. Lopez, RPR
Certified Court Reporter #50449

(COPY)

A P P E A R A N C E S

Representing the State:
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- and -
Kelly Luther
Maricopa County Attorney

Representing the Defendant:
Chris Allen Simcox
Pro per

Acting as Advisory Counsel:
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- and -
Sheena Chawla
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P R O C E E D I N G S

THE BAILIFF: Number 11 on the Court's calendar.

THE COURT: CR 2013-428563-001, State of Arizona vs. Simcox, on for trial. Parties please announce.

MR. COHEN: Good morning, Your Honor. Yigael Cohen for the State. Also, Katie Staab. And especially appearing for the purposes of the victim accommodation motion is Kelly Luther.

MS. LUTHER: Good morning.

MR. SIMCOX: Chris Simcox appearing pro per in custody for 653 days.

MR. SHIPMAN: As advisory counsel Robert Shipman is present. Sheena Chawla is also on the record as advisory counsel. She is in another courtroom, but is on her way.

THE COURT: Currently we have pending the Motion for Accommodation. Before we get to that, are we going to be able to start trial on Monday?

MR. SIMCOX: Well, Your Honor, if I may, I'd like to submit a motion, motion 10.2 for notice of change for Judge in this hearing.

THE COURT: On for cause?

MR. SIMCOX: Well, 10.2.

THE COURT: You're out of time for the --

MR. SIMCOX: Based on -- it's interesting 'cause our last meeting we both figured that we were done because it was pretrial hearings. Neither one of us knew who was going to be assigned the trial Judge, am I correct? So it had to go to the master calendar. So there is no way either one of us knew we were going to be back here again. Certainly I was surprised, and under 42, rule 42, they make some concessions here that because of calendar systems do not regularly identify the trial Judge sufficiently far in advance of a trial, I know we've had hearings before and that seems to be the ruling, but in this case it would seem that our business was completed and now it's starting again.

THE COURT: That's the problem, Mr. Simcox, it seems, but it wasn't. I have been the assigned Judge or actually my predecessor was and I was assigned to this case in July. And so unless you have a full cause motion, that's untimely.

MR. SIMCOX: That's okay. I would move to submit motion 10.1 for change of Judge for cause.

THE COURT: And what is the cause? Actually, 10.1, that has to go to the presiding.

MR. SIMCOX: Yes.

THE COURT: All right. Corrine, can you call Judge Welty or his J.A.? Who is doing the motions for

cause? I can't be hearing motions for cause where I'm the cause.

MR. SIMCOX: Certainly not for a cause of delay. We expressed that. Can I also -- I'd like to file both of these motions today with the court.

THE COURT: It's got to be Judge Welty. Is he available? It's a motion for cause. We're checking to see if Judge Welty is available.

THE BAILIFF: It's a 10.1; correct?

THE COURT: Yes, for cause.

While we're waiting on that, will this case go to trial on Monday assuming the Judge can hear that motion, 'cause they can assign a new Judge right away?

MR. SIMCOX: Yes. As soon as we -- I am prepared to argue the prosecution's --

THE COURT: The accommodation.

MR. SIMCOX: -- accommodation. I am ready for that, yes.

THE COURT: And they can do that later this afternoon if they can find a Judge. If not, I'll hear the motion for accommodation.

MS. LUTHER: And Your Honor, I think the only issue with Monday would be if either side seeks a stay on the Court's order regarding the resolution of this issue, the victim --

THE COURT: That will be addressed to the judge that hears that, whether it's me or someone else.

THE BAILIFF: Do you wish to speak to Judge Welty or --

THE COURT: Send it back.

THE BAILIFF: I can't send it back.

(Judge Padilla is on the phone with Judge Welty.)

THE COURT: All right. Judge Welty will hear it at 2 o'clock in courtroom 5 A, and that's the motion for cause. All of the other motions are pending.

And Corrine, could you pick up from Mr. Simcox those motions?

THE BAILIFF: I can.

THE COURT: Has the State been provided copies?

MR. COHEN: No, Your Honor.

THE DEFENDANT: Yeah, I don't have the ability to make copies.

THE COURT: We will make copies and provide it to you. We are in recess until 2 o'clock, in courtroom 5 A in the South Court Tower before Judge Welty on 10.1 and then we'll take it from there.

MR. COHEN: Just for logistics purposes, Your Honor, if the motion is denied and you remain the judge, will we be addressing --

THE COURT: The accommodation motion.

MR. COHEN: Today?
THE COURT: Yes.
MS. LUTHER: And Your Honor, again, I will not be available this afternoon due to my jury selection in Judge Mullins' court at 1:30.
THE COURT: Will you have someone that will be available?
MR. COHEN: I can certainly handle it.
THE COURT: I was going to say, Mr. Cohen seems to be pretty competent.
MS. LUTHER: Your Honor, Ms. Godbehere has informed me that she would pick my jury for me so I could be here so we could keep this moving.
THE COURT: I will let you guys decide how to do that. 2 o'clock, Judge Welty's courtroom, 5 A on the 10.2 notice, and we will deal with the rest after that.
(Whereupon, a recess was taken.)
THE BAILIFF: All rise.
THE COURT: And please be seated. Before we proceed with the Motion For Accommodations, let's talk jury, let's talk scheduling. Looks like you're requesting 10 to 15 trial days.
MR. COHEN: Probably be not as many of those, Your Honor. And just letting the Court know again that if we go past April 30th, then, or May 1st we do have to go

dark for three weeks.

THE COURT: Well, if we start Monday, that would be 19 trial days on the 30th, so we should be done by then.

MR. COHEN: I would hope so.

THE COURT: The only conflict I have is I have an appointment April 13th in the morning, but we can do the afternoon. So any other dates besides after the 1st?

MR. COHEN: The only thing else is, Your Honor, it really depends on the ruling on this motion because then we might ask for a stay from this Court depending on how the Court rules, of course, and at least delay of a couple of days to see -- and again, not presuming how the Court will rule, but if we do get an adverse ruling that we do have time to go to the Court of Appeals and see if they will grant us a stay. So I think what I would request is, and we have come to an accord on jury questionnaire, that we hand out jury questionnaires, I think Wednesday would give us enough time to have heard from the Court of Appeals. So if we can hand out the jury questionnaires on Wednesday, that would be what the State's request would be.

THE COURT: The other thing that I hand out is time. I deal with time questionnaire and it's only on that, but if the two of you have agreed on a case-specific

questionnaire in terms of facts of the case and charges in the case, yeah, we can give that to the jury as well. Usually when I use questionnaires, once we've had those we release the jury so that the parties can go over those and then we can start deciding if -- if there is any people that are for sure. Surgeries I generally let them out. We've had a lot of college students coming through these days, so sometimes yes, sometimes no, so...

MR. COHEN: There's also another possibility that I may not be available next week, but my co-counsel will be available to go through the jury questionnaires with the assistance of somebody else from my bureau just for the purpose of jury selection, just to let the Court know if I am not available next week, but that's not an impediment to what we want to do.

THE COURT: And Mr. Simcox, any foreseeable days between April 6th and April 30th that you can think of?

MR. SIMCOX: No, not from me, Your Honor, and I agree with the jury questionnaire. We've come to an agreement on that.

MR. COHEN: Would the Court like a copy of the questionnaire?

THE COURT: Eventually, yeah, 'cause I want to do the time thing. We will be in session April 6th through the 30th, Monday through Thursday, 10:30 to 4:30 daily, so

we will send that out and see how many people we lose on the questionnaire. I am thinking about a hundred jurors. Is that enough?

MR. COHEN: That seems appropriate, Your Honor. I have had success in that regard.

THE COURT: So that we can get those ordered up, let me call the case. State of Arizona vs. Simcox on for trial. Parties please announce.

MR. COHEN: Yigael Cohen, Katie Staab and Kelly Luther specific purpose for the victim accommodation issue for the State.

MR. SIMCOX: Chris Simcox, Your Honor, representing himself pro per.

MR. SHIPMAN: Robert Shipman is and Sheena Chawla with the Office of Legal Defender both appearing as advisory counsel for Mr. Simcox.

THE COURT: Thank you, counsel, and the motion now pending is a motion filed by the State to accommodate the victim witnesses in reference specifically to where there is a self-represented defendant and the victim witnesses are now on the stand. Your request is broadly worded to basically allow advisory counsel to question those witnesses or make some other accommodation essentially. And call your first witness.

MS. LUTHER: Your Honor, may I approach the

podium?

THE COURT: Certainly. I take it we are not hearing evidence today?

MS. LUTHER: I think we are having oral argument, Your Honor.

THE COURT: Okay. If that's the case I will deny it right now.

MS. LUTHER: Okay.

THE COURT: Simply because the Craig case is instructive, and the question there is what quantum of evidence was necessary to show that the victims were going to be damaged. Now, they also acknowledge the fact that trial in and of itself is traumatic, and the cases seem to indicate that it has to be something beyond the mere idea of coming to trial and testifying. And if all we're doing is arguing the cases, I read all the cases, I read the motion, I read the response, I read the reply, and there is simply no showing that confirming the defendant/counsel in and of itself would cause further trauma. And so if that's where we're at now, if there is no additional evidence -- in fact, the Craig case points out that there was no expert testimony in that case indicating and substantiating the need for accommodation, and that seems to be where we're at now.

What we do have is the letter from mom saying the

kids are still currently traumatized.

MS. LUTHER: Your Honor, may I be heard on that?

THE COURT: Sure.

MS. LUTHER: At least to make some distinctions between Maryland vs. Craig and the situation that we have here, and, Your Honor, in this case, and I think the Fields case is instructive because the Fields case points out --

THE COURT: Is that the 4th Circuit?

MS. LUTHER: Yes. Yes. That points out in that situation, which is most analogous to our situation here, Your Honor, is that, again, this is not a situation, first of all, when we were asking for any accommodation for a child to be outside the presence of this courtroom. The defendant's right to confrontation is intact as the 4th Circuit stated, and we are not requesting any closed circuit television, anything like that. The only accommodation we are requesting is that either advisory counsel question the young children involving, again, we are talking, again, they are either almost nine or nine years old right now, and as the 4th Circuit and the case law points out, is that when there is an important public interest in protecting the rights of child victims and child witnesses, and that the defendant has never ever had a right to personally question these children. Does he

have the right to confrontation? Absolutely. But that does not include -- that does not mean he has the right for each witness to personally question the child, and, again, the Court the 4th Circuit outlined an opinion that we don't actually have to have advisory counsel question the victim; that it actually can be a multitude of options.

Your Honor, what is so important in this case is that, is that the 4th Circuit decision recognized -- they didn't require an evidentiary hearing. There was never a requirement. It was based on the fact that the defendant himself said he wanted to personally cross-examine the children, the child victims in this case. There was never an expert called. You can imagine the circular argument that would be presented if basically the children are terrified to be questioned by the defendant, the defendant is representing himself, and that we'd then have to have an evidentiary hearing where we call the children into the courtroom to be questioned by the defendant about how afraid are they of him. There is not a single case that requires that. Maryland vs. Craig does not deal with that issue at all. The 4th Circuit is the decision, is the case that deals with a pro per defendant --

THE COURT: Let me stop you there, counsel.

MS. LUTHER: Yes.

THE COURT: I am looking at Craig right now and I am thinking, if I am reading this correctly, would be either at Supreme Court, let see, at 497 U.S. at page 838, and it reads: The requisite necessary finding must be case specific. The trial court must hear evidence and determine whether the procedures used or the procedures used is necessary to protect the particular child, and that the child would be traumatized not by the courtroom generally, but by defendant's presence. That's the U.S. Supreme Court dealing with this very issue.

MS. LUTHER: Actually, Your Honor, it wasn't dealing with this exact issue. It was actually defendant --

THE COURT: The setup was different, but they are talking about when is it that we can quote, unquote, curtail, and I understand the 4th Circuit basically said even though they say right to confront, they don't really mean that, and I get that nuance, but in this case you still have to make a showing that we have to use something other than standard courtroom procedure; that is, call the witness, defense, whether it's self-represented or just defense counsel, question them. That's the general procedure. The fact that we have self-represented individuals doesn't change that. If it were an adult witness we wouldn't be changing that at all.

MS. LUTHER: Well, Your Honor, I hope if there was circumstances that required it that the Court would be open to that, but in this case --

THE COURT: Again, I would be if there were a particular showing that these children will be traumatized not so much, but, again, from coming into court, but from having this particular self-represented individual, for lack of a better term, the perpetrator, traumatize the kid, and we really don't have that. Some cases even speak of expert testimony. But again, the testimony or evidence we have here is a letter from mom saying that these kids are traumatized, not that they are going to be traumatized, but they have been traumatized, and there is no distinction between past trauma and current trauma.

MS. LUTHER: And Your Honor, I think it's important to note, again, a couple clarifications just for the record, Your Honor.

THE COURT: Yes.

MS. LUTHER: Maryland vs. Craig we were not dealing with a pro per defendant. We were dealing with a defendant who was represented by counsel and the very young children and they wanted a closed circuit television outside the courtroom. So again, a different situation. And again, while they talk of evidence, if you look to the 4th Circuit case which is dealing with a pro per

defendant, which is consistent with the Kentucky case and Rhode Island case and other jurisdictions have dealt with that, and made very clear that there is no onus on the victim to prove anything; that the defendant, it was the defendant's request to do that, and, and that was denied without any -- it was the fact that they were young children and he wanted not to have a buffer between these young children and him, and that is basically allowing him to have direct control and power over the young children in a courtroom. And here in Arizona -- I mean, those are jurisdictions that do not even have good victim rights. Here when we're talking important public policy reasons, which is what the 4th Circuit talks about, when there is an important policy reason to do it, and we are talking about the 4th Circuit, child victims, child witnesses. Again, we are talking in this case eight and nine-year olds, and with letters from each mother of those children about how, not they being traumatized by court, they are willing to come into this courtroom, Your Honor, and they are willing to sit on that stand. The only accommodation they want is not to have the defendant questioning them face-to-face and have control of them in the courtroom. And so we have provided this Court with the words from the parents. The only other thing we could do is bring these children into court and have the defendant question them

about, Do I intimidate you? And clearly that puts the need for the accommodation on its head. It would create an incredible chilling effect. So basically, we get the accommodation, the child would have to testify twice, and I don't think that's what the 4th Circuit or our constitution when it guarantees crime victims the right to be free from intimidation, harassment, the right to dignity and treated with fairness, I don't think anyone envisioned a situation where a defendant in a case like this could control his own victims in the courtroom.

And in fact, you may remember the Wassenaar case, which I didn't cite here, I actually remembered it today, it was Rickey Wassenaar was representing himself. You may recall in the prison when the prison guards were taken hostage at Lewis.

THE COURT: Yes. Actually, I read that.

MS. LUTHER: He was representing himself and he wanted as pro per defendant testify for himself, and the Court said, I think it was Granville who made the ruling on it originally, Mr. Wassenaar, you cannot get up on the stand and start talking. I am ordering your advisory counsel to question you. You can come up with a list of topics and you'll have to be -- and you'll have to use advisory counsel.

THE COURT: Wasn't that more in -- I'm thinking

of the Woody Allen movie Bananas, the awkwardness of testifying; that is, you can ask yourself the question, then answer it, wasn't that more along the lines of the mechanics of testifying simply 'cause generally we don't permit narrative testimony either, and the Court does have the authority to control how cross-examination occurs and their testimony, so it's not so much on the idea that the victims would have been traumatized by that or that the procedure used there violated the individual right to be self-represented. It's simply a procedural method of getting the testimony out that makes sense in a trial.

Here we're talking about several different rights. One, we are talking about Mr. Simcox's right to self-represent, and a lot of the cases that deal with that talk about the apparent perception that the jury will get when someone steps in in place of the self-represented individual, whether it be by advisory counsel. In fact, the case, it had to go up to the Supreme Court whether the Court could even appoint advisory counsel, and that's been resolved.

So that said, here what we're dealing with, and I don't -- I don't -- I don't have issue with the idea that in some circumstances that perhaps an accommodation could be made, but under the facts as they stand now, again, and with all due respect to the parents, they have a duty to

protect their children, but with all due respect, they are simply not qualified to make that assessment. And in other cases we hear it all the time from children, child psychologist, from people that deal with trauma that are familiar with children and the trauma they suffer and those individuals can tell us why they should not come into court and be faced with this. In this case, with all due respect, we have interested parties and we don't know if they are talking about past trauma or they are simply projecting what could be past trauma into the future that if further confronted, so --

MS. LUTHER: Your Honor --

THE COURT: Continue.

MS. LUTHER: I understand the points you're making; however, I will tell you the constitutional law and the case law that goes through the right to confrontation as well as the right to self-representation. There is no requirement for the victims to have to bear that burden. Once the defendant makes the choice to go pro per and then he wants to do that, the case is, say again and again, and I'd like to quote, and I do have it in my reply, but just for the record, the 4th Circuit addressing the defendant's request or demand to cross-examine the victims, and the 4th Circuit said, again, that the trial court refused to allow such personal

cross-examination offering instead that Mr. Fields could write up questions that he wished to ask the girls and have them read -- have them read by the lawyer. Quote, "Because the trial court was not required to allow personal cross-examination, Fields was denied nothing to which he was entitled." And that's the 4th Circuit, you know, the United States doing a constitutional analysis.

The defendant was not denied anything. He was not entitled to it. He was not entitled to cross-examine his own victims personally. Again, as Wassenaar points out, courts have ordered advisory counsel to do questioning, and this Court makes a very good point, and at least in my experience you see advisory counsel being used for all sorts of things, but what is instructive to me, especially with the victims Bills of Rights, is what it comes down to the well-being of children who with victim rights in our constitution, it was so important to protect crime victims that we put it in our constitution, and they are guaranteed the right to be free from intimidation, from harassment, the right to dignity and to respect and fairness, and we're able to have advisory counsel direct a defendant and order that and make that happen whether the defendant wants it or not, but when we have a situation where you have a nine-year-old little girl who has to face her accuser who also happens to be

her dad in court in this situation, that basically we all have to stand by and allow him to do it, and I don't think the Arizona constitution, I don't think the United States constitution requires you to do that or gives that right to the defendant. He doesn't have that right.

THE COURT: Now, and I am trying to think whether it was a dissent in the Craig case that talks about that, but one of the points that's made, and, again, this is not a pure question of victim rights. It has to do with self-representation, the right to cross-examine both under the federal and state constitutions. But again, going back to Faretta, I went that far back, they are talking about whether, and the case that deals with advisory counsel, they talk about the perception the jurors will get when someone jumps in. And you can't explain that, well, counsel got sick and that's why this person is here. How do we get past that perception that perhaps the Court is somehow protecting the victim because now we accommodated you? Mr. Simcox conducts the case and the trial, and then all of a sudden there's a new person, whether it be either advisory counsel, how do you keep that perception from reaching the jury and say, well, it really doesn't impose on his right to be self-represented and it really doesn't prejudice his case and it really doesn't show that the Court is leaning towards the victims

because they are made special accommodations?

MS. LUTHER: Actually, Your Honor, I was flipping through my notes because I thought I had a case on that. See if I can find it here. I believe that the other jurisdictions that have addressed that, I think may have been the Kentucky case. My apologies, Your Honor, trying to remember --

THE COURT: You did cite to the Kentucky case.

MS. LUTHER: -- which case it was.

THE COURT: I think you did cite to that.

MS. LUTHER: Basically they said that by ensuring and reminding the jury that -- actually, I may have it right here. I think it may have actually been in the Wassenaar case where they were talking about that it was incumbent upon the trial court to remind the jury that the defendant continues to represent himself; that he has the assistance of advisory counsel to aid in questioning witnesses as well as posing questions to the defendant should he decide to testify. So I think the idea was, again, the fact of ensuring that the jury is reminded that Mr. Simcox is indeed representing himself, however, he also has assistance of advisory counsel to assist him with trial and to help him question certain witnesses, and maybe, and again, who knows, but obviously there is case law to permit this Court to order advisory counsel to

question Mr. Simcox should he take the stand. There is -- obviously that's a Court of Appeals decision in Arizona and it's been upheld. I believe it went all the way up on habeas and was upheld. So this is from the perspective of how to handle the jury. The good news is that at least in Arizona we have guidance there. These facts are unique for a case of first impression, but in the Wassenaar case we have dealt with the logistics of that, and that is a concern, Your Honor, but I think that's something through jury instructions and the fact that we have dealt with advisory counsel for a long time.

THE COURT: Addressing the latter concern, but that's, that's not much different than when you have deposition testimony, whether it's from a prior trial or pure deposition where an individual, often times a paralegal or secretary or in some cases even an officer, where the question is asked by either counsel or self-represented individual, the person reads from the transcript what the answer was, so that procedure is not foreign to Arizona courts where they, again, because of the logistics of it, makes sense to do something other than simply let a defendant testify in the narrative.

MS. LUTHER: Uh-huh.

THE COURT: All right. Anything else, counsel?

MS. LUTHER: No, Your Honor, thank you.

THE COURT: Thank you. And Mr. Simcox, response?

MR. SIMCOX: Yes, Your Honor. Thank you. I made it very clear all along in this process that I wanted to go to trial, and my frustration has been given to you on the numerous occasions for the delays. We are here now.

THE COURT: I get paid to take it.

MR. SIMCOX: So, and I just have to point out that by me self-representing myself, representing yourself in this trial, I'm at a great disadvantage and I am aware of that, so, but I feel that this is a case of being found guilty before, you know, being found innocent.

THE COURT: Why don't we address the merits of the motion as opposed to the general trial.

MR. SIMCOX: The merits are, again, that we have the case law, we have Cuen, which seems to set a precedent here in Arizona.

THE COURT: Actually, it's a memorandum decision. Has no precedent.

MR. SIMCOX: Okay. And --

THE COURT: It's persuasive maybe, but that's about it.

MR. SIMCOX: All right.

THE COURT: And it's very brief and it really doesn't tell us a whole lot.

MR. SIMCOX: I just have to say that, again,

about, it's about my respect for the courtroom and the respect for the process. As I stated in my argument that I understand that this is a sensitive issue and in no way would I wait 654 days to get to this point to do something untoward and inappropriate in cross-examining the alleged victims in this case. I have 12 people sitting over there that are going to determine my life, the rest of my life in this case, and there is no doubt that the testimony of the children witnesses will be the sum and substance of this entire case. So I'm not going to sit here and make a fool of myself in front of a jury by, as opposing counsel has claimed, that I will somehow control or manipulate the children on the stand. It couldn't be the furthest thing from my mind about how I am going to approach the situation.

I have approached it with common sense and I have a respect for the courtroom. I have a respect for the propriety and the procedures, and I think during my time in this courtroom I've exhibited that, and I -- you won't see anything else from me during that process. The Court does have, as the case law has said, has the ability to manage the case in this situation, and I would fully expect still being a parent, even though I'm accused of things that I am innocent of, I wouldn't want to see any child put on that stand and be harassed in that case, and

I have no intention of doing that in any way and I have respect for that process.

There will be no deliberate disruptions or anything that did occur in some of the other cases that were mentioned, and so I just -- that's basically my argument. I made my argument. But the children are the percipient witness in this case and I would do nothing to harm my chances with the jury by being abusive or harassing to these witnesses in any way.

THE COURT: Okay. Thank you, sir. Response briefly.

MS. LUTHER: Your Honor, I think I got pretty much covered everything, but again, there is nothing in the case law. Again, the case law that truly matters, which is the Supreme Court, and really we are looking at a constitutional analysis here, there is nothing indicating that the victim has to wait for the defendant to behave poorly or inappropriately to basically allow that to happen, and that nothing in any of the cases that I'm aware of that are published decision upheld all the way up to the Supreme Court have ever said, oh, you should have waited until the child was harassed and was in tears and shut down before you can protect them. That's not how the constitution in Arizona works as far as victims rights. They have the constitutional right to be free from

harassment, intimidation, to be treated with dignity. And to have a child have to sit here and have her perpetrator control her and talk to her directly with no buffer is traumatic enough for a young child to be in a courtroom with a defendant sitting just at counsel table and being questioned by a defense attorney. Often we have to ask for accommodations for those children, and the case law is extensive of permitting that sort of thing. And this goes above and beyond where you actually have the defendant control that child. The child has to respond to her perpetrator. That is unheard of, Your Honor, and we can't expect children, or any victim to come in and to be, and to sit idly by where the person who was charged with violating them gets to control them in the courtroom.

And again, there is no right of the defendant that will be violated. The rest of his rights to self-representation and to confront are all intact, and that's the analysis the courts look at overall. Would Mr. Simcox's rights have been protected overall in all the other areas? And the fact that he's able to question any other witnesses, it will be intact. And again, Your Honor, I don't believe there would be any constitutional violation should the accommodation be granted. Thank you.

THE COURT: While I agree at some point in time we may have to address it on the status of this record, I

can't find such case would warrant curtailing Mr. Simcox's ability to cross-examine the victims. Again, we can infer that children may be traumatized by coming to court, simply being in the building, but we cannot infer that that's -- that the children are going to be further traumatized by having to be cross-examined by the parent or the perpetrator. And so on the state of this record, the Court denies the motion.

Mr. Cohen, do you have a motion?

MR. COHEN: State would request that this matter be stayed pending filing a special action with the Court of Appeals.

THE COURT: And given the status of the case and how long it has been, that request is denied. We will start Monday.

MR. COHEN: State would then ask for at least some accommodation that we start on Wednesday so that we can at least maybe hear from the Court of Appeals before then.

THE COURT: Tuesday, 9 o'clock.

MS. LUTHER: Just for the record, we too have a constitutional duty to confer with the victims about their appellate rights and again ask for that time to be able to do that.

THE COURT: Certainly.

MR. COHEN: Off -- on the record, but in terms of scheduling, what does the Court propose now in terms of --

THE COURT: What I would like to do is send out the questionnaires. That way no matter what they do at the Court of Appeals we will at least have that out of the way. We will ask for a hundred jurors. Once they finish the questionnaires, send them home and see what the Court of Appeals does on Tuesday.

MR. COHEN: And the questionnaire, are you talking about the time screen questionnaire or what about the State's, or the joint questionnaire?

THE COURT: Both. Both.

MR. COHEN: So the State will have delivered to the Court at 9 o'clock one hundred questionnaires.

THE COURT: Preferably Monday.

MR. COHEN: That's fine too, Your Honor.

THE COURT: Does that work for you, Mr. Simcox?

MR. SIMCOX: Yes, Your Honor.

THE COURT: That's the case specific questionnaire. Ours will be prepared just to see if anybody has -- you would be surprised how many people have surgery in a two-week period out of a hundred people. Mine will be only on time, and then we will give them the stipulated questionnaire on the specifics of the case.

MR. COHEN: And can we look to start testimony no

earlier than Monday the 13th?

THE COURT: If we, well, if the Court of Appeals stays it on Tuesday, I can't -- it's up to them. I tried this before. If we don't hear from them on Tuesday, we will go through jury selection, and that may take a day or two. So again, I can't believe that we're going to start witness testimony any earlier than Thursday, probably Monday, whatever that may be.

MR. COHEN: Just for the record, I potentially will be going to an out-of-state conference next week. I do have people that will be able to do the jury selection, but I will be here for openings and everything so that's why at least the accommodation to start everything on Monday should we have a jury picked by the end of next week.

THE COURT: Why don't we take that, as they say, play it by ear on that one. I understand, however, and with all due respect, Mr. Cohen, not two minutes or 20 minutes ago we talked about the scheduling and I asked if there was anything other than April 13th, which is when I'm going to be gone, you indicated if we were done by the 30th that would be fine. So the short answer is if we're ready to start testimony on Thursday, we will start testimony on Thursday. If we can't start it on Thursday, we'll start Monday, but we will start this case unless the

Court of Appeals tells me otherwise. All right.

Anything else, counsel?

MR. SIMCOX: Yes, Your Honor. I have a few things. First I'd like to submit this for the record my final list of witnesses that I'd like to submit.

THE COURT: When you say "final," have they been previously disclosed?

MR. SIMCOX: I gave Mr. Cohen a copy earlier today.

THE COURT: When I mean previously, before this week?

MR. COHEN: There are some undisclosed witnesses on that list.

THE COURT: Any witness that has been undisclosed prior to today will not be allowed to come in unless you can make a showing that they were unknown and through due diligence could not have been discovered prior to today. So somewhere in the process we will discuss who was properly disclosed, who was not.

MR. SIMCOX: Okay. Thank you.

THE COURT: Anything else?

MR. SIMCOX: Yes. There was an asking for how to figure out how to do this, an accommodation, if you want to call it that, I'd like to present a slide show during the hearing of photographs, and I'm not sure.

THE COURT: First question, have those photographs been disclosed?

MR. COHEN: No, Your Honor.

THE COURT: They are not coming in.

MR. SIMCOX: Some of them have, yes, actually.

THE COURT: If they have been disclosed. And again, I guess my question would be in slide shows at the beginning of trial for opening statements they become very tricky because unless they have been either stipulated to prior to trial and both sides have agreed that at some point in trial these are going to come in, you have the issue of what if they don't come in during trial, now the jury has seen them and you're kind of stuck with them. You can't un-ring that bell. So for openings it's very difficult. In closings it's not that difficult because either they came in and you put them into some kind of order or they didn't come in and they don't get into the slide show. So unless there is a stipulation to the slide show before it's shown to the jury. And if it's before openings it's going to be very difficult to figure out what's going to get in because we're trying to project what might happen. If you can get a stipulation, I am not opposed to it. I know that we're a technologic society, but, again, it has to comply with the rules.

So first of all, if they haven't been disclosed,

the photographs, they don't come in. If they have been disclosed, then you have to figure out either if they are going to be stipulated to come in. If they are going to be stipulated to come in during trial and you're going to use those in your slide show presentation at the beginning of trial, then we'll have to discuss about the content, and the State will have to see it before the jury actually sees it. So if they have an objection to it, they can do so.

MR. SIMCOX: Okay. All right. Well, so I have to make a stipulation that I want them to be in?

THE COURT: Yes.

MR. SIMCOX: I definitely do.

THE COURT: The stipulation is that both agree that they are going to come in. All right. If you can get that and identify the photographs with particularity so we know exactly which photographs we're talking about, then yes, that can come in, but you have to at some point in time show the State what it is you're going to present by way of opening that would include the stipulated admission of these photographs. You just can't spring it on them at opening 'cause if you want to delay that would cause a mistrial and that certainly will delay things.

So again, you just can't put stuff in front of the jury, all right, especially in opening and closing,

it's a little bit, not easier, but it's a little less complex because you know what's come in, you know which photographs are in evidence, and all you're doing is arranging them in a certain way in the presentation.

MR. SIMCOX: Yes, the photographs have been presented so it's just what order they would be shown in.

THE COURT: Closing, yes, but for opening it's a different story.

MR. SIMCOX: Okay.

THE COURT: Anything else, sir?

MR. SIMCOX: I guess my only other question is how is the Court going to handle my testimony, I mean, when it's time for me to take the stand?

THE COURT: Put your questions and advisory counsel can ask them, or I can ask them. There is an impact in one of the accommodation cases the judge was handed the questions and the judge asked the questions of the victim. We're not going to do the Woody Allen thing.

MR. SIMCOX: I am unfamiliar.

THE COURT: You never saw the movie? Basically he is self-represented and he is standing where you are, asked the question, runs over to the witness stand, takes the witness stand, answers the question, runs back. We are not going to do that.

MR. SIMCOX: The choices are taking the stand,

speaking extemporaneously, or having questions?

THE COURT: I suspect you'll draw a quick objection in narrative form. Unless there is a stipulation to that, it's not going to happen either.

MR. COHEN: It not going to happen.

MR. SIMCOX: Okay. I believe that's all the questions I have.

THE COURT: Anything else?

MR. COHEN: No.

THE COURT: We're at recess.

C E R T I F I C A T E

I, HILDA E. LOPEZ, do hereby certify that the foregoing 35 pages constitute a full, true and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

WITNESS my hand this 3rd day of April 2015.

/S/

HILDA E. LOPEZ, RPR
AZ Court Reporter #50449

APPENDIX B

Michael K Jeanes, Clerk of Court
*** Electronically Filed ***
M. Martin, Deputy
3/11/2015 7:41:05 AM
Filing ID 6457658

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. CHRIS A. SIMCOX, aka CHRISTOPHER ALLEN SIMCOX, Defendant.	CR2013-428563-001 DT **STATE'S REQUEST FOR CERTAIN VICTIM TRIAL ACCOMODATIONS BASED ON THE PRO PER STATUS OF DEFENDANT – SUPPLEMENT: VICTIM LETTER ON BEHALF OF VICTIM J.D.** (Assigned to the Honorable Jose Padilla Div.CRJ11)

The State of Arizona, by and through undersigned counsel, hereby supplement its request of this Court to grant certain trial accommodations for the child victims – ages 7 and 8 respectively and 404 (c) victim, also age 7, who are victims of the pro per Defendant in CR 2013-428563-001. Attached please find an additional letter from the parent of J.D.

RESPECTFULLY SUBMITTED MARCH 11, 2015

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/
/s/ Yigael M. Cohen
Deputy County Attorney

Copy mailed\delivered
March 11, 2015,
to:

The Honorable Jose Padilla CRJ11
Judge of the Superior Court

Chris Simcox
Booking #982577
Pro Per Defendant

Robert Shipman
Sheena Chawla
Advisory Counsel for Defendant

BY: /s/
/s/ Yigael M. Cohen
Deputy County Attorney

ATTACHMENT A

I am writing this letter to tell you about my daughter, [redacted]. [redacted] is a very intelligent, creative, curious, and loving child. She loves school and craves any opportunity to learn something new. She looks for the good in all and is very trusting. She believes in God and enjoys going to church with her father. She is your average child, who loves to laugh, draw, dance, and sing. [redacted] didn't differ from many children her age.

[redacted] still has all of these qualities; however, she has changed in many ways, which aren't in the ways that a parent hopes for or looks forward to. While most children change, most to be expected due to normal changes in growth, my daughters changes have been due to a very unfortunate event that was not her fault, and one that is not to be expected or anticipated throughout a child's life.

Before this event, [redacted] fell asleep with no problems and slept through the night, she was very trusting, any complaints of feeling sick were far and few between and were due to true illnesses, and she was only emotional/angry when the time was "right" which was determined by your typical 7-year-old child. She now has nightmares and does not fall asleep without complaining of her stomach hurting. She also complains of being "sick" when I have to leave her. She does not sleep through the night and most nights she finds her way into my room, even though she has her own room and bed. She worries about the doors being locked and asks over and over if they have been secured. [redacted] is extremely emotional, with extreme sensitivity and crying occurring frequently at home and at school; now, she is extremely angry at home and at school. She screams at others and is now hitting or attempting to hit. [redacted] never raised her hand to me in anger; however, this is a common occurrence when she is upset. She no longer thinks before she acts; she is having behavior problems at school and home.

[redacted] has anxiety and panic attacks with differing symptoms all the time. This makes it difficult as I have trouble understanding how to help her. A trip to Disneyland for Thanksgiving last year was plagued with panic attacks to where [redacted] felt she couldn't breathe. Standing in line for rides that were to be fun, became terrifying for her. She was unable to take the elevator or be in a car with the window rolled up. The only way for us to make the 5 hour drive home was to get her a portable fan so that she could feel air on her face.

I realize that nightmares and separation anxiety may be typical of a young child's behavior and that many children will exhibit periods of emotional sensitivity and anger; these behaviors were never existent in [redacted] prior to this happening to her.

Her father and I continually do our best to help [redacted] through all of this by providing her with comfort, consistency, and other avenues that encourage her to work through this in a positive manner to where her daily life isn't effected. Allowing Mr. Simcox the ability to address my daughter, I fear, will only set [redacted] back in her healing and quite possibly exacerbate her symptoms and anxiety/panic attacks.

Over the past, close to 2 years, [redacted] has made progress, and while it is not as much as we would like, its progress and it is our hope that she will continue to receive the support that she needs to become the strong child that persevered through one of the most difficult events that someone could endure.

I understand that within the justice system, all accused have specific rights that officials do their best to uphold so to be fair and maintain the integrity of the Constitution, but it is my hope that my daughters rights are also taken into consideration and is given the opportunity to progress and not regress due to the ensuring of one individuals rights over another.

Thank you,

Michelle A. [redacted]

I am writing this letter to tell you about my daughter, [redacted]. [redacted] is a very intelligent, creative, curious, and loving child. She loves school and craves any opportunity to learn something new. She looks for the good in all and is very trusting. She believes in God and enjoys going to church with her father. She is your average child, who loves to laugh, draw, dance, and sing. [redacted] didn't differ from many children her age.

[redacted] still has all of these qualities; however, she has changed in many ways, which aren't in the ways that a parent hopes for or looks forward to. While most children change, most to be expected due to normal changes in growth, my daughters changes have been due to a very unfortunate event that was not her fault, and one that is not to be expected or anticipated throughout a child's life.

Before this event, [redacted] fell asleep with no problems and slept through the night, she was very trusting, any complaints of feeling sick were far and few between and were due to true illnesses, and she was only emotional/angry when the time was "right" which was determined by your typical 7-year-old child. She now has nightmares and does not fall asleep without complaining of her stomach hurting. She also complains of being "sick" when I have to leave her. She does not sleep through the night and most nights she finds her way into my room, even though she has her own room and bed. She worries about the doors being locked and asks over and over if they have been secured. [redacted] is extremely emotional, with extreme sensitivity and crying occurring frequently at home and at school; now, she is extremely angry at home and at school. She screams at others and is now hitting or attempting to hit. [redacted] never raised her hand to me in anger; however, this is a common occurrence when she is upset. She no longer thinks before she acts; she is having behavior problems at school and home.

[redacted] has anxiety and panic attacks with differing symptoms all the time. This makes it difficult as I have trouble understanding how to help her. A trip to Disneyland for Thanksgiving last year was plagued with panic attacks to where [redacted] felt she couldn't breathe. Standing in line for rides that were to be fun, became terrifying for her. She was unable to take the elevator or be in a car with the window rolled up. The only way for us to make the 5 hour drive home was to get her a portable fan so that she could feel air on her face.

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Thank you,

Michelle A. [redacted]

REDACTED COPY

From:
To:
Subject:
Date:

[redacted]

-----Original Message-----
From: alena simcox [redacted]
Sent: Thursday, March 05, 2015 05:31 PM US Mountain Standard Time
To: Stewart Rhonda
Subject: Letter for Court in the Simcox Matter March 5t 2015

To whom it may concern:

It has come to my attention that my Daughter's, [redacted] biological father (Christopher Simcox)
has invoked his 6th Amendment Right to cross examine his own daughters in a sexual molestation case against him.

I am lost for words and I can't even tell you how much anxiety and fear this invokes that my two beautiful girls who have already suffered under the cruelty and intimidation and abuse of their father, now as small children have to re-suffer this abuse in a public trial. This is outrageous and I feel it is a misuse of the 6th Amendment of the Constitution of the United States of America and it needs to be changed. I am sure when our forefathers, who were gentlemen, wrote this they never foresaw this being used in such a manner that would torture poor innocent children. How can a child and an adult (especially one accused of such horrific acts) be on the same level?

Therefore, I object to what Mr Simcox plans to do, as he most likely knew any mother would object under these circumstances. I think he was hoping they would withdraw as witnesses, (his ace in the hole) but that is not the case. They have

something important to do, so they will accomplish it, but it should be as humane and gentle as possible.

I must also tell you that my daughters are very upset and when they heard their father would be cross examining them, [redacted] said to "FIRE DADDY"! She also said he is a bad, bad, bad daddy and a terrible father and was planning to do more harm to her to hurt her feelings again. So, I as their mother ask the court to reach down into their heart and hear the pleadings of children who have been so abused and stop this re-abuse, this intimidation. Give some protection to my children as I believe wholeheartedly that this is completely the wrong decision for my daughters and will severely hinder the road to their psychological recovery from this event.

Thank you for hearing me and taking this into consideration.

Sincerely,

Signature of Alena M. Simcox

March 4, 2015

Your Honor:

This letter comes to you with a concerned heart and a sincere plea for your consideration. My daughter, [redacted], who is now 7 years old, was a "witness" to a crime perpetrated two years ago in 2013. According to the way Arizona law is written, no "crime" was committed against her. Apparently, in Arizona, an adult can request a minor child show him her "privates" without breaking the law!

This may uphold in a court of law. I am not arguing or suggesting that [redacted]s legal status be changed. However, I am requesting that the court appreciate that regardless of her legal label, she was indeed a victim of a crime. As such, it is only just that she be granted the same assurances and protection as the victims in this case. I am requesting that Mr. Simcox be ordered NOT to cross examine his own witnesses and that any such communication be mediated via legal counsel for both the defendant and the witness.

Ellie once trusted Mr. Simcox. As did I. However, there has been a brutal violation of that trust. As [redacted] matures, she is understanding the depths of the wrongdoings committed against her. I have always raised her to "just be who she is." Who she is is a happy, trusting, vibrant young girl. She should not have to be punished, more than once, by any adult who used the tenure of age and trust against her!

With gratitude,

X

Nicole Evans
Parent of the Minor child: [redacted]

Nicole Evans

APPENDIX C

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

Office of the Legal Defender
Robert Shipman, Bar No. 022693
Sheena Chawla, Bar No. 025966
222 North Central Avenue, Suite 8100
Phoenix, Arizona 85004
Telephone (602) 506-8800
Facsimile (602) 506-8862
minute@old.maricopa.gov
Attorneys for Defendant

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

STATE OF ARIZONA, Plaintiff, vs. CHRISTOPHER SIMCOX, Defendant.	CR 2013-428563-001DT **DEFENDANT'S REQUEST TO REPRESENT HIMSELF FOR ALL FURTHER PROCEEDINGS** (Expedited Hearing Requested) (Assigned to Hon. Jose Padilla)

Pursuant to *Faretta v. California*, 422 U.S. 806 (1975), the defendant, Christopher Allen Simcox, after conferring with his assigned attorneys in this matter, invokes his right to represent himself for all further proceedings, including the jury trial set in this matter for March 2, 2015 before the Master Calendar Assignment Judge.

Mr. Simcox asks this Court to set a hearing as soon as possible to discuss some of the potential issues that will arise during self-representation.

DATED this 12th day of February, 2015.

MARTY LIEBERMAN
OFFICE OF THE LEGAL DEFENDER

By _/s/ Robert Shipman

ORIGINAL filed electronically
this 12th day of February, 2015 with:

Clerk of the Superior Court
201 West Jefferson
Phoenix, Arizona 85003

COPIES sent via e-filing system and
mail to:

Honorable Jose Padilla
Judge of the Superior Court
201 West Jefferson
Phoenix, AZ 85003

Yigael Cohen
Deputy County Attorney
Maricopa County Attorney's Office
301 West Jefferson Street
Phoenix, Arizona 85003

/s/ Robert Shipman

OFFICE OF THE LEGAL DEFENDER
222 North Central Avenue, Suite 910
PHOENIX, AZ 85004-2237

APPENDIX D

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
02/27/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-428563-001 DT 02/23/2015

HONORABLE JOSE S. PADILLA

CLERK OF THE COURT
A. Marquez
Deputy

STATE OF ARIZONA

YIGAEL COHEN

v.

CHRIS ALLEN SIMCOX (001)

ROBERT S SHIPMAN
SHEENA CHAWLA

JUDGE WELTY

TRIAL CONTINUANCE PAST ORIGINAL LAST DAY

9:29 a.m. This is the time set for Final Trial Management Conference.

State's Attorney:	Yigael Cohen
Defendant's Attorney:	Robert Shipman and Sheena Chawla
Defendant:	Present
Court Reporter:	Hilda Lopez

Having considered the Motion to Continue by counsel for the State, the Court finds,

1. The nonmoving party or parties: Do Not Object.

2. The Arraignment date was: No Information Provided.

3. The Original last day was: No Information Provided.

4. The existing date of the trial when the motion was filed: No Information Provided.

5. The number of continuances granted before this continuance was: No Information Provided.

6. The motion was: In writing.

7. The motion was filed at least 5 days before trial: Yes

8. If filed untimely, the motion sets forth with specificity the reasons for its untimeliness: Does Not Apply

The Court finds that delay is indispensable to the interests of justice and that the following extraordinary circumstance(s) exist warranting the continuance:

State is currently in trial.

The Defendant waived applicable time limits:

IT IS ORDERED vacating the current **Trial** setting of **03/02/2015 at 8:00 a.m.** and resetting same to 03/16/2015 at 8:00 a.m. before the Master Calendar Assignment Judge in Courtroom 5B in the South Court Tower. All subpoenaed witnesses are to report to Courtroom 5B in the South Court Tower for trial and will be directed to the trial court from there.

IT IS ORDERED continuing the **Final Trial Management Conference** (FTMC) set on this date to **03/09/2015 at 8:45 a.m.** before this Court.

IT IS FURTHER ORDERED excluding all time from 03/02/2015 through 03/16/2015 (14 days). **NEW LAST DAY: 04/11/2015.**

IT IS FURTHER ORDERED affirming prior custody orders.

9:38 a.m. Matter concludes.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

APPENDIX E

Michael K Jeanes, Clerk of Court
*** Electronically Filed ***
I. OSUNA, Deputy
3/6/2015 3:58:50 PM
Filing ID 6450598

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

Yigael M. Cohen
Deputy County Attorney
BAR ID#: 009951
Keli Luther
Deputy County Attorney
Bard ID# 021908
MCAO Firm #: 00032000
301 West Jefferson, 5th Floor
Phoenix, AZ 85003
Telephone: (602) 506-8556
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. CHRIS A. SIMCOX, aka CHRISTOPHER ALLEN SIMCOX, Defendant.	CR2013-428563-001 DT **STATE'S REQUEST FOR CERTAIN VICTIM TRIAL ACCOMODATIONS BASED ON THE PRO PER STATUS OF DEFENDANT** (Assigned to the Honorable Jose Padilla Div.CRJ11)

The State of Arizona, by and through undersigned counsel, hereby requests this Court to grant certain trial accommodations for the child victims – ages 7 and 8 respectively and 404 (c) victim, also age 7, who are victims of the pro per Defendant in CR 2013-428563-001. Due to the complexity of the issue discussed herein as well as the desire to assure judicial economy, the State respectfully requests permission to exceed the designated 1O page limit provision pursuant to Rule 35.1. The State's motion is based on the following Memorandum

of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

On the eve of trial, the Defendant has invoked his right to proceed pro-per. By making this choice, he has now created a constitutional crisis – not for himself but for his child victims. Without this Court's intervention, the Defendant fully intends to utilize the same tools he used to commit his crimes – power and control. The Defendant will directly question and control his child victims without the buffer of defense counsel. This Court and the State cannot stand by and permit such a constitutional violation especially under the facts and circumstances of this case.

Under the best circumstances, utilizing all of the constitutional protections available under law, the courtroom is, far too often, an incredibly traumatic environment for any child – especially a child who is also the victim. Considering the facts and circumstances of this case where one of the victims is the child of the Defendant and another also knows the Defendant, without accommodations in place, the rights of the child victims will be forever violated. The Defendant cannot be permitted to directly question his own victims. He has no right. While a case of first impression in Arizona, case law and the state and federal level supports this contention.

The Defendant, while exercising his constitutional right to self-representation does not have the right to directly cross examine his own victims. The Defendant has been appointed advisory counsel. The availability of advisory counsel to assist the Defendant and cross examine the Victims is an appropriate

accommodation. The State on behalf of the Minor Crime Victims respectfully requests this Court to order the Defendant to utilize advisory counsel to question the child victims in this case.

The Arizona Constitution guarantees crime victims the right to be treated with dignity and respect as well as the right to be free from intimidation and harassment throughout the criminal justice process --- including trial. Ariz. Const., Art. II, §2.1. These constitutional guarantees envelope the child victims in this case as well - thus necessitating certain constitutional protections upon the Defendant choosing to represent himself. The Defendant is representing himself pro per. By choosing to assert his right to represent himself, now, the child victims in this case – including the Defendant's own children – ages 7 and 8 - have the right to be granted certain accommodations to ensure that the children are treated with the constitutional right to dignity and to be free from intimidation.

Jurisdictions with far fewer constitutional protections have recognized that merely because a defendant chooses to represent himself does not mean that he may cross examine and control his own victim. Pro per status is not a license to intimidate and control his victim. Several jurisdictions have recognized that a defendant's right to represent himself can and will co-exist with the duty of the trial court to ensure victims and witnesses are treated with dignity and respect. Through the aid of advisory counsel, these jurisdictions have balanced the rights of all.

Based on the traditional role of advisory counsel, it is anticipated that Defendant's advisory counsel will conducted numerous duties on behalf of the

Defendant before and during trial. Under such a rubric, advisory counsel, upon direction of the Defendant, may question the children – asking questions written or orally requested from the Defendant.

On behalf of the Crime Victims, the State respectfully requests this Court to grant certain trial accommodations to ensure that the Crime Victims' constitutional rights to be free from intimidation and harassment as well as their rights to be treated with fairness, dignity and respect are protected. The State requests this Court to prohibit the Defendant from directly questioning his Victims. While other states offer different methods of achieving the same goal, the State requests this Court to order the Defendant to utilized advisory counsel to ask the questions on cross examination.

While this issue is a case of first impression in Arizona, over the last decade, the Fourth Circuit as well as other state cases have permitted such a practice and have held that such an accommodation does not violate any right of the defendant assuming the Defendant's right to self-representation is otherwise protected. Without such accommodations, the victims are once again under the power and control of the Defendant without any buffer. Such a circumstance violates the Crime Victims' constitutional right to be free from intimidation and harassment and would certainly cause a chilling effect on truth seeking function of trial and ascertaining testimony from a traumatized child.

FACTUAL SUMMARY:

Defendant is presently charged with three counts of Sexual Conduct with a

Minor, a class 2 felony; two counts of Child Molestation, a class 2 felony; and one count of Furnishing Harmful Items to Minors, a cla$S 4 felony. This Court has already granted the State's request to introduce evidence of Defendant's sexual conduct with other victims involving similar offenses, under similar circumstances. A brief summary of the victimization of the charged and 404(C) victims follows.

A. CHARGED VICTIMS

1. J.D.

J.D. is just under eight years old. J.D. was between the age of four and five when she was victimized. J.D. is the friend of Z.S., Defendant's daughter. J.D. disclosed that when would go to Defendant's home to play with Defendant's daughters, Defendant confronted her in the kitchen, put his hands inside her clothing, and rubbed her vagina in a masturbatory fashion.

2. Z.S.

Z.S. is eight years old. Z.S. was victimized between the age of five and six years of age. Z.S. is Defendant's daughter. Z.S. disclosed that throughout her young life, Defendant would find ways to touch her vagina or butt. On one occasion, Defendant snuck up on her as she was getting out of the shower and penetrated her vagina with his finger. On another occasion, Defendant threw sand inside her pants and, with his hand still inside her clothing, he touched her vagina. On a different occasion, Defendant inserted his finger up Z.S.'s anus while she laid in bed at night.

B. 404 (C) VICTIMS

1. E.M.

E.M., seven years old, is a friend of Z.S., Defendant's daughter. E.M. disclosed that she went to Defendant's house to play with Defendant's daughters, but the daughters were not home.

Defendant then invited E.M. into the home. They went together to Z.S.'s bedroom, at which point Defendant asked E.M. to show him her underwear. She complied. Defendant then offered her candy in exchange for showing him her vagina, which she did.

THE ISSUE BEFORE THIS COURT IS WHETHER REQUIRING ADVISORY COUNSEL TO CROSS EXAMINE A CHILD CRIME VICTIM IN ORDER TO PROTECT HER CONSTITUTIONAL RIGHTS TO BE FREE FROM INTIMIDATION AND HARASSMENT VIOLATES A DEFENDANT'S RIGHT TO SELF REPRESENTATION?

A. Requiring the Defendant's advisory counsel to cross-examine the victims does not violate the Defendant's constitutional rights to self-representation.

The Sixth Amendment of the United States gives defendants the right to self-representation at trial. *Faretta v. California,* 422 U.S. 806, 819-20, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975). The United States Supreme Court has explained that the nature, extent and purpose of the right to self-representation means that a defendant must be able 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 jury at appropriate points in the trial...[However], [t]he right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. *Both of these objectives can be accomplished without categorically silencing standby*

> *counsel...[W]hether the defendant had a fair chance to present his case his own way...[and t]he specific rights to make his voice heard...form the core of a defendant's self-representation.*

McKaskle v. Wiggins, 465 U.S. 168, 174, 176-77, 104 S.Ct. 944, 949, 950 (1984) (punctuation taken from *Partin v. Commonwealth,* 168 S.W.3d 23, 27 (KY 2005) (quoting *McKaskle) (* emphasis added)).

Faretta and *McKaskle* make it clear that the defendant's right of self-representation is not absolute and can be modified to the individual defendant. "[T]he trial judge may terminate self- representation by a defendant who deliberately engages in serious and obstructionist misconduct .... The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta,* 422 U.S. at 834. Thus, *the Defendant's Sixth Amendment right to self-representation, including cross examination of witnesses, does not mean that the Defendant himself has a constitutional right to cross examine a particular witness.*

Arizona trial courts have discretion regarding the scope of cross examination and the standard of review at the appellate level for these decisions is a "clear abuse of discretion." *State v. Riggs,* 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997) (citing *State v. Schrock,* 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986) and *State v. Zuck,* 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982)). In *Riggs,* the Arizona Supreme Court stated that "if, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, the victim's rights must yield." *State v. Riggs,* 189 Ariz. at 330-31, 942 P.2d at 1162-63.

Riggs can be distinguished from the instant case because there was a direct conflict between the defendant's federal rights and the victim's state rights. In *Riggs,* the defendant wanted to question the victim on the stand about his refusal to give a pre-trial interview. The victim had a state constitutional right to refuse a pre-trial interview and the State asked the trial court to not allow the defendant to question the victim on his reasons for refusing. The trial court agreed with the state and did not allow the questioning based on relevancy grounds. *Id.* at 328, at 1160. The conflict in *Riggs* was such that there was no means by which both the Defendant's federal rights and the Victim's state rights could be both upheld simultaneously. Thus, the Arizona Supreme Court correctly asserted that a defendant's federal rights trump a victim's state rights.

Facts similar to this case have met constitutional scrutiny at one of the highest levels – the Fourth Circuit – in *Fields v. Murray.* 49 F.3d 1024, 1035 (4th Cir. 1995. The instant case can be distinguished from *Riggs* in the sense that *Riggs* featured a conflict of rights which could not be resolved by giving some effect to both rights. Several courts have held in similar cases the means by which both rights can be given effect. This is certainly not a zero-sum game. The Defendant is entitled to "due process and effective cross examination." *Id.* at 330-31, at 1162-63. This conflict can be resolved by allowing the Defendant to write out the questions he intends to ask of the Victim witness and then have his advisory counsel ask those questions for him -- assuming the questions comply with the rules of professional responsibility, evidence and the Arizona Constitution.

The Defendant's constitutional right to self-representation will not be

violated by requiring advisory counsel to conduct the cross-examination of the Crime Victim. *Fields v. Murray,* 49 F.3d 1024, 1035 (4th Cir. 1995); *Partin v. Commonwealth,* 168 S.W.3d 23 (KY 2005). *Fields* is extremely similar in its factual basis to the instant case. In *Fields,* the defendant was accused of a sexual abuse charges against his daughter and her friends. The defendant did not represent himself in the case because he did not clearly waive his right to counsel. Although *Fields* was decided as part of an appeal from a denial of the defendant's right to self- representation, *the Fourth Circuit discussed whether the defendant could have even questioned the child crime victims had he been given the right to represent himself.*

The Fourth Circuit stated:

> Fields' self-representation right could have been properly restricted by preventing him from cross-examining personally some of the witnesses against him, which is one "element" of the self-representation right, if, first, the purposes of the self-representation right would have been otherwise assured and, second, the denial of such personal cross-examination was necessary to further an important public policy.

Fields, 49 F.3d at 1035.

Specifically, the Fourth Circuit stated:

> If a defendant's Confrontation Clause right can be limited in the manner provided in *Craig,* we have little doubt that a defendant's self-representation right can be similarly limited. While the Confrontation Clause right is guaranteed explicitly in the Sixth Amendment, U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."), the self-representation right is only implicit in that Amendment, *Faretta v. California,* 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975). The self-

representation right was only firmly established in 1975 in *Faretta,* and then only over the dissent of three justices, *Id.* at 836, 95 S.Ct. at 2542 (Burger, C.J., dissenting, joined by Blackmun and Rehnquist, JJ.). Moreover, it is universally recognized that the *self-representation right is not absolute. See, e.g., McKaskle v. Wiggins,* 465 U.S. 168, 176-77, 104 S.Ct. 944, 950, 79 L.Ed.2d 122 (1984); *Bassette v. Thompson,* 915 F.2d 932, 941 (4th Cir.1990), *cert. denied,* 499 U.S. 982, 111 S.Ct. 1639, 113 L.Ed.2d 734 (1991).

We must, therefore, apply *Craig's* analysis to determine whether the state trial court was constitutionally required to allow Fields to cross-examine personally the young girls who were witnesses against him. Under this analysis, Fields' self-representation right could have been properly restricted by preventing him from cross-examining personally some of the witnesses against him, which is one "element" of the self-representation right, if, first, the purposes of the self-representation right would have been otherwise assured and, second, the denial of such personal cross-examination was necessary to further an important public policy.

On the first prong, the purposes of the self-representation right are to allow the defendant "to affirm [his] dignity and autonomy" and to present what he believes is his "best possible defense." *McKaskle,* 465 U.S. at 176-78, 104 S.Ct. at 950-51. Just as the Court in *Craig* determined that the purpose of the defendant's Confrontation Clause right, ensuring the reliability of the testimony, was "otherwise assured" when one element of the right, face-to-face confrontation with the witnesses, was denied but the other elements of the right, oath, cross-examination, and observation of the witness' demeanor by the jury, were preserved, *Craig,* 497 U.S. at 850-51, 110 S.Ct. at 3166, we find that the purposes of the self- representation right would have been otherwise assured in the case at bar had Fields been tried *pro se* and prevented from cross-examining the girls who were witnesses against him.

Fields at 1036.

The Supreme Court of Kentucky followed the reasoning in *McKaskle* and

held that requiring advisory counsel to actually pose the questions to the crime victim was not an abuse of discretion and did not violate the defendant's Sixth Amendment right to self-representation. *Id.* at 29. In *Partin,* the trial court denied the defendant the right to personally conduct the cross- examination of the victims and instead, ordered that advisory counsel pose the questions prepared by the defendant. *Id.* at 26. The *Partin* court entered the order based on an *ex parte* letter from a victim advocate stating that the victim was afraid of and had been threatened by the defendant. *Id.*

Also, recently in *Depp v. Commonwealth of Kentucky,* 278 S.W.3d 615 at 619 (2009), citing *Partin,* the Supreme Court of Kentucky upheld the trial court's decision prohibiting the pro per defendant from personally cross examining the crime victim stating:

> Appellant did not ask for standby counsel, although now he argues that he ultimately decided to represent himself based on the trial court erroneously informing him that if he had an attorney, he would not be able to cross-examine the witnesses personally and that he would have been able to retain this right. In fact, the trial court was attempting to explain that if it appointed an attorney, the attorney would be conducting the questioning of the victim witness, but that Appellant would have input. This was a decision well within the trial court's discretion under *Partin,* and does not require a separate hearing any more than mest discretionary decisions do. In fact, *Partin* itself approved a trial court's decision not to allow the defendant to personally cross-examine the victim without first conducting a hearing because it "was not an abuse of discretion and did not violate Appellant's right of self-representation." *Partin,* 168 S.W.3d at 29.
>
> *A defendant "confronts" an alleged victim by his presence during questioning, and has no constitutional right to intimidate a victim witness by personally questioning him*

> *or her. His interest is sufficiently protected when the judge asks questions that he has provided. It is within the judge's sound discretion whether to allow the defendant to question a victim witness, and it would be difficult to imagine a scenario where that discretion had been abused when the judge did not allow an alleged perpetrator to question an alleged victim of a sexual assault directly. See id. at 28-29.*

Id.

In the instant case, the State is informing this Court of the Crime Victims' fear of being cross-examined directly by the pro per Defendant based on their assault. Attached for this Court's review are individual emails from the parents of some of the child Victims fearing for the emotional well-being of their young children. Attachment A. The State anticipates additional letters and will supplement them once they are received. All of the minor Crime Victims object to the Court permitting the Defendant to directly cross examine them.

This Court has a constitutional and statutory duty to not only protect the Defendant's right but also the rights of the Crime Victims. *See* Victims' Bill of Rights, Art. 2.1(A) and (A) (1),A.RS. §13-4431 ("Before, during and immediately after any court proceeding, the court shall provide appropriate safeguards to minimize contact that occurs between the victim, the victim's immediate family and the victims' witnesses and the defendant ...."), and §13-4253.

According to the parent of the child crime victims:

> I am lost for words and I can't even tell you how much anxiety and fear this invokes that my two beautiful daughters who have already suffered under the cruelty and intimidation and abuse of their father, now as small children have to re-suffer this abuse in a public trial.

Attachment A. Alena M. Simcox, email correspondence dated March 5, 2015.

Ms. Simcox makes this simple request on behalf of her young children:

> ...[A]s their mother [I] ask the court to reach down into their heart and hear the pleadings of children who have been so abused and stop this re-abuse., this intimidation. Give some protections to my children as I believe wholeheartedly that this is completely the wrong decision for my daughters and will severely hinder the road to their psychological recovery from this event.

Id.

This Court should follow the reasoning in *McKaskle, Fields, Partin and Depp* and order the Defendant's Advisory Counsel conduct the cross-examination of the Crime Victim. It is short-sighted to discard a victim's constitutional right when both the victim's right and the defendant's right can both be successfully protected.

CONCLUSION

Given the Crime Victim's rights to be free from intimidation, harassment, or abuse, the court should merely order Defendant's advisory counsel to conduct any examination of the crime victim witness. The State, on behalf of the Crime Victims, has demonstrated to this court avenues by which the Defendant's federal rights to due process and effective cross examination can be upheld while still giving effect the Crime Victim's state constitutional rights.

RESPECTFULLY SUBMITTED MARCH 6, 2015

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/
/s/ Yigael M. Cohen
Deputy County Attorney

Copy mailed\delivered
March ___, 2015,
to:

The Honorable Jose Padilla CRJ11
Judge of the Superior Court

Chris Simcox
Booking #982577
Pro Per Defendant

Robert Shipman
Sheena Chawla
Advisory Counsel for Defendant

BY: /s/_____
/s/ Yigael M. Cohen
Deputy County Attorney

ATTACHMENT A

ATTACHMENT A

REDACTED COPY

From:
To:
Subject:
Date:

[redacted]

-----Original Message-----
From: alena simcox [redacted]
Sent: Thursday, March 05, 2015 05:31 PM US Mountain Standard Time
To: Stewart Rhonda
Subject: Letter for Court in the Simcox Matter March 5t 2015

To whom it may concern:

It has come to my attention that my Daughter's, [redacted] biological father (Christopher Simcox)
has invoked his 6th Amendment Right to cross examine his own daughters in a sexual molestation case against him.

I am lost for words and I can't even tell you how much anxiety and fear this invokes that my two beautiful girls who have already suffered under the cruelty and intimidation and abuse of their father, now as small children have to re-suffer this abuse in a public trial. This is outrageous and I feel it is a misuse of the 6th Amendment of the Constitution of the United States of America and it needs to be changed. I am sure when our forefathers, who were gentlemen, wrote this they never foresaw this being used in such a manner that would torture poor innocent children. How can a child and an adult (especially one accused of such horrific acts) be on the same level?

Therefore, I object to what Mr Simcox plans to do, as he most likely knew any mother would object under these circumstances. I think he was hoping they would withdraw as witnesses, (his ace in the hole) but that is not the case. They have

something important to do, so they will accomplish it, but it should be as humane and gentle as possible.

I must also tell you that my daughters are very upset and when they heard their father would be cross examining them, [redacted] said to "FIRE DADDY"! She also said he is a bad, bad, bad daddy and a terrible father and was planning to do more harm to her to hurt her feelings again. So, I as their mother ask the court to reach down into their heart and hear the pleadings of children who have been so abused and stop this re-abuse, this intimidation. Give some protection to my children as I believe wholeheartedly that this is completely the wrong decision for my daughters and will severely hinder the road to their psychological recovery from this event.

Thank you for hearing me and taking this into consideration.

Sincerely,

Signature of Alena M. Simcox

March 4, 2015

Your Honor:

This letter comes to you with a concerned heart and a sincere plea for your consideration. My daughter, [redacted], who is now 7 years old, was a "witness" to a crime perpetrated two years ago in 2013. According to the way Arizona law is written, no "crime" was committed against her. Apparently, in Arizona, an adult can request a minor child show him her "privates" without breaking the law!

This may uphold in a court of law. I am not arguing or suggesting that [redacted]s legal status be changed. However, I am requesting that the court appreciate that regardless of her legal label, she was indeed a victim of a crime. As such, it is only just that she be granted the same assurances and protection as the victims in this case. I am requesting that Mr. Simcox be ordered NOT to cross examine his own witnesses and that any such communication be mediated via legal counsel for both the defendant and the witness.

[redacted] once trusted Mr. Simcox. As did I. However, there has been a brutal violation of that trust. As [redacted] matures, she is understanding the depths of the wrongdoings committed against her. I have always raised her to "just be who she is." Who she is is a happy, trusting, vibrant young girl. She should not have to be punished, more than once, by any adult who used the tenure of age and trust against her!

With gratitude,

X

Nicole Evans
Parent of the Minor child: [redacted]

Nicole Evans

APPENDIX F

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/11/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-428563-001 DT 03/09/2015

HONORABLE JOSE S. PADILLA

CLERK OF THE COURT
E. Rosel
Deputy

STATE OF ARIZONA

YIGAEL COHEN

v.

CHRIS ALLEN SIMCOX (001)

CHRIS ALLEN SIMCOX
17030 NORTH 49TH STREET
#1160
SCOTTSDALE AZ 85254
ROBERT S SHIPMAN
SHEENA CHAWLA

INMATE LEGAL SERVICES
OFFICE OF PUBLIC DEFENSE
SERVICES-CCC

FINAL TRIAL MANAGEMENT CONFERENCE

9:01 a.m. This is the time set for Final Trial Management Conference.

State's Attorney:	Yigael Cohen
Defendant's Attorney:	Robert Shipman (Advisory Counsel)
	Sheena Chawla (Advisory Counsel)
Defendant:	Present
Court Reporter:	Vanessa Gartner

Court and counsel discuss pretrial matters.

Counsel are ready to proceed to trial.

Advisory counsel has advised the Court that although Defendant's motion to proceed pro per was granted on February 23, 2015, the Court's minute entry did not reflect this, therefore the Defendant has not been allowed to use Inmate Legal Services to prepare his case.

IT IS ORDERED amending the Court's February 23, 2015 minute entry nunc pro tunc to reflect that Defendant's February 12, 2015, "Request to Represent Himself for all Further Proceedings," is granted.

IT IS FURTHER ORDERED appointing Robert Shipman as advisory counsel.

Advisory counsel further requests the Court to correct the record that the Defendant objected to trial being continued at the February 9, 2015 and February 23, 2015 Final Trial Management Conferences.

IT IS ORDERED correcting the Court's February 9, 2015 and February 23, 2015 minute entries, page 1, paragraph 2, to reflect:

1. The nonmoving party or parties: **Object to the continuance**.

IT IS ORDERED affirming the Firm Trial Date of **March 16, 2015 at 8:00 a.m**. before the Master Calendar Assignment Judge in Courtroom 5B in the South Court Tower. All subpoenaed witnesses are to report to Courtroom 5B in the South Court Tower for trial and will be directed to the trial court from there.

Defendant makes an oral motion for the Office of Public Defense Services pay for Defendant's expert, Dr. Phillip Esplin.

Good cause appearing,

IT IS ORDERED granting the oral motion.

IT IS ORDERED that no time be excluded. LAST DAY REMAINS: 4/11/2015.

IT IS FURTHER ORDERED affirming prior custody orders.

9:08 a.m. Matter concludes.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

APPENDIX G

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/27/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-428563-001 DT 03/24/2015

HONORABLE JOSE S. PADILLA

CLERK OF THE COURT
A. Ocanas
Deputy

STATE OF ARIZONA

YIGAEL COHEN

v.

CHRIS ALLEN SIMCOX (001)

CHRIS ALLEN SIMCOX
17030 NORTH 49TH STREET
#1160
SCOTTSDALE AZ 85254
SHEENA CHAWLA
ROBERT S SHIPMAN

INMATE LEGAL SERVICES

MINUTE ENTRY

The Court is advised by staff that Defendant is confirmed to have been hospitalized. The status of his physical condition is unknown. The Court met informally in chambers this date with counsel regarding scheduling and to determine Defendant's status.

Accordingly,

IT IS ORDERED vacating the trial set this date and resetting as a Status Conference on **April 2, 2015 at 10:30 a.m. (90 minutes allotted)** in this Division. At the time of the Status Conference, the Court will address 1) the status of Defendant's physical condition, 2) anticipation of going forward with Trial, 3) the State's 03/11/2015 Request for Certain Victim Trial Accommodations Based on the Pro Per Status of Defendant, 4) number of jurors needed for the jury panel for Trial, 5) and Trial scheduling and potential conflicts by the parties and/or counsel.

The Court finds that delay is indispensable to the interests of justice and that extraordinary circumstances exist warranting the continuance.

IT IS ORDERED excluding all time from 03/24/2015 through 04/02/2015 (9 days). **NEW LAST DAY: 04/20/2015**

IT IS FURTHER ORDERED affirming prior custody orders.

IT IS FURTHER ORDERED that all subpoenas shall remain in full force and effect.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

APPENDIX H

SA
S. Cohen

Christopher A. SIMCOX P982577
Lower Buckeye Jail
3250 W. Lower Buckeye Rd
Phoenix, Az 85009

IN the Superior Court of the state of Arizona
In and for the county of Maricopa

State plaintiff
v
Christopher A. SIMCOX Defendant

CR2013-428563-001

MOTION FOR RESPONSE TO STATES REQUEST FOR TRIAL ACCOMODATIONS

comes now the defendant, Christopher A. SIMCOX, in propria persona, and hereby requests this court to accept response to prosecutions request to prohibit Defendant from Cross-examining child witnesses at trial. Defendant asserts his right to cross-examine alleged victim witnesses with respect to no harm intended. Defendant's advisory counsel should not be thrust into exposing themselves and subjected to potential for claims of ineffective assistance of counsel. Defendant asserts his full right to self-representation by the U.S. Constitution Sixth Amendment, Arizona II section 24.

Wherefore, Defendant respectfully requests that the Honorable Master Calendar Judge grant the relief requested.

C. Simcox

cc:

Copies to be forwarded to the following:

Arizona Superior Court Master Calendar Judge Kreamer

County Attorney Yigael Cohen
Bar ID # 009951
MCAO Firm # 00032000
301 West Jefferson, Suite 800
Phoenix, AZ 85003

Public Defender / Advisory Counsel

Robert Shipman
222 North Central Suite 8100
Phoenix, AZ 85004

C. Simcox — 3-18-15

signature — Date

(1)

The defendant, Christopher A. Simcox, hereby submits the rebuttal response to the motion filed by Maricopa County Deputy County Attorney Yigael M. Cohen - CR2013-428563-001 DT — State's Request for certain Victim Trial Accomodations Based ON the Pro Per Status Of Defendant, filed in the Superior Court of the State of Arizona In And For The County Of Maricopa, 3-6-2015.

Due to the complexity of the issue discussed herein as well as the desire to assure judicial economy, the defendant respectfully requests permission to exceed the designated 10 page limit provision pursuant to Rule 35.1.

Memorandum of Points and Authorities

With adequate time before trial for the prosecution to prepare, the Defendant, Christopher A. Simcox has invoked his right to proceed Pro Per. The Defendant after awaiting trial for 21 months has carefully weighed the lack of evidence and after turning down an offer of plea agreement submitted by Prosecutor Cohen has instead chosen to exercise his right to self-representation guaranteed by the 6th Amendment of the U.S. Constitution and by Article II section 24 of the Arizona Constitution.

I, Chris Simcox, the defendant, have Knowingly, intelligently and voluntarily elected to exercise my Constitutionally protected right to self-representation during my trial.

I am also innocent of the spurious charges brought against me. I expect under the rights of due process to be presumed innocent until proven guilty by a jury; I expect to be treated as innocent by the court.

With eyes open I have Knowingly and intelligently chosen to forgo the perceived benefits of a lead attorney because of my innocence and because I feel that I can present my best case defense. A fundemental aspect of my best defense relies on my right to confront my accusers. The counsel clause of the Sixth Amendment implies the right of defendant to conduct his own defense with assistance at his trial. Pro se defendants must be allowed to control 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 court and jury at appropriate points in trial.

In Prosecutor Cohen's motion he states "the Defendant fully intends to utilize the same tools he used to commit his crimes - power and control... this Court and the State cannot stand by and permit such a constitutional violation especially under the facts and circumstances of this case".

In Mr. Cohen's conflated statements of opinion, not fact, he claims he magically knows that the Defendant intends to inflict pain, harrasment and control to harm the alleged victim witnesses, who were never subjected to such harm in the first place. Prosecutor Cohen has already made claims that defendant stands guilty of such repugnant behaviors and is asking the court to find defendant guilty of such behaviors before the trial has even begun. Mr. Cohen, in his motion for special accomodations makes the accusation that the Defendant is guilty of threatening the alleged victims merely by his presence in the courtroom and that he has planned with pemeditation to intimidate the witnesses and assert power and control over them during cross-examination. Defendant considers these accusations akin to premature adjudication and a prejudicial violation of the right to be considered innocent

(4)

until proven guilty.

Citing from Partin v. Commonwealth of Kentucky

Keller, Justice, dissenting.

I respectfully dissent because the trial court clearly violated Appellant's Sixth Amendment right to self-representation by prohibiting him from personally cross-examining the victims.

Time and again, courts, including this Court have honored the right of an accused to defend him or herself and to question witnesses as guaranteed by the Sixth Amendment.[FN2] Although "[t]he right of self-representation is not a license to abuse the dignity of the courtroom" or to ignore the "relevant rules of procedural and substantive law,"[FN3] it is not a right to be taken lightly, as the trial judge may only terminate it when "a defendant .... deliberately engages in serious and obstructionist misconduct."[FN4] But here, without any evidence of disruptive, disorderly, or disrespectful behavior by Appellant, the trial court banned Appellant from cross-examining the victims due to the concerns of a victim's advocate, which were communicated ex parte to the trial court, that the victim-witnesses might be intimidated if Appellant questioned them. This was error.

FN2 See, e.g. McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2nd 297 (1973); Mason v. Mitchell, 320 F.3d 604 (6th Cir. 2003); Wake v. Barker

, 514 S.W.2d 692 (Ky. 1974) FN3 Faretta, 422 U.S. at 834, 95 S.Ct. at 2541 n. 46 FN4. Id.

As the United States Supreme Court has pointed out, in a passage that the majority opinion also quotes:

A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant *must* be allowed 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. FN5

FN5, McKaskle, 465 U.S. at 174, 104 S.Ct. at 949 (emphasis added) accord Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed 2d. 347, 353 (1974) ("Confrontation means more than being allowed to confront the witness physically.") Chambers, 410 U.S. at 295, 93 S.Ct. at 1046 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure.").

"The specific right to make his voice heard ... form[s] the core of a defendant's right of self-representation." FN6 And if only standby counsel is allowed to question witnesses, i.e., "to speak *instead* of the defendant on [a] matter of importance," the defendant's right of self-representation is eroded. FN7 In the present case, requiring standby counsel to conduct

cross-examination of the victims over Appellant's objection clearly violated this right. Appellant had no choice as to whether counsel would be helpful in cross-examining the victims, and "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." FN8

FN6. McKaskle, 465 U.S. at 177, 104 S. Ct. at 950
FN7, McKaskle, 465 U.S. at 178, 104 S. Ct. at 951
FN8, Faretta, 422 U.S. at 817, 95 S. Ct. at 2532

In his motion relating to the instant case before the court, Prosecutor Cohen states "Requiring the defendant's advisory counsel to cross-examine the victims does not violate the Defendant's constitutional rights to self-representation.

The Defendant clearly understands it is within the judges sound discretion whether to allow the Defendant to question an alleged victim witness. Furthermore, Defendant is aware that some case law has determined that a trial court shall exercise reasonable control over the mode of interrogating witnesses so as to protect witnesses from harrassment or undue embarassment.

The Defendant is cognizant of the fact that he is compelled to respect the court. It is common sense and with respect for propriety that he will follow procedures, and never use the courtroom for deliberate disruption of a trial. The Defendant maintains his innocence, has patiently waited 21 months for his trial to begin and would never engage in unwise behavior that would alienate the court or the jury.

Defendant understands the right of self-representation is not a license to abuse the dignity of the courtroom, nor is it his intention to undermine judicial economy. The Defendant inherently and intrinsically understands his responsibility and duty to the law, the court and the witnesses to restrain any obstreperous behavior during the proceedings. Defendant understands his responsibility to treat all witnesses with respect and dignity, just as the Prosecutor is responsible to restrain himself from crossing the line of Prosecutorial misconduct.

Despite Prosecutor Cohen's conflated accusations, there is no substantive evidence of any threats, intimidation or threatening, lacivious behavior towards his children, alleged victims or any other child.

Conversely, the situation is exactly the opposite. Testimony from many witnesses during this trial will prove that Defendant's relationships with all alleged victims was nurturing, friendly, respectful, appropriate and with his children, fatherly, gentle and supportive. The Defendants 15 year career as a teacher, private tutor and sports coach led to his skills with children to be lauded as above reproach by his superiors, parents and other proffesionals in the field of education.

The Defendant holds academic degrees in Early Childhood Education, Human Development and Cognitive development studies, achievements that would preclude any accusations that his behavior and comportment around children to have ever been deemed threatening or intimidating.

The Defendant fully appreciates the delicate psychological state of a child's emotional well being in this stressful situation. The Defendant in no way intends to create a situation of injustice, to knowingly affect the alleged victims in a harmful manner. This, again by virtue of common sense and propriety is not at the heart of his desire to waive counsel; Defendant does feel that being allowed to cross-examine the children is a crucial cornerstone of his desire

to present his best defense.

There is no doubt testimony of the children witnesses will make the sum and substance of material facts in this trial.

Prosecutor Cohen, through his self-admitted special interest and "special relationship" with the parents of the alleged victims has a distinct and expressed advantage, having 21 months to script, coach and possibly coerce the children witnesses to "act" in a certain way and even recite the adult coach's prefered testimony to influence the jury.

The Defendant expresses concern the court, in trying to protect these children will close its eyes to Defendant's right to cross-examine the witnesses. The possible bias that a court and Prosecutor might not like the consequences flowing from his Sixth Amendment rights do not justify the court taking Defendant's request to self-represent any less seriously.

Citing from Partin v. Commonwealth of Kentucky.
The Massachusetts Supreme Court in Commonwealth v. Conefrey FN9 evaluated a trial court's similar

ban on a defendant personally cross-examining the victim and determined that a restriction based on perceived harm violated the defendant's Sixth Amendment rights. The Conefrey Court's words are equally applicable here:

FN9, 410 Mass. 1, 570 N.E.2d 1384 (1991).

The judge appears to have concluded, based on his own experience and feelings as to this trial... that trauma and intimidation of the complainant, and possibly untruthful answers, would be the inevitable result of the defendant cross-examining the complainant..... The record contains nothing to show that the defendant intended to exploit or manipulate the right of self-representation for ulterior purposes. There is also no indication that the defendant's questioning of the complainant would harm her, that it would violate the rules of evidence and protocol which normally apply in this sort of trial, or that the complainant would not respond truthfully to his questions..." "The possibility that reasonable cooperation may be withheld, and the right later waived, is not a reason for denying the right of self representation from the start."

United States v. Dougherty, [473 F.2d 1113, 1126 (D.C. cir. 1972)].

There also can be no question that cross-examination of witnesses in particular the principal

accuser of the defendant, is a fundamental component of the right of self-representation... The mere belief held by the judge that the complainant could be intimidated or harmed beyond the normal limits associated with a trial involving a young complainant, or that she might respond untruthfully if she was questioned by the defendant, is not sufficient to justify the restriction placed on cross-examination. FN10

FN10. Id. at 1390-91.

Prosecutor Cohen asserts that "Requiring the Defendant's advisory counsel to cross-examine the victims does not violate the Defendant's constitutional rights to self-representation".

Defendant strongly objects. Denying Defendant the ability to cross-examine witnesses personally, will deprive Defendant the right to self-representation which includes the Confrontation clause. The ability to manage and direct the examination of witness accusors reaches beyond the form of simply writing questions that advisory counsel will then read to witness. The form of questioning witnesses includes the pace, expression, style, mannerisms and sensitivity to personal knowledge as well as the situational context surrounding the alleged incident.

If advisory counsel were to be mandated it would deny defendant the right to assert his own strategy, tactics and to adjust to the fluid process that surrounds examination of a witness. This would directly violate the Arizona Constitutional right and provision protecting the right of confrontation which may be considered broader than the federal provision.

> In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel,... [and] to meet the witnesses against him face to face...
> Arizona Constitution article II section 24

Citing Partin v. Commonwealth of Kentucky.

The denial of a defendant's right to personally cross-examine the victims cannot be dismissed as harmless error on the basis that his or her appointed standby attorney effectively questioned the witnesses. This is because the harmless error analysis is inappropriate when addressing the right of self-representation: "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." FN13

Nevertheless, "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense" FN14 since "from the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself." FN15 In this case, the "jury might have received a significantly different impression" of the victim's credibility had Appellant himself been permitted to cross-examine them. FN16 This is especially so when we consider that the victims were the Key witnesses against Appellant. Thus in addition to the Constitutional infringement, the appellant may have also suffered actual harm from the trial court's denial of his Sixth Amendment right to personally cross-examine the victims.

FN13. McKaskle, 465 U.S. at 177n. 8, 104 S. Ct. at 950; accord Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35, 46 (1999) McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed 2d 122 (1984) FN14 Faretta, 422 U.S. at 834, 95 S. Ct. at 2540.

FN15. McKaskle, 465 U.S. at 179, 104 S. Ct. at 951.

FN16. Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S. Ct. 1431, 1436, 89 L. Ed 2d 674, 684 (1986).

Keller, Justice, dissenting.

(9)

Citing from an Amici Curiae brief submitted in the Court of Appeals of the State of Arizona Division One, State of Arizona, ex rel. William G. Montgomery, Maricopa County Attorney, V. The Honorable Edward Bassett, Judge of the Superior Court of the State of Arizona in and for the County of Maricopa, Joe Cuen, Pro Per Defendant. Brief of Amici Curiae Arizona Attorneys for Criminal Justice, Maricopa County Public Defender's Office, and Pima County Public Defender's Office in Support of Real Party in Interest

The Idaho Supreme Court, concluded that the trial court's order requiring standby counsel to question a child sex-crime victim violated the defendant's right of self-representation and right to confront witnesses. State v. Folk, 256 P.3d 735, 745-47 (Idaho 2011).

The Idaho court held, and the Superior Court in this case agreed, that, absent evidence that the witness would suffer emotional trauma that would impair his or her ability to communicate, or some indication that the defendant intended to use cross-examination to intimidate or embarass the witness, the defendant's right of self-representation and confrontation must take priority over concerns about the witness. "...Because public defenders are frequently appointed to act as advisory counsel or standby counsel in cases such as these, amici have an interest in ensuring that defendants representing themselves

at trial are not prevented from exercising their constitutional rights to confront and cross-examine witnesses and that public defenders are not placed in the precarious position of engaging in an ineffective cross-examination using someone else's questions and tactics. Argument: If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.

The defendant's ability to control examination of witnesses extends beyond the formulation of the questions to the pace and expressions of the examiner. Advisory counsel conducting a cross-examination, even with questions supplied by the defendant, would necessarily conduct himself according to his own strategy and tactics, rather than those of the defendant who is supposed to be controlling the direction of the case. This result violates the U.S. and Arizona Constitutions.

"The right to confront witnesses means more than simply being able to physically confront witnesses in the courtroom; confrontation also includes as its 'main and essential purpose' the ability to effectively cross-examine witnesses. State ex rel. Romley v. Super. Ct. 172 Ariz. 232, 240, 836 P.2d 455, 453 App. 1992)

Thus, Pro se defendants have the right to conduct their own cross-examinations, and "[r]equiring Defendant to write out questions to be asked by someone else in order to cross-examine [a witness] is a significant impairment of the right of confrontation." Folk, 256 P. 3d at 745; see also Commonwealth v. Conefrey, 570 NE. 2d 1384, 1389 (Mass. 1991) (standby counsel appointed to cross-examine child witness noted "that he could no adjust his questions quickly enough to respond to the complainant's answers without constantly conferring with the defendant.")

Prosecutor Cohen states: "Based on the traditional role of advisory counsel, it is anticipated that Defendant's advisory counsel will conducted (sic) numerous duties on behalf of the Defendant before and during trial. Under such a rubric, advisory counsel, upon direction of the Defendant, may question the children - asking questions written or orally requested from the Defendant."

This not true. Adviory counsel assigned to Defendant is prohibited from doing anything for the Defendant other than answering questions. The advisory counsel are strictly advisory, they cannot even conduct research on behalf of Defendant. According to James Logan, Director Maricopa County Office of Public Defense Services: "My (offices) functions as

I understand it is to remain passive throughout the entire trial, to take no affirmative actions whatsoever. I (nor officers) am not his research assistant. I'm not his paralegal. I'm not his investigator. I am simply here essentially in the event he changes his mind and wants me to proceed as counsel of record. ... if I see what I consider to be horrible blunders being made, it is not my job to intercede and stop those blunders. If I see objectionable things happening, it is not my job to object, it is my job to assume that (he) is doing everything in this courtroom for a reason, just as if he were the attorney of record."

If advisory counsel were to be forced into the role of questioning the witnesses they would be subjected to potential for claims of ineffective assistance of counsel. Advisory counsel should not be exposed to claims of ineffective assistance of counsel.

Conclusion

Defendant asks court to deny prosecutions request for special accomodations and should uphold Defendants U.S. and Arizona Constitutional right to cross-examine all witnesses. Any defense presented minus the right to respectfully cross-examine all witnesses will erode Defendants ability to

(18)

present his best defense. The right to proceed pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of his constitutionally guaranteed right of best defense.

Respectfully Submitted March 18, 2015

Christopher A. Simcox
Defendant Pro Se
By: C. Simcox

This page must be completed and attached to the last page of your motion/request.

I have filed the ORIGINAL of the attached document(s) on March (Month), 18 (Day), 2015.

with the Clerk of the Superior Court of Arizona in Maricopa County.

I have mailed/delivered a COPY of the attached document(s) on March (Month), 18 (Day), 2015.

to Judge Master Calendar Judge Kreamer
(The Judge assigned to your case)

I have mailed/delivered a COPY of the attached document(s) on March (Month), 18 (Day), 2015.

to COUNTY ATTORNEY Yigal Cohen 301 N. Jefferson Suite 800 Phoenix, AZ 85003
Address

By signing below, I promise that I have filed/mailed the attached document(s) as shown above. I understand that if I do not file/mail the attached document(s) as shown above, the judge in my case will not read my request/motion.

Your signature

MARICOPA COUNTY SHERIFF'S OFFICE
JOSEPH M. ARPAIO, SHERIFF

CERTIFICATION

I hereby certify that on this date **03/25/15**

In accordance with the instruction received by the inmate, I hereby certify, I delivered the attached original for filing to the Clerk of the Superior Court, Maricopa County, and State of Arizona.

I further certify that copies of the original have been forwarded to:

✓ Judge/Comm. **Kreamer** Superior Court, Maricopa County, State of Arizona.

✓ County Attorney, Maricopa County, State of Arizona **Y. Cohen**

___ Public Defender, Maricopa County, State of Arizona

✓ Advisory Counsel **R. Shipman**

___ Probation Officer

___ Adult Probation Department, Maricopa County, State of Arizona

___ Legal Defender

___ Legal Advocate

___ Attorney

INMATE LEGAL SERVICES
Maricopa County, Sheriff's Office
201 S. 4th Avenue
Phoenix, AZ 85003

Cert 06/11/2013

APPENDIX I

Michael K Jeanes, Clerk of Court
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4/2/2015 7:32:55 AM
Filing ID 6507858

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MARICOPA COUNTY ATTORNEY

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. CHRIS A. SIMCOX, aka CHRISTOPHER ALLEN SIMCOX, Defendant.	)	CR2013-428563-001 STATE'S REPLY: STATE'S REQUEST FOR CERTAIN VICTIM TRIAL ACCOMODATIONS BASED ON THE PRO PER STATUS OF DEFENDANT (The Honorable Jose Padilla)

The State of Arizona, through undersigned counsel, comes before this Honorable Court and submits the following reply.

RIGHT OF CONFRONTATION

In Defendant Simcox's response, he urges this Honorable Court to deny the State's motion for certain victim accommodations. Defendant Simcox while conceding that his right to represent

himself is not absolute, argues that such a victim accommodation violates not only his right to self representation but also his right to confront witnesses citing a dissenting opinion in *Partin v. Commonwealth of Kentucky* . Response at 2-4.

The Fourth Circuit court in *Fields v. Murray* dealt with the constitutional calculus of whether granting certain child victim accommodations violated the Defendant's constitutional right not only to represent himself but also the defendant's right to confront witnesses. The United States Court of Appeals, Fourth Circuit held that it did not. The Fourth Circuit case emphasizes that a proper constitutional balance can be struck between protecting the constitutional rights of both the Defendant and the minor crime victims. It is not a zero sum game.

The *Fields* case involves facts and arguments strikingly similar to this matter. Similar to the Defendant's arguments, the defendant in *Fields* wished to represent himself pro per so he could personally cross examine his child victims. The Fourth Circuit's summarization includes:

> The [Trial] Court then explained that he would not allow Fields to cross-examine the young girls who were witnesses against him; *instead, he could "write out [his] questions and give it to [his] lawyers if [he] want[ed] to."* [FN5] When, at the hearing, the trial judge made it plain that he would not permit Fields to cross-examine the children, Fields responded, as the panel opinion points out, "Well, then, there won't be any justice in this courtroom." This ended the conversation between Fields and the trial judge. Fields' demand had not changed or "evolved." He was still focusing wholly on his demand to cross-examine the children, so much so that he declared there would "not be any justice in this courtroom" if the trial judge denied him the right to cross-examine the children. That is the unquestioned demand of Fields. If that right was given him, he said, in effect, that he would be content.

Fields at 1027-1028.

> The Fourth Circuit held that no right of Fields was violated stating:
>
> The trial court refused to allow such personal cross examination, offering instead that Fields could write out questions that he wished to ask the girls and have them ready by a lawyer. *Because the trial*

> *court was not required to allow such personal cross examination, Fields was denied nothing to which he was entitled.*

Fields at 1034.

In *Fields*, the Fourth Circuit looked to the landmark United States Supreme Court child victim accommodation case, *Maryland v. Craig*, 497 U.S. 836 (1990) for guidance. It is significant to note that the facts of *Fields* as well as this case are very different from *Maryland v. Craig* in one key area. In *Maryland v. Craig*, the State requested an accommodation to permit the child victims to testify *outside the presence of the defendant*.

The Fourth Circuit in *Fields* also recognized this distinction:

> Our analysis of whether the state trial court properly prevented Fields from cross-examining the young girls who were witnesses against him begins with the Supreme Court's opinion in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). The Court in *Craig* addressed the constitutionality of a state statute that allowed child victims of sexual abuse to testify against their alleged abuser out of his presence and outside of the courtroom by one-way closed circuit television. *It held that a defendant's Confrontation Clause right can be restricted by preventing him from confronting face-to-face the witnesses against him, which is one "element" of this right, if, first, the purpose of the Confrontation Clause, ensuring "the reliability of the testimony," is "otherwise assured" and, second, the "denial of such [face-to-face] confrontation is necessary to further an important public policy." Id. at 850, 110 S.Ct. at 3166 (emphasis added).*
>
> The Court found, on the first prong, that the statute "adequately ensure[d]" the reliability of the child witnesses' testimony because, while it eliminated the defendant's face-to-face confrontation with the witnesses, *it preserved the "other elements of confrontation-oath, cross-examination, and observation of the witness' demeanor [by the jury]."* *Id.* at 851, 110 S.Ct. at 3166 (emphasis added). On the second prong, the Court 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 denial of this face-to-face confrontation was necessary to protect the children from "emotional trauma."* *Id. at 853-55, 110 S.Ct. at 3167-68*. The Court instructed that to find adequately that denial of face-to-face confrontation was necessary to

protect the children from emotional trauma, the state court must "hear evidence," *id.* at 855, 110 S.Ct. at 3169, and conclude that each child would be traumatized "by the presence of the ***1035** defendant," *id.* at 856, 110 S.Ct. at 3169. Because the state statute required such a finding before denying face-to-face confrontation, the Court upheld its constitutionality. *Id.* at 857, 110 S.Ct. at 3169-70.

If a defendant's Confrontation Clause right can be limited in the manner provided in Craig, we have little doubt that a defendant's self-representation right can be similarly limited. While the Confrontation Clause right is guaranteed explicitly in the Sixth Amendment, U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."), the self-representation right is *only implicit* in that Amendment, *Faretta v. California,* 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975) (emphasis added). The self-representation right was only firmly established in 1975 in *Faretta,* and then only over the dissent of three justices, *id.* at 836, 95 S.Ct. at 2542 (Burger, C.J., dissenting, joined by Blackmun and Rehnquist, JJ.). *Moreover, it is universally recognized that the self-representation right is not absolute. See, e.g., McKaskle v. Wiggins,* 465 U.S. 168, 176-77, 104 S.Ct. 944, 950, 79 L.Ed.2d 122 (1984); *Bassette v. Thompson,* 915 F.2d 932, 941 (4th Cir.1990), *cert. denied,* 499 U.S. 982, 111 S.Ct. 1639, 113 L.Ed.2d 734 (1991).

[9] We must, therefore, apply *Craig* 's analysis to determine whether the state trial court was constitutionally required to allow Fields to cross-examine personally the young girls who were witnesses against him. *Under this analysis, Fields' self-representation right could have been properly restricted by preventing him from cross-examining personally some of the witnesses against him, which is one "element" of the self-representation right, if, first, the purposes of the self-representation right would have been otherwise assured and, second, the denial of such personal cross-examination was necessary to further an important public policy.*

Fields, 1034-1035.

The Fourth Circuit went on to discuss the important public policy interest in preventing Fields from personally cross examining the young girl witnesses (all older than the girls in this case):

As to *Craig* 's second prong, *the State had an extremely important interest in preventing Fields from personally cross-examining the*

> *young girls here.* 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 denial of this face-to-face confrontation was necessary to protect the children from "emotional trauma." *Craig*, 497 U.S. at 853-55, 110 S.Ct. at 3167-69. *The State's interest here in protecting child sexual abuse victims from the emotional trauma of being cross-examined by their alleged abuser is at least as great as, and likely greater than, the State's interest in Craig of protecting children from the emotional harm of merely having to testify in their alleged abuser's presence.* We have little trouble determining, therefore, that the State's interest here was sufficiently important to outweigh Fields' right to cross-examine personally witnesses against him if denial of this cross-examination was necessary to protect the young girls from emotional trauma.

Fields at 1036 (emphasis added).

Here, at this juncture, it is the State's assessment, that the child victims will testify in open court. The only accommodation the State and the Victims are requesting is that someone other than Mr. Simcox directly question the child victims and 404 (c) child witnesses.

The Defendant in this case outlines the same arguments in his response that were presented by Defendants Fields and Craig and summarily rejected by both the Fourth Circuit and the United States Supreme Court. While a case of first impression in Arizona, the Fourth Circuit and the United States Supreme Court as well as assorted state courts have blazed a constitutional trail that provides solid constitutional guidance to this Court. Should this Court make a finding that the children in this case would likely suffer emotional harm by being personally cross examined by the Defendant and either order the Defendant to submit questions to this Honorable Court or order advisory counsel to ask questions drafted by the Defendant, assuming the Defendant's right to self representation otherwise remains intact, both the constitutional rights of the Defendant and the child victims are preserved. This is

not a zero sum game. Both can be accomplished.

Should this Honorable Court deny the State's request, the State respectfully requests a brief stay of this Court's order so that the State may confer with the victims regarding their right to seek appellate review in the form of a special action. See A.R.S. 13-4437 ("The victim has standing to … bring a special action … seeking to enforce any right or to challenge an order denying any right guaranteed to victims under the victims' bill of rights, article II, § 2.1, Constitution of Arizona.

RESPECTFULLY SUBMITTED this 2nd Day of April, 2015,

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/_____
/s/ Keli B. Luther
Deputy County Attorney

Copy of the foregoing
emailed/hand-delivered this
April 2, 2015, to:

The Honorable Jose Padilla
Judge of the Superior Court

Defendant Chris Simcox

BY: /s/_____
/s/ Keli B. Luther
Deputy County Attorney

APPENDIX J

IN THE

Court of Appeals

STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 04/06/2015
RUTH A. WILLINGHAM, CLERK
BY: JT

STATE OF ARIZONA ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney, Petitioner, v. THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, CHRIS SIMCOX, a.k.a. CHRISTOPHER ALLEN SIMCOX, Real Party in Interest.	Court of Appeals Division One No. 1 CA-SA 15-0087 Maricopa County Superior Court No. CR2013-428563-001

ORDER DENYING PETITIONER'S REQUEST FOR STAY

The court, Presiding Judge Margaret H. Downie, and Judges Patricia K. Norris and Randall M. Howe participating, considered the State's request for stay of the superior court proceedings during a telephonic hearing with counsel for the State, Deputy County Attorneys Keli Luther and Yigael Cohen; Deputy Legal Defenders Sheena Chawla and Robert Shipman, advisory counsel for real party in interest Simcox, and Chris A. Simcox, representing himself.

Based on the record and arguments presented in the superior court, the Court of Appeals declines to stay the trial court's order. Although trial will likely proceed, with cross-examination of the witnesses at issue occurring before this Court can address the special action petition on the merits, the court declines to dismiss the petition as moot. See Big D Construction Corp. v. Court of Appeals, 163 Ariz. 560, 789 P.2d 1061 (1990) (appellate court may

consider issues that have become moot when significant questions of public importance are presented that are likely to recur and evade review). We therefore affirm the briefing schedule on the substantive merits set forth in the order dated April 6, 2015.

/s/
_____
MARGARET DOWNIE, Presiding Judge

To:
Keli B Luther
Chris A Simcox, P982577 (Mailed)
Robert S Shipman
Sheena Singh Chawla
Jose S Padilla
Jose S Padilla

APPENDIX K

WILLIAM G. MONTGOMERY
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Telephone: (602) 506-7422

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney,

Petitioner,

vs.

THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

CHRIS SIMCOX, aka CHRISTOPHER ALLEN SIMCOX

Real Party in Interest.

Court of Appeals

No. 1 CA-SA

Maricopa County Superior Court
No. CR 2013-428563-001

PETITION FOR SPECIAL ACTION

(EXPEDITED RULING REQUESTED – TRIAL PENDING)

(ORAL ARGUMENT REQUESTED

INTRODUCTION

Pro Per Defendant Chris Simcox does not enjoy the right to *personally and directly* cross examine his own young victims – all between 7 and 9 years old. Pro per status is not a license to control and intimidate his own child victims at trial. Defendant Chris Simcox, on essentially the eve of trial, asserted his right to proceed pro se. State's Appendix C. Not one, but two attorneys were appointed to act as advisory counsel.

Defendant Simcox is charged with three counts of *Sexual Conduct with a Minor*, class 2 felonies; two counts of *Child Molestation*, class 2 felonies; and one count of *Furnishing Harmful Items to Minors*, a class 4 felony. J.D. and Z.S., the charged victims in this case are between 7 and 9 years old. Z.S. is the Defendant's daughter. E.M. is seven years old and she is a 404 (c) witness.

The children are expected to testify in the courtroom. The State has *not* requested a *Maryland v. Craig* accommodation permitting the children to testify *outside* the courtroom. Once alerted that the Defendant intended to proceed pro se and intended to personally cross examine his own child victims, the State conferred with the parents of the victims. The Victims objected to the Defendant's intent to personally cross examine the children during trial. The parents drafted individual letters expressing their objections specifically outlining the harm that their

daughters have experienced and how they believe the children will be harmed should the Defendant once again control their children.

One mother wrote explaining why she did not want the Defendant to personally cross examine her daughter:

> She (Victim J.D. – 7 years old) now has nightmares and does not fall asleep without complaining of her stomach hurting. She also complains of being"sick" when I have to leave her. …She worries about the doors being locked and asks over and over if they have been secured. … She is extremely emotional, with extreme sensitivity and crying occurring frequently at home and at school …. These behaviors were never existent prior to this happening to her. … Allowing Mr. Simcox the ability to address my daughter, I fear, will only set [Victim J.D.] back in her healing and quite possibly exacerbate her symptoms and anxiety/panic attacks.

Michelle A. [Mother of Victim J.D.], State's Appendix B.

The State, on behalf of the Victims, filed *State's Request for Certain Victim Trial Accommodations Based on the Pro Per Status of Defendant* that included the individual Victim letters. State's Appendix E. The Defendant filed his response objecting to the State's request. State's Appendix H. The State filed its reply. State's Appendix I. The Trial Court set a status conference to address the several issues including the Victim accommodation motion. *See* State's Appendix G.

Yesterday afternoon, April 2, 2015, the Trial Court denied the State's request thus holding that the Defendant will be permitted to have direct and personal access to the young children in the courtroom without any buffer of

counsel. As of this writing, a minute entry has yet to be filed, however an expedited transcript was prepared. State's Appendix A.

While few jurisdictions have addressed this issue, including Arizona, the United States Fourth Circuit, in a case strikingly similar to the facts of this case, held that a pro per defendant *does not* have the right to *personally* cross examine his child victims. *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995). The Fourth Circuit stated:

> Fields' self-representation right could have been properly restricted by preventing him from cross-examing personally some of the witnesses against him, which is one 'element' of the self-representation right, if, first, the purposes of the self-representation right would have been otherwise assured and, second, the denial of such personal cross examination was necessary to further an important public policy.

Fields at 1035.

As recognized by the Fourth Circuit:

> The State had an extremely important interest in preventing Fields from personally cross-examining the young girls here. 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 denial of this face-to-face confrontation was necessary to protect the children from emotional trauma.' Craig, 497 U.S. at 853-55, 110 S.Ct. at 3167-69. The State's interest here in protecting child sexual abuse victims from the emotional trauma of being cross examined by their alleged abuser is at least as great as, and likely greater than, the State's interest in Craig of protecting children from the emotional harm of merely having to testify in

> their alleged abuser's presence. We have little trouble determining, therefore, that the State's interest here was sufficiently important to outweigh Field's right to cross examine personally witnesses against him if denial of this cross-examination right was necessary to protect the young girls from emotional trauma.

Fields at 1035-1036.

The constitutional right to self-representation is not absolute. *Faretta v. California 422 U.S. 806, 834 (1975).* Over the last two decades several courts (state and federal) have recognized that important public police reasons justify curtailing a pro per defendant's direct cross examination of his own victims *so long as his right to self-representation is otherwise assured. Fields v. Murray*, 49 F.3d 1024, 1035 4th Cir. 1995); *Partin v. Commonwealth*, 168 S.W. 3d 23 (KY 2005); *Depp v. Commonwealth*, 278 S.W. 3d 615 (2009); *State v. Estabrook*, 68 Wash. App. 309, 319 (1993); *State v. Taylor*, 562 A.2D 445, 453 (R.I. 1989); *Contra Commonwealth v. Conefrey*, 410 Mass, 1, 570 N.E.2d 1384, 1390-91 (1991).

For Arizona courts, this is a case of first impression. Interestingly, without the benefit of the constitutional protections guaranteed crime victims here in Arizona, these jurisdictions – both state and federal -- have crafted victim accommodations for both child and adult crime victims that have stood the test of appellate review for over two decades and demonstrate that balancing the rights of the accused and the victim is not a zero sum game.

Crime victims in Arizona have a constitutional right to be free from intimidation as well as a right to be treated with dignity and respect. Ariz. Const., Art. II, Sec. 2.1 (A). In this case, the State of Arizona, on behalf of three crime victims, requested the trial court to order the pro per Defendant from personally cross examining the victims. The Defendant has appointed advisory counsel. In this instance, under these facts, the constitutional rights of both can be protected. The trial court erred by denying the State's request for victim accommodations limiting the pro per defendant from directly cross examining his own victims.

In an twist of irony, after denying the State's accommodation motion, the Trial Court informed the Defendant that should he decide to take the stand and testify, his advisory counsel must ask the Defendant questions that the Defendant prepares in advance – the same accommodation that the young crime victims requested but was denied. *See* State's Appendix A at 34. Such a denial violates the constitutional rights of the crime victims to be free from intimidation as well as their right to be treated with dignity and respect.

As stated by the United States Court of Appeals in *Fields v. Murray*:

> The trial court refused to allow such personal cross examination, offering instead that Fields could write out questions that he wished to ask the girls and have them read by a lawyer. *Because the trial court was not required to allow such personal cross examination, Fields was denied nothing to which he was entitled.*

Fields at 1034.

Pro per Defendant Chris Simcox certainly enjoys the right to self-representation however, the constitution does not entitle him to have direct control and contact with his own child victims at trial. *He is simply not entitled.* The State respectfully requests this Court to reverse the trial court's order denying the State's request to preclude the defendant from personally cross examining his victim.

ISSUE

THE TRIAL COURT ERRED WHEN, IN A SEXUAL CONDUCT CASE IT FAILED TO PROTECT THE CONSTITUTIONAL RIGHTS OF THE CHILD CRIME VICTIMS TO BE FREE FROM INTIMIDATION AS WELL AS THEIR RIGHT TO BE TREATED WITH DIGNITY AND RESPECT BY DENYING THE STATE'S REQUEST FOR AN ORDER PROHIBITING A PRO PER DEFENDANT FROM PERSONALLY CROSS EXAMINING HIS CRIME VICTIMS.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear and determine petitions for special action pursuant to Arizona Revised Statutes ("A.R.S.") § 12-120.21. A.R.S. § 13-4437(A) provides: "[t]he victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying a right guaranteed to victims under the victims' bill of rights, Article 2, section 2,1, Constitution of Arizona, any implementing legislation or court rules." *See also* Rule 2(a)(2), Arizona Rules of Procedure for Special Actions. JD and ZS are victims pursuant to Article 2, Section 2.1(C) and A.R.S. § 13-4401 and § 13-4437. EM is a 404 (c) victim and is seven years old. "At the request of the victim,

the prosecutor may assert any right to which the victim is entitled." A.R.S. §13-4437 (C).

The Crime Victims' constitutional right to be treated with fairness, respect, and dignity, and their right to be free from intimidation, harassment, or abuse has been violated by the trial court's order allowing the Defendant to personally cross-examine the Crime Victim – even though advisory counsel is available to sit next to the Defendant at counsel table and question the victims as directed by the Defendant. Thus, the State has standing to bring this special action for the constitutional violation of these rights.

This Court has jurisdiction for this special action because there is no other remedy available by appeal. *State v. Dairman*, 208 Ariz. 484, 486, 95 P.3d 548, 550 (2004), *citing State ex rel. Gonzalez v. Superior Court,* 184 Ariz. 103, 104, 907 P.2d 72, 73 (App. 1995) (stating that special action jurisdiction is appropriate if there is no adequate remedy by appeal and the case will guide the trial court's interpretation of a statute); *see also State ex rel. Romley v. Sheldon,* 198 Ariz. 109, 110, ¶ 2, 7 P.3d 118, 119 (App. 2000) (accepting jurisdiction where the legal issue is likely to recur and where the state would have no remedy by appeal of trial court's ruling).

It is also appropriate for the Court of Appeals to accept jurisdiction for either of two reasons: 1) the issue presented by the Petitioner is one of first impression,

involves a purely legal question, is of statewide importance, and is likely to arise again, *Blake v. Schwartz*, 202 Ariz. 120, 42 P.3d 6, 8 (Ariz. 2002); and 2) the Crime Victims have no plain, speedy or adequate remedy by appeal and justice cannot be obtained by other means. *See* Ariz. R. Spec. Act. 1(a); *State ex rel. Romley v. Fields*, 201 Ariz. 321, 323, 35 P.3d 82, 84 (App. 2001).

In this case, the standard of review is *de novo*. *See Norgord v. State ex rel. Berning*, 201 Ariz. 228, 33 P.3d 1166 (App. 2001); *Hobson v. Mid-Century Ins. Co.*, 199 Ariz. 525, 19 P.3d 1241 (App. 2001).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

CR 2013-428563:

Trial is scheduled to begin with jury selection on Tuesday, April 7, 2015. State's Appendix A. Immediately, upon receiving the trial court's ruling, the State requested a stay so that the State could confer with the Victims and seek appellate review in the form of a Petition for Special Action. The trial court denied the stay giving the State *less than one day* to file – much less schedule a stay hearing. State's Appendix A.

Defendant is presently charged with three counts of Sexual Conduct with a Minor, a class 2 felony; two counts of Child Molestation, a class 2 felony; and one count of Furnishing Harmful Items to Minors, a class 4 felony. The Trial Court granted the State's request to introduce evidence of Defendant's sexual

conduct with other victims involving similar offenses, under similar circumstances. A brief summary of the victimization of the charged and 404(C) victim follows.

CHARGED VICTIMS

J.D.

J.D. is just under nine years old. J.D. was between the age of four and five when she was victimized. J.D. is the friend of Z.S., Defendant's daughter. J.D. disclosed that when would go to Defendant's home to play with Defendant's daughters. Defendant confronted her in the kitchen, put his hands inside her clothing, and rubbed her vagina in a masturbatory fashion.

Z .S.

Z.S. is eight years old. Z.S. was victimized between the age of five and six years of age. Z.S. is Defendant's daughter. Z.S. disclosed that throughout her young life, Defendant would find ways to touch her vagina or butt. On one occasion, Defendant snuck up on her as she was getting out of the shower and penetrated her vagina with his finger. On another occasion, Defendant threw sand inside her pants and, with his hand still inside her clothing, he touched her vagina. On a different occasion, Defendant inserted his finger up Z.S.'s anus while she lay in bed at night.

404 (C) VICTIM:E.M.

E.M., seven years old, is a friend of Z.S., Defendant's daughter. E.M. disclosed that she went to Defendant's house to play with Defendant's daughters, but the daughters were not home. Defendant then invited E.M. into the home. They went together to Z.S.'s bedroom, at which point Defendant asked E.M. to show him her underwear. She complied. Defendant then offered her candy in exchange for showing him her vagina, which she did.

ARGUMENT

PROHIBITING A PRO PER DEFENDANT FROM PERSONALLY CROSS EXAMINING HIS CRIME VICTIM IN ORDER TO PROTECT HER CONSTITUTIONAL RIGHTS TO BE FREE FROM INTIMIDATION AND HARASSMENT DOES NOT VIOLATE A DEFENDANT'S RIGHT TO SELF REPRESENTATION.

In this case, the Defendant is representing himself. State's Appendix C. Advisory counsel has been appointed to assist the Defendant and continues to assist. *Id*. The Sixth Amendment of the United States gives defendants the right to self-representation at trial. *Faretta v. California*, 422 U.S. 806, 819-20, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975). The United States Supreme Court has explained that the nature, extent and purpose of the right to self-representation means that a defendant must be able to:

> …[C]ontrol 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 jury at appropriate points in the trial… [However], [t]he right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible

> defense. *Both of these objectives can be accomplished without categorically silencing standby counsel…[W]hether the defendant had a fair chance to present his case his own way…[and t]he specific rights to make his voice heard…form the core of a defendant's self-representation.*

McKaskle v. Wiggins, 465 U.S. 168, 174, 176-77, 104 S.Ct. 944, 949, 950 (1984) (punctuation taken from *Partin v. Commonwealth*, 168 S.W.3d 23, 27 (KY 2005) (quoting *McKaskle*) (emphasis added)).

The Supreme Court emphasized that it *rejected* the Fifth Circuit's holding that stand by counsel "is to be seen and not heard." *McKaskle* at 173. The Supreme Court stated:

> After exhausting direct appellate and state habeas review Wiggins filed a petition for federal habeas corpus relief. He argued that standby counsel's conduct deprived him of his right to present his own defense, as guaranteed by *Faretta.* The District Court denied the habeas petition, but the Court of Appeals for the Fifth Circuit reversed. *Wiggins v. Estelle*, 681 F.2d 266, *rehearing denied*, 691 F.2d 213 (CA5 1982). The Court of Appeals held that Wiggins' Sixth Amendment right of self-representation was violated by the unsolicited participation of overzealous standby counsel:
>
> > 'The rule that we establish today is that court-appointed standby counsel is 'to be seen, but not heard.' By this we mean that he is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only, to be used or not used as the defendant sees fit.'
>
> *Id.*, 681 F.2d, at 273 (footnote omitted).
>
> *We do not accept the Court of Appeals' rule, and reverse its judgment.*
> …
>
> [3] I*n our view, both Faretta 's logic and its citation of the Dougherty case indicate that no absolute bar on standby counsel's unsolicited*

> *participation is appropriate or was intended. The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. Both of these objectives can be achieved without categorically silencing standby counsel.*
>
> [4] In determining whether a defendant's *Faretta* rights have been respected, *the primary focus must be on whether the defendant had a fair chance to present his case in his own way. Faretta* itself dealt with the defendant's affirmative right to participate, not with the limits on standby counsel's additional involvement. *The specific rights to make his voice heard that Wiggins was plainly accorded, see supra, at p. 949, form the core of a defendant's right of self-representation.*
>
> …
>
> FN7. *A pro se defendant must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses*, from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense, from the plural voices speaking "for the defense" in a trial of more than one defendant, or from an amicus counsel appointed to assist the court, see *Brown v. United States*, 105 U.S.App.D.C. 77, 83, 264 F.2d 363, 369 (CADC 1959) (Judge Burger, concurring in part).
>
> …

McKaskle, 173 – 178.

Faretta and *McKaskle* make it clear that the defendant's right of self-representation is not absolute and can be modified to the individual defendant. "[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct…The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."

Faretta, 422 U.S. at 834. Thus, the Defendant's Sixth Amendment right to self-representation, including cross examination of witnesses, is not absolute and does not mean that the defendant himself has a constitutional right to cross examine a particular witness.

The Defendant's constitutional right to self-representation will not be violated by prohibiting the Defendant from personally cross examining his victims. Case law has upheld various procedures including requiring advisory counsel to conduct the cross-examination of the Crime Victim. *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995); *Partin v. Commonwealth*, 168 S.W.3d 23 (KY 2005).

In *Fields*, the defendant was accused of a sexual abuse charges against his daughter and her friends. The defendant did not represent himself in the case because he did not clearly waive his right to counsel. Although *Fields* was decided as part of an appeal from a denial of the defendant's right to self-representation, the Fourth Circuit, *en banc*, discussed whether the defendant could have even questioned the crime victims had he been given the right to represent himself:

> Fields' self-representation right could have been properly restricted by preventing him from cross-examining personally some of the witnesses against him, which is one "element" of the self-representation right, if, first, the purposes of the self-representation right would have been otherwise assured and, second, the denial of such personal cross-examination was necessary to further an *important public policy*.

Fields, 49 F.3d at 1035.

It is important to note that in *Fields*, the trial court, apparently sua sponte, informed Fields that he would not be permitted to personally cross-examine the young girls who were witnesses against him. *Fields* at 1027. The trial court did not require the young girls to testify prior to trial in any sort of evidentiary hearing to testify as to their fear. Counselors were not summoned and, if the girls were indeed in counseling, their right to privacy remained intact. The trial court and later the Fourth Circuit recognized that *a pro per defendant is not entitled to personally cross examine his own victims.*

The Supreme Court of Kentucky followed the reasoning in *McKaskle* and held that requiring advisory counsel to actually pose the questions to the crime victim was not an abuse of discretion and did not violate the defendant's Sixth Amendment right to self-representation. *Id.* at 29. In *Partin*, the trial court denied the defendant the right to personally conduct the cross-examination of the adult victims and instead, ordered that advisory counsel pose the questions prepared by the defendant. *Id.* at 26. The *Partin* court entered the order based on an *ex parte* letter from a victim advocate stating that the victim was afraid of and had been threatened by the defendant. *Id.*

In *Partin*, the Supreme Court in Kentucky analyzed *Faretta, McKaskle, Fields, Estabrook* and *Taylor* stating in part:

> In *Fields v. Murray*, 49 F. 3d 1024 (4th Cir. 1995), a majority of the en banc United States Court of Appeals for the Fourth Circuit held that

the trial court did not err in refusing to allow the defendant to personally cross examine the victims who testified against him in his trial on child sexual abuse charges. Instead, the trial court permitted standby counsel to conduct the cross-examination and to ask questions written by the defendant. The Fourth Circuit likened this partial restriction on the right of self-representation to the partial restriction on the right of confrontation approved in *Maryland v. Craig*, 497 U.S. 836, 857, 110 S.Ct. 3157, 3170, 111 L.Ed.2d 666 (1990) …; and held that the defendant's right to personally cross-examine the witnesses against him could be restricted if the purposes of self-representation would have been 'otherwise assured,' and if denial of personal cross-examination was necessary to further an important public policy. Fields, 49 F. 3d at 1035.

> [W]hile Fields' ability to present his chosen defense may have been reduced slightly by not being allowed personally to cross-examine the girls, it would have been otherwise assured because he could have personally presented his defense in every other portion of the trial and could even have controlled the cross examination by specifying the questions to be asked. As a result, we are convinced that the purposes of the self-representation right were better "otherwise assured" here, despite the denial of personal cross-examination, than was the purpose of the Confrontation Clause right in Craig when the defendant was denied face-to-face confrontation with the witnesses.

Id. at 1035-36.

In *State v. Estabrook,* 68 Wash. App. 309, 842 P.2d 1001 (1993), the defendant had no standby counsel, and the trial judge read the defendant's questions to the victim. Applying the *McKaskle* test, the court concluded that the procedure did not violate the defendant's right of self-representation.

> First, it appears that Estabrook was permitted to maintain 'actual control over the case he [chose] to present to the jury.' He prepared the questions asked of J.H. He had the opportunity to ask follow up questions. Furthermore,

> the judge was persistent in asking Estabrook's questions, rephrasing questions and obtaining answers when J.H. initially did not understand certain questions. Secondly, the procedure followed did not 'destroy the jury's perception that [Estabrook was] representing himself.' The court carefully explained to the jury several times that Estabrook was representing himself, and indeed, that was the reason why the judge was asking the questions prepared by the defendant. After reviewing the entire record before this court, we are satisfied that Estabrook had a fair chance to present his case in his own way and make his voice heard.
>
> *Id.* at 1006. *See also State v. Taylor*, 562 A.2d 445, 453 (R.I. 1989) (defendant was properly denied right to personally cross examine victim upon a finding that such a cross examination would harm victim.)

Partin, 27-28.

In the instant case, the Victims have submitted individual detailed letters outlining the emotional impact their children would suffer should the Defendant have personally cross examine them. The trial court seemed to indicate but does not actually hold that in order to permit any victim accommodation preventing the Defendant from personally cross examining the victims, there must be an evidentiary hearing akin to the procedure approved in *Maryland v. Craig*, 497 U.S. 836, 857, 100 S.Ct. 3157, 3170, 111 L.Ed.2d 666 91990). State's Appendix A. *To the contrary, neither Fields nor Partin holds that such an evidentiary hearing is necessary:*

We agree with the conclusion reached by the Fourth Circuit in Fields that the failure to hold a Craig-type evidentiary hearing on this issue did not violate the Appellant's rights.

> It is far less difficult to conclude that a child of sexual abuse will be emotionally harmed by being personally cross-examined by her alleged abuser than by being required to merely testify in his presence. Further, the right denied here, that of cross-examining witnesses personally, lacks the fundamental importance of the right denied in *Craig*, that of confronting adverse witnesses face-to-face. As a result, we do not believe it was essential in this case that psychological evidence of probable harm to each of the girls be presented in order for the trial court to find that denying Fields personal cross-examination was necessary to protect them.

Fields, 49 F.3d at 1036 – 37.

Cross examination can be used to attack the human components of the prosecution's case-in-chief through intimidation. In certain cases, the intimidation of the witness during cross examination and the tactical advantage gained by it may exceed what the Constitution and fundamental fairness in the adversarial process require. William F. Lane, Note, *Explicit Limitations on the Implicit Right of Self-Representation in Child Sexual Abuse Trials: Fields v. Murray*, 74 N.C. L.Rev.863, 894 (March 1996). Furthermore, KRE 611 (a) provides that a trial court 'shall exercise reasonable control over the mode … of interrogating witnesses … so as to … protect witnesses from harassment or undue embarrassment.' In the context of the Confrontation Clause claim, the United States Supreme Court has held that 'trial judges retain wide latitude … to impose reasonable limits on such cross examination based on concerns about, among other

> things, harassment, prejudice, confusion of the issues, the witness' safety ….' *Delaware v. Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 ….

Partin at 29 (emphasis added).

This Court should follow the reasoning in *McKaskle*, *Fields* and *Partin* and reverse the Trial Court's order denying the State's request to prohibit the Defendant from personally cross examining the crime victims.

PERMITTING THE DEFENDANT TO CROSS-EXAMINE THE CRIME VICTIMS WILL NECESSARILY SUBJECT THEM TO INTIMIDATION, HARASSMENT, OR ABUSE IN VIOLATION OF THE ARIZONA CONSTITUTION.

In Arizona, crime victims have the constitutional right to be free from intimidation and harassment as well as the right to be treated with dignity and respect. Ariz. Const. Art. II, Section 2.1 (A) ("To preserve and protect victims' rights to justice and due process, a victim of crime has the right: 1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment or abuse, throughout the criminal justice process.").

Acting as his own attorney, the Defendant intends to personally cross examine his own victims at trial – a decision that violates the Crime Victims' constitutional rights under Arizona law. Noted trauma expert Judith L. Herman, M.D., author of *Trauma and Recovery*, while describing the devastating impact of the trial process on survivors of sexual assault and domestic violence stated: "If one set out by

design to devise a system for provoking intrusive post-traumatic symptoms, one could not do a better job than a court of law." *Id*. at 72 (1992).

Dr. Herman was describing the experience of crime victims testifying at the trial with a defendant being represented by counsel. The defense counsel buffer is not present for the three child victims in this case – all under ten years old. Surely, the constitutional right to be free from intimidation means, at a minimum, that a crime victim ought to be free from the control of the defendant – sanctioned by the court -- in a setting promising justice for all.

In 1992, the Arizona Supreme Court issued its first published opinion involving the application of the recently-enacted Victims' Bill of Rights. The Court stated:

> It is important to emphasize that Arizona courts must follow and apply the plain language of this new amendment to our constitution. If trial courts are permitted to make ad hoc exceptions to the constitutional rule based upon the perceived exigencies of each case, the harm the Victims' Bill of Rights was designed to ameliorate will, instead, be increased. … Such proceedings can only increase the harassment of victims that the Victims' Bill of Rights was designed to decrease.

Knapp v. Martone, 170 Ariz. 237, 239 (1992).

The Arizona State Constitution explicitly provides, "[A] crime victim has a right [t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal process." Ariz. Const.

§ 2.1 (A) (1). Additionally, ARS §13-4431 mandates that the Trial Court shall provide appropriate safeguards to minimize contact between victims and the Defendant. Ironically, if a defendant started to talk directly to a victim during any other proceeding, the Court would put a stop to such communication.

This Constitutional right clearly anticipates both 1) that the victim will be a participant in the criminal justice process and 2) that the process can be extremely difficult for a victim to endure – even more so when a young child must testify. As such, the enumerated rights provide accommodations to the victim. Victims are not seeking to escape the emotional difficulty of trial, but rather persevere through the often tumultuous process in order to see justice served. This distinction is critical in cases such as the instant case, where the victim is not seeking to trump defendant's constitutional rights, but rather is seeking to participate in the criminal justice process without having to subject herself to the direct control of the defendant for a second time. Notably, there are no exceptions or carve outs to the victim's constitutional protection. The Victim's Bill of Rights provides victims with constitutional guarantees designed to prevent the system from inflicting the worst of its painful process on crime victims that are just beginning to heal from the crime itself.

Because subjecting crime victims – especially young children under ten years old -- to personal cross examination by the individual charged with harming

them is an affront to their right to fairness, dignity, and respect as well as their constitutional right to be free from intimidation, the Victims' Bill of Rights constitutes an important state interest that justifies preventing the Defendant from directly cross-examining the victim.

The Trial Court's order disregards the integrity of the Crime Victims' constitutional right to be treated with fairness, dignity, and to be free from intimidation, harassment and abuse because it seems to assume that no remedy can occur until *after* the victim's rights have been violated – if at all. Such a view is incorrect and gives undue and complete trumping power to the defendant's rights when there is case law to the contrary as well as zero weight given to the victims' rights.

Case law on point from the 4th Circuit, as well as the Kentucky Supreme Court and others, show that the balancing of rights can be accomplished, without making the constitutional rights of victims into mere paper promises.

CONCLUSION

Given the child victims' right to be free from intimidation, harassment, or abuse, the State respectfully requests this court to reverse the trial court's ruling and order the trial court to prohibit the Defendant from personally cross examining the children in this case. The State has demonstrated to this Court as well as the Trial Court avenues by which the Defendant's federal rights to due process and

effective cross examination can be upheld while still giving effect to the Crime Victim's state constitutional rights.

RESPECTFULLY SUBMITTED this 3rd day of April, 2015.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY:/s/
Keli Luther
Deputy County Attorney

APPENDIX L

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

Keli B. Luther
Deputy County Attorney
Bar ID #: 021908
Firm ID # 00032000
301 West Jefferson
Phoenix, AZ 85003
Telephone: 602 506-7422
MCAOEXEC@mcao.maricopa.gov
Attorneys for Petitioner

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney,

Petitioner,

v.

THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

CHRIS A. SIMCOX, aka CHRISTOPHER ALLEN SIMCOX,

Real Party in Interest.

No. 1 CA-SA _____

Maricopa County
Superior Court
No. CR2013-428563-001 DT

PETITION FOR SPECIAL ACTION—REQUEST FOR STAY

Christopher Allen Simcox ("Defendant") is charged with three counts of Sexual Conduct with a Minor, class 2 felonies; two counts of Child Molestation, class 2 felonies; and one count of Furnishing Harmful Items to Minors, a class 4 felony. His victims are presently between eight and nine years old. On February 12, 2015, Defendant filed a motion to represent himself, which was granted by the trial court. Advisory counsel was appointed to assist Defendant with his defense. On March 6, 2015, the State filed a Motion for Victim Trial Accommodations, requesting that the trial court order advisory counsel to conduct the cross-examinations of the child victims in order to protect the victims' and Defendant's constitutional rights simultaneously. Respondent Judge denied the State's motion immediately after oral argument on April 2, 2015. The State requested a stay of the trial court's order directly after Respondent Judge ruled from the bench. The Defendant took no position on the State's stay request. The trial court denied the State's request for stay and set jury selection to begin on Tuesday, April 7, 2015. Without a stay from this Court, the child victim's constitutional rights will be forever violated without the opportunity to seek appellate review as guaranteed to the Victims pursuant to ARS §13-4436. The issue will be moot.

The State of Arizona, asks this Court to stay the trial court's order, which denied the State's Request for Victim Trial Accommodations. The State further moves for a stay of all trial proceedings since trial in this case is set to commence

on April 7, 2015. By ordering that the child victims be subject to cross-examination directly by Defendant himself, the Court's order violates the victims' constitutional rights to protection, dignity, and to be free from harassment and intimidation.

A request for a stay made in conjunction with special action proceedings should be evaluated based on the traditional criteria for the issuance of preliminary injunctions, which are: "(1) a strong likelihood of success on the merits; (2) irreparable harm if the stay is not granted; (3) that the harm to the requesting party outweighs the harm to the party opposing the stay; and (4) that public policy favors the granting of the stay." *Smith v. Az Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410-11, 132 P.2d 1187, 1190-91 (2006). In evaluating these factors, the Arizona Supreme Court has held that the analysis is based on a sliding scale and not on counting the factors:

> Rather, the moving party may establish either (1) probable success on the merits and the possibility of irreparable harm; or (2) the presence of serious questions and [that] the balance of hardships tip[s] sharply in favor of the moving party.

The risk of irreparable harm is the cornerstone of the analysis: "The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be." *Id.* In this case, the State's Petition for Special Action has a strong likelihood of success on the merits. And, there is the very real risk of

irreparable harm. Special action jurisdiction is particularly appropriate on this issue where, as here, the rights of the child victims will be lost if special action jurisdiction is not available. *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 485, ¶ 2, 95 P.3d 548, 549 (App. 2004).

Children who are victims of sexual abuse already re-experience that abuse when they are forced to testify in a courtroom in the presence of the accused. The trial court's order inappropriately subjects the victims in this case to additional trauma by allowing the very man who victimized them to question them on the stand. This issue undoubtedly raises a question of public importance. The harm to the victims and society can only be stopped by preventing Defendant from personally cross-examining the victims and allowing advisory counsel to conduct the cross-examinations – a remedy recognized by several jurisdictions including the United States Court of Appeals in *Fields v. Murray*. *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995).

Without this Court's intervention, the children in this case will be ordered to endure the Defendant's direct cross examination without the buffer of defense counsel. The State of Arizona has a strong public interest in protecting the rights of child abuse victims. A stay prior to trial is necessary to prevent that harm. The Rule 8 time will not continue running while the stay is in effect. The time during which the superior court proceedings are stayed pending the determination of a

special action is excludable time under Rule 8. *See State v. Steele,* 23 Ariz. App. 73, 76, 530 P.2d 919, 922 (1975); *State v. Edwards*, 122 Ariz. 206, 213, 594 P.2d 72, 79 (1979), *rev'd on other grounds,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1980).

There is no published Arizona decision on this issue. This is another important criterion evaluated in the whether this Court will accept jurisdiction of the State's special action in this case. *See Arizona Board of Medical Examiners v. Superior Court In and For Maricopa County,* 186 Ariz. 360, 361, 922 P.2d 924, 925 (App. 1996) (fact that matter was one of "first impression" was important consideration in accepting special action review); *Jones v. Buchanan*, 177 Ariz. 410, 411, 868 P.2d 993, 994 (App. 1993) (among reasons for accepting special jurisdiction was "the absence of any appellate decisions on the amendments [to the rules of procedure]").

The balance of harm tips sharply toward the State's position to protect the child victims. This is an issue that is important enough to take the time to seek appellate review.

For the above reasons, the State asks this Court to stay the trial court's order and all proceedings below, pending special action review by this Court.

Submitted April 3, 2015.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY:/s/
Keli Luther
Deputy County Attorney

APPENDIX M

IN THE

Court of Appeals

STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 04/06/2015
RUTH A. WILLINGHAM, CLERK
BY: JT

STATE OF ARIZONA ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney,	)	Court of Appeals Division One No. 1 CA-SA 15-0087
Petitioner,	)	Maricopa County Superior Court No. CR2013-428563-001
v.	)	
THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,	)	
Respondent Judge,	)	
CHRIS SIMCOX, a.k.a. CHRISTOPHER ALLEN SIMCOX,	)	
Real Party in Interest.	)	**ORDER SETTING DATES, DIRECTING ELECTRONIC OR ALTERNATIVE SERVICE and FIXING TIME FOR RESPONSE**

A petition in a special action having been filed,

IT IS ORDERED that said petition will be considered at conference, or oral argument, during the MORNING of April 29, 2015, before Department C:

Margaret H Downie, Presiding Judge
Patricia K Norris, Judge
Randall M Howe, Judge

IT IS FURTHER ORDERED that any response or objection to the relief requested in the petition, shall be filed and served within seven business days after service of the petition upon the respondent, unless the court, prior thereto, declines to accept jurisdiction without requiring a response. If a response is filed, petitioner may file and electronically deliver a reply, but must do so within five business days after the response is filed with the court. **Any reply is to be filed with the court by 1:00 p.m. on the date it is due.** After the time for filing a response has expired, the parties will be notified if the court has scheduled oral argument. The parties will not receive notification if the court elects to forgo oral argument.

IT IS FURTHER ORDERED that in the event a stay has been requested, Petitioner or Petitioner's counsel must contact the office of Presiding Judge Margaret H. Downie at (602) 542-1478 to arrange a time for the stay motion to be heard.

NOTICE TO RESPONDENTS: In order to avoid scheduling conflicts that might arise because of the time limitations contained in this order, Division One of the Court of Appeals will not entertain cross-petitions in this special action. In the event respondents seek affirmative relief from the order that is the subject matter of the petition for special action, respondents are directed to file a separate special action and seek consolidation with this pending matter.

Regularly updated information about the status of this case may be viewed by visiting http://azcourts.gov/coa1/Home.aspx and clicking on "Case Status" from the menu. A summary of Division One's policies may be viewed by clicking on the "Court Policies" link on the home page menu under "About the Court".

NOTICE TO FILERS: Arizona Supreme Court Administrative Order 2012-2 requires all attorneys to utilize electronic filing via AZTurboCourt when filing in the Court of Appeals. If you are not bound by this requirement, all documents filed in a special action shall comply with ARCAP 4 - Filing and Service. Nothing herein requires that the Respondent Judge be served by e-mail.

Ruth A. Willingham, Clerk

A true copy of the foregoing
order was sent April 6th, 2015, to:

Chris A Simcox (Mailed)
Keli B Luther
Robert S Shipman
Sheena Singh Chawla
Hon Jose S Padilla
Hon Jose S Padilla

APPENDIX N

SUPREME COURT OF ARIZONA

M.A. AS MOTHER OF J.D.,	)	Arizona Supreme Court
	)	No. CV-15-0110-SA
Petitioner,	)	
	)	Court of Appeals
v.	)	Division One
	)	No. 1 CA-SA 15-0087
HON. JOSE PADILLA, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,	)	Maricopa County Superior Court No. CR2013-428563-001
Respondent Judge,	)	
STATE OF ARIZONA, CHRIS A. SIMCOX, aka CHRISTOPHER ALLEN SIMCOX,	)	
Real Parties in Interest.	)	
	)	**FILED 04/09/2015**

ORDER GRANTING STAY

Petitioner having filed an "Emergency Petition for Special Action—Request for Stay," and upon consideration of the available record and after telephonic conference with all parties on April 9, 2015,

IT IS ORDERED accepting jurisdiction for the sole purpose of granting the request for stay of the underlying superior court proceedings, pending a determination of the special action pending in the Court of Appeals, case no. 1 CA-SA 15-0087.

The stay shall take effect either immediately or upon completion of the ongoing jury selection process in superior court, with that determination to be made by the trial court in consultation with the

parties. The stay shall remain in effect until the Court of Appeals has ruled on the petition for special action pending in that court, on which briefing has been ordered and oral argument set for April 29, 2015. Any party wishing to extend the stay following the ruling of the Court of Appeals shall file a renewed request at that time.

DATED this 9th day of April, 2015.

_____
JOHN PELANDER
Duty Justice

TO:
John D Wilenchik
Hon. Jose S Padilla
Jairo Torres
Robert S Shipman
Sheena Singh Chawla
Chris A Simcox, P982577, Maricopa County Jail, Lower Buckeye
William G Montgomery
Keli B Luther
Ruth Willingham
Michael K Jeanes

APPENDIX O

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
05/15/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-428563-001 DT 05/11/2015

HONORABLE JOSE S. PADILLA

CLERK OF THE COURT
A. Beery
Deputy

STATE OF ARIZONA

YIGAEL COHEN

v.

CHRIS ALLEN SIMCOX (001)

CHRIS ALLEN SIMCOX
#P982577
MCSO INMATE MAIL
-- -- 00000
SHEENA CHAWLA
ROBERT S SHIPMAN
JOHN DOUGLAS WILENCHIK
COLLEEN CLASE

INMATE LEGAL SERVICES

MINUTE ENTRY

Courtroom CCB 1101

10:22 a.m.

State's Attorney:	Katie Staab for Yigael Cohen
Defendant's Attorney:	Sheena Chawla (advisory counsel)
Defendant:	Present pro per
Court Reporter:	Hilda Lopez

This is the time set for status conference.

Discussion re: Court of Appeals ruling.

IT IS ORDERED setting trial for **July 6, 2015 at 10:30 a.m.** in this division.

IT IS FURTHER ORDERED setting hearing re: pending motions for **May 27, 2015 at 11:00 a.m.** in this division.

IT IS ORDERED excluding all time between April 9, 2015 (stay granted) and July 6, 2015 (new trial date) = 88 days.

NEW LAST DAY: 7/8/2015

IT IS ORDERED affirming prior custody orders.

10:41 a.m. Matter concludes.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

APPENDIX P

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

SUMMARY SHEET

ATTORNEY:
Robert Shipman
Bar Number: 022693, Issuing State: AZ
Office of the Legal Defender
222 North Central Avenue #8100
Phoenix, AZ 85004
Telephone Number: (602) 506-8800
Email: Cynthia.Beck@old.maricopa.gov

[X] I have been appointed by the Court to act as Advisory Counsel in this case

What Side Are You Filing For? - REAL PARTY(IES) IN INTEREST

STATE v. HON PADILLA/SIMCOX

ATTACHED DOCUMENTS LIST:
NOTICE - Other
Certificate of Service
CERTIFICATE - Compliance
Certificate of Service

Office of the Legal Defender
Robert Shipman, Bar No. 022693
Sheena Chawla, Bar No. 025966
222 North Central Avenue, Suite 8100
Phoenix, Arizona 85004
Telephone (602) 506-8800
Advisory Counsel for Appellant
old_appealsme@mail.maricopa.gov

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THE STATE OF ARIZONA, Petitioner, vs. HON. JOSE PADILLA, Judge of the Superior Court of Arizona in and for Maricopa County, Respondent/Judge, and CHRISTOPHER ALLEN SIMCOX, Real Party in Interest.	No. 1 CA-SA 15-0087 Maricopa County Superior Court No. CR 2013-428563-001DT **NOTICE OF FILING RESPONSE TO STATE'S PETITION FOR SPECIAL ACTION**

Undersigned counsel, as advisory counsel to Appellant Christopher Simcox, respectfully submits the attached pleading contained in Exhibit #1 to this Notice of Filing. Appellant Simcox wants Exhibit #1 to be considered by the court as his Response to the State's Special Action. Appellant Simcox contacted advisory

counsel and asserted that he submitted the pleading to Inmate Legal Services with the Maricopa County Sheriff's Office to be filed on Thursday, April 9, 2015. Appellant Simcox asserted that as of April 13, 2015, he had not received confirmation that the pleading was filed on his behalf. Therefore, he requested that advisory counsel file a copy in case Inmate Legal Services failed to file the pleading on his behalf as requested.

RESPECTFULLY SUBMITTED this 15th day of April, 2015.

MARTY LIEBERMAN
MARICOPA COUNTY LEGAL DEFENDER

By /s/ Robert Shipman
Robert Shipman
Deputy Legal Defender
Advisory Counsel to Real Party in Interest Simcox

Advisory Counsel
LD R. Shipman

Christopher A. SIMCOX P982577
Lower Buckeye Jail
3250 W. Lower Buckeye Rd
Phoenix, Az 85009

In the Superior Court of the State of Arizona
In and for the County of Maricopa

State plaintiff
v
Christopher A. SIMCOX Defendant

CR2013-428563-001

MOTION FOR RESPONSE TO STATES REQUEST FOR TRIAL ACCOMODATIONS

Comes now the defendant, Christopher A. SIMCOX, in propria persona, and hereby requests this court to accept response to prosecutions request to prohibit Defendant from cross-examining child witnesses at trial. Defendant asserts his right to cross-examine alleged victim witnesses with respect to no harm intended. Defendants advisory counsel should not be thrust into exposing themselves and subjected to potential for claims of ineffective assistance of counsel. Defendant asserts his full right to self-representation by the U.S. Constitution Sixth Amendment, Arizona II. Section 24.

Wherefore, Defendant respectfully requests that the Honorable Master Calendar Judge grant the relief requested.

C. Simcox

cc:

Copies to be forwarded to the following:

Arizona Superior Court Master Calendar Judge Kreamer

County Attorney Yigael Cohen
Bar ID # 009951
MCAO Firm # 00032000
301 West Jefferson, Suite 800
Phoenix, AZ 85003

Public Defender / Advisory Counsel

Robert Shipman
222 North Central Suite 8100
Phoenix, AZ 85004

C. Simon 3-18-15
signature Date

(1)

The defendant, Christopher A. Simcox, hereby submits the rebuttal response to the motion filed by Maricopa County Deputy County Attorney Yigael M. Cohen - CR2013-428563-001 DT — State's Request for certain Victim Trial Accomodations Based ON the Pro Per Status Of Defendant, filed in the Superior Court of the State of Arizona In And For The County Of Maricopa, 3-6-2015,

Due to the complexity of the issue discussed herein as well as the desire to assure judicial economy, the defendant respectfully requests permission to exceed the designated 10 page limit provision pursuant to Rule 35.1.

Memorandum of Points and Authorities

With adequate time before trial for the prosecution to prepare, the Defendant, Christopher A. Simcox has invoked his right to proceed Pro Per. The Defendant after awaiting trial for 21 months has carefully weighed the lack of evidence and after turning down an offer of plea agreement submitted by Prosecutor Cohen has instead chosen to exercise his right to self-representation guaranteed by the 6th Amendment of the U.S. Constitution and by Article II section 24 of the Arizona Constitution.

I, Chris Simcox, the defendant, have Knowingly, intelligently and voluntarily elected to exercise my Constitutionally protected right to self-representation during my trial.

I am also innocent of the spurious charges brought against me. I expect under the rights of due process to be presumed innocent until proven guilty by a jury; I expect to be treated as innocent by the court.

With eyes open I have Knowingly and intelligently chosen to forgo the perceived benefits of a lead attorney because of my innocence and because I feel that I can present my best case defense. A fundamental aspect of my best defense relies on my right to confront my accusers. The counsel clause of the Sixth Amendment implies the right of defendant to conduct his own defense with assistance at his trial. Pro se defendants must be allowed to control 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 court and jury at appropriate points in trial.

(3)

In Prosecutor Cohen's motion he states "the Defendant fully intends to utilize the same tools he used to commit his crimes - power and control... this Court and the State cannot stand by and permit such a constitutional violation especially under the facts and circumstances of this case".

In Mr. Cohen's conflated statements of opinion, not fact, he claims he magically knows that the Defendant intends to inflict pain, harrasment and control to harm the alleged victim witnesses, who were never subjected to such harm in the first place. Prosecutor Cohen has already made claims that defendant stands guilty of such repugnant behaviors and is asking the court to find defendant guilty of such behaviors before the trial has even begun. Mr. Cohen, in his motion for special accomodations makes the accusation that the Defendant is guilty of threatening the alleged victims merely by his presence in the courtroom and that he has planned with pemeditation to intimidate the witnesses and assert power and control over them during cross-examination. Defendant considers these accusations akin to premature adjudication and a prejudicial violation of the right to be considered innocent

(4)

until proven guilty.

Citing from Partin V. Commonwealth of Kentucky

Keller, Justice, dissenting.

I respectfully dissent because the trial court clearly violated Appellant's Sixth Amendment right to self-representation by prohibiting him from personally cross-examining the victims.

Time and again, courts, including this Court have honored the right of an accused to defend him or herself and to question witnesses as guaranteed by the Sixth Amendment.[FN2] Although "[t]he right of self-representation is not a license to abuse the dignity of the courtroom" or to ignore the "relevant rules of procedural and substantive law,"[FN3] it is not a right to be taken lightly, as the trial judge may only terminate it when "a defendant ... deliberately engages in serious and obstructionist misconduct."[FN4] But here, without any evidence of disruptive, disorderly, or disrespectful behavior by Appellant, the trial court banned Appellant from cross-examining the victims due to the concerns of a victim's advocate, which were communicated ex parte to the trial court, that the victim-witnesses might be intimidated if Appellant questioned them. This was error.

FN2. See, e.g. McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d [illegible] (1973); Mason v. Mitchell, 320 F.3d 604 (6th Cir. 2003); Wake v. Barker

, 514 S.W.2d 692 (Ky. 1974) FN3 Faretta, 422 U.S. at 834, 95 S.Ct. at 2541 n. 46 FN4. Id.

As the United States Supreme Court has pointed out, in a passage that the majority opinion also quotes:

A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant *must* be allowed 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. FN5

FN5, McKaskle, 465 U.S. at 174, 104 S.Ct. at 949 (emphasis added) accord Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed 2d. 347, 353 (1974) ("Confrontation means more than being allowed to confront the witness physically.") Chambers, 410 U.S. at 295, 93 S.Ct. at 1046 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure.").

"The specific right to make his voice heard ... form[s] the core of a defendant's right of self-representation." FN6 And if only standby counsel is allowed to question witnesses, i.e., "to speak *instead* of the defendant on [a] matter of importance," the defendant's right of self-representation is eroded. FN7 In the present case, requiring standby counsel to conduct

cross-examination of the victims over Appellant's objection clearly violated this right. Appellant had no choice as to whether counsel would be helpful in cross-examining the victims, and "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." FN8

FN6. McKaskle, 465 U.S. at 177, 104 S. Ct. at 950
FN7, McKaskle, 465 U.S. at 178, 104 S. Ct. at 951
FN8, Faretta, 422 U.S. at 817, 95 S. Ct. at 2532

In his motion relating to the instant case before the court, Prosecutor Cohen states "Requiring the defendant's advisory counsel to cross-examine the victims does not violate the Defendant's constitutional rights to self-representation.

The Defendant clearly understands it is within the judges sound discretion whether to allow the Defendant to question an alleged victim witness. Furthermore, Defendant is aware that some case law has determined that a trial court shall exercise reasonable control over the mode of interrogating witnesses so as to protect witnesses from harrassment or undue embarassment.

The Defendant is cognizant of the fact that he is compelled to respect the court. It is common sense and with respect for propriety that he will follow procedures, and never use the courtroom for deliberate disruption of a trial. The Defendant maintains his innocence, has patiently waited 21 months for his trial to begin and would never engage in unwise behavior that would alienate the court or the jury.

Defendant understands the right of self-representation is not a license to abuse the dignity of the courtroom, nor is it his intention to undermine judicial economy. The Defendant inherently and intrinsically understands his responsibility and duty to the law, the court and the witnesses to restrain any obstreperous behavior during the proceedings. Defendant understands his responsibility to treat all witnesses with respect and dignity, just as the Prosecutor is responsible to restrain himself from crossing the line of Prosecutorial misconduct.

Despite Prosecutor Cohen's conflated accusations, there is no substantive evidence of any threats, intimidation or threatening, lacivious behavior towards his children, alleged victims or any other child.

Conversely, the situation is exactly the opposite. Testimony from many witnesses during this trial will prove that Defendant's relationships with all alleged victims was nurturing, friendly, respectful, appropriate and with his children, fatherly, gentle and supportive. The Defendants 15 year career as a teacher, private tutor and sports coach led to his skills with children to be lauded as above reproach by his superiors, parents and other proffesionals in the field of education.

The Defendant holds academic degrees in Early Childhood Education, Human Development and cognitive development studies, achievements that would preclude any accusations that his behavior and comportment around children to have ever been deemed threatening or intimidating.

The Defendant fully appreciates the delicate psychological state of a child's emotional well being in this stressful situation. The Defendant in no way intends to create a situation of injustice, to knowingly affect the alleged victims in a harmful manner. This, again by virtue of common sense and propriety is not at the heart of his desire to waive counsel; Defendant does feel that being allowed to cross-examine the children is a crucial cornerstone of his desire

to present his best defense.

There is no doubt testimony of the children witnesses will make the sum and substance of material facts in this trial.

Prosecutor Cohen, through his self-admitted special interest and "special relationship" with the parents of the alleged victims has a distinct and expressed advantage, having 21 months to script, coach and possibly coerce the children witnesses to "act" in a certain way and even recite the adult coach's prefered testimony to influence the jury.

The Defendant expresses concern the court, in trying to protect these children will close its eyes to Defendant's right to cross-examine the witnesses. The possible bias that a court and Prosecutor might not like the consequences flowing from his Sixth Amendment rights do not justify the court taking Defendant's request to self-represent any less seriously.

Citing from Partin v. Commonwealth of Kentucky.
The Massachusetts Supreme Court in Commonwealth v. Conefrey FN9 evaluated a trial court's similar

ban on a defendant personally cross-examining the victim and determined that a restriction based on perceived harm violated the defendant's Sixth Amendment rights. The Conefrey Court's words are equally applicable here:

FN9. 410 Mass. 1, 570 N.E.2d 1384 (1991).

The judge appears to have concluded, based on his own experience and feelings as to this trial..., that trauma and intimidation of the complainant, and possibly untruthful answers, would be the inevitable result of the defendant cross-examining the complainant..... The record contains nothing to show that the defendant intended to exploit or manipulate the right of self-representation for ulterior purposes. There is also no indication that the defendant's questioning of the complainant would harm her, that it would violate the rules of evidence and protocol which normally apply in this sort of trial, or that the complainant would not respond truthfully to his questions..." "The possibility that reasonable cooperation may be withheld, and the right later waived, is not a reason for denying the right of self representation from the start."

United States v. Dougherty, [473 F.2d 1113, 1126 (D.C. cir. 1972)].

There also can be no question that cross-examination of witnesses, in particular the principal

accuser of the defendant, is a fundamental component of the right of self-representation... The mere belief held by the judge that the complainant could be intimidated or harmed beyond the normal limits associated with a trial involving a young complainant, or that she might respond untruthfully if she was questioned by the defendant, is not sufficient to justify the restriction placed on cross-examination. FN10

FN10. Id. at 1390-91.

Prosecutor Cohen asserts that "Requiring the Defendant's advisory counsel to cross-examine the victims does not violate the Defendant's constitutional rights to self-representation".

Defendant strongly objects. Denying Defendant the ability to cross-examine witnesses personally, will deprive Defendant the right to self-representation which includes the Confrontation clause. The ability to manage and direct the examination of witness accusors reaches beyond the form of simply writing questions that advisory counsel will then read to witness. The form of questioning witnesses includes the pace, expression, style, mannerisms and sensitivity to personal knowledge as well as the situational context surrounding the alleged incident.

If advisory counsel were to be mandated it would deny defendant the right to assert his own strategy, tactics and to adjust to the fluid process that surrounds examination of a witness. This would directly violate the Arizona Constitutional right and provision protecting the right of confrontation which may be considered broader than the federal provision.

> In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel,... [and] to meet the witnesses against him face to face....
> Arizona Constitution article II section 24

Citing Partin v. Commonwealth of Kentucky.

The denial of a defendant's right to personally cross-examine the victims cannot be dismissed as harmless error on the basis that his or her appointed standby attorney effectively questioned the witnesses. This is because the harmless error analysis is inappropriate when addressing the right of self-representation: " Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." FN13

Nevertheless, "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense." FN14 since "from the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself." FN15 In this case, the "jury might have received a significantly different impression" of the victim's credibility had Appellant himself been permitted to cross-examine them. FN16 This is especially so when we consider that the victims were the key witnesses against Appellant. Thus in addition to the Constitutional infringement, the appellant may have also suffered actual harm from the trial court's denial of his Sixth Amendment right to personally cross-examine the victims.

FN13. McKaskle, 465 U.S. at 177 n. 8, 104 S.Ct. at 950; accord Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35, 46 (1999) McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) FN14 Faretta, 422 U.S. at 834, 95 S.Ct. at 2540.

FN15. McKaskle, 465 U.S. at 179, 104 S.Ct. at 951.

FN16. Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986).

Keller, Justice, dissenting.

Citing from an Amici Curiae brief submitted in the Court of Appeals of the State of Arizona Division One. State of Arizona, ex rel. William G. Montgomery, Maricopa County Attorney, V. The Honorable Edward Bassett, Judge of the Superior Court of the State of Arizona in and for the County of Maricopa, Joe Cuen, Pro Per Defendant. Brief of Amici Curiae Arizona Attorneys for Criminal Justice, Maricopa County Public Defender's Office, and Pima County Public Defender's Office in Support of Real Party in Interest

The Idaho Supreme Court, concluded that the trial court's order requiring standby counsel to question a child sex-crime victim violated the defendant's right of self-representation and right to confront witnesses. State v. Folk, 256 P.3d 735, 745-47 (Idaho 2011).

The Idaho court held, and the Superior Court in this case agreed, that, absent evidence that the witness would suffer emotional trauma that would impair his or her ability to communicate, or some indication that the defendant intended to use cross-examination to intimidate or embarass the witness, the defendant's right of self-representation and confrontation must take priority over concerns about the witness. "...Because public defenders are frequently appointed to act as advisory counsel or standby counsel in cases such as these, amici have an interest in ensuring that defendants representing themselves

at trial are not prevented from exercising their constitutional rights to confront and cross-examine witnesses and that public defenders are not placed in the precarious position of engaging in an ineffective cross-examination using someone else's questions and tactics. Argument: If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.

The defendant's ability to control examination of witnesses extends beyond the formulation of the questions to the pace and expressions of the examiner. Advisory counsel conducting a cross-examination, even with questions supplied by the deferdant, would necessarily conduct himself according to his own strategy and tactics, rather than those of the defendant who is supposed to be controlling the direction of the case. This result violates the U.S. and Arizona Constitutions.

"...The right to confront witnesses means more than simply being able to physically confront witnesses in the courtroom; confrontation also includes as its 'main and essential purpose' the ability to effectively cross-examine witnesses. State ex rel. Romley v. Super. Ct. 172 Ariz. 232, 240, 836 P 2d 455, 453 App. 1992)

Thus, Pro se defendants have the right to conduct their own cross-examinations, and "[r]equiring Defendant to write out questions to be asked by someone else in order to cross-examine [a witness] is a significant impairment of the right of confrontation." Falk, 256 P.3d at 745; see also Commonwealth v. Conefrey, 570 NE.2d 1384, 1389 (Mass. 1991) (standby counsel appointed to cross-examine child witness noted "that he could no adjust his questions quickly enough to respond to the complainant's answers without constantly conferring with the defendant;)

Prosecutor Cohen states: "Based on the traditional role of advisory counsel, it is anticipated that Defendant's advisory counsel will conducted (sic) numerous duties on behalf of the Defendant before and during trial. Under such a rubric, advisory counsel, upon direction of the Defendant, may question the children - asking questions written or orally requested from the Defendant."

This not true. Adviory counsel assigned to Defendant is prohibited from doing anything for the Defendant other than answering questions. The advisory counsel are strictly advisory, they cannot even conduct research on behalf of Defendant. According to James Logan, Director Maricopa County Office of Public Defense Services: "My (offices) functions as

I understand it is to remain passive throughout the entire trial, to take no affirmative actions whatsoever, I (nor officers) am not his research assistant. I'm not his paralegal. I'm not his investigator. I am simply here essentially in the event he changes his mind and wants me to proceed as counsel of record. ... if I see what I consider to be horrible blunders being made, it is not my job to intercede and stop those blunders. If I see objectionable things happening, it is not my job to object, it is my job to assume that (he) is doing everything in this courtroom for a reason, just as if he were the attorney of record."

If advisory counsel were to be forced into the role of questioning the witnesses they would be subjected to potential for claims of ineffective assistance of counsel. Advisory counsel should not be exposed to claims of ineffective assistance of counsel.

Conclusion

Defendant asks court to deny prosecutions request for special accomodations and should uphold Defendants U.S. and Arizona Constitutional right to cross-examine all witnesses. Any defense presented minus the right to respectfully cross-examine all witnesses will erode Defendants ability to

present his best defense. The right to proceed pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of his constitutionally guaranteed right of best defense.

Respectfully Submitted March 18, 2015

Christopher A. Simcox
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By: CA Simcox

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THE STATE OF ARIZONA, Petitioner, vs. HON. JOSE PADILLA, Judge of the Superior Court of Arizona in and for Maricopa County, Respondent/Judge, and CHRISTOPHER ALLEN SIMCOX, Real Party in Interest.	No. 1 CA-SA 15-0087 Maricopa County Superior Court No. CR 2013-428563-001DT **CERTIFICATE OF SERVICE**

COPIES of Notice of Filing Response to State's Petition for Special Action, with attachments, were mailed/e-mailed this 15th day of **April, 2015**, to:

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RESPECTFULLY SUBMITTED this 15th day of April, 2015.

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THE STATE OF ARIZONA, Petitioner, vs. HON. JOSE PADILLA, Judge of the Superior Court of Arizona in and for Maricopa County, Respondent/Judge, and CHRISTOPHER ALLEN SIMCOX, Real Party in Interest.	No. 1 CA-SA 15-0087 Maricopa County Superior Court No. CR 2013-428563-001DT **CERTIFICATE OF COMPLIANCE**

Real Party in Interest Christopher Simcox, through advisory counsel undersigned and pursuant to Rule 7(e) of the Arizona Special Actions Rule of Procedure and 31.13(b) of the Arizona Rules of Criminal Procedure, hereby avows that the Response to the Special Action Petition filed on this date is handwritten

and consists of twenty pages.

RESPECTFULLY SUBMITTED this 15th day of April, 2015.

MARTY LIEBERMAN
MARICOPA COUNTY LEGAL DEFENDER

By /s/ Robert Shipman
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THE STATE OF ARIZONA, Petitioner, vs. HON. JOSE PADILLA, Judge of the Superior Court of Arizona in and for Maricopa County, Respondent/Judge, and CHRISTOPHER ALLEN SIMCOX, Real Party in Interest.	No. 1 CA-SA 15-0087 Maricopa County Superior Court No. CR 2013-428563-001DT **CERTIFICATE OF SERVICE**

COPIES of Certificate of Compliance were mailed/e-mailed this 15th day of **April, 2015**, to:

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Respondent Judge

RESPECTFULLY SUBMITTED this 15th day of April, 2015.

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APPENDIX Q

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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney, Petitioner, v. THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, Respondent Judge, CHRIS SIMCOX, a.k.a. CHRISTOPHER ALLEN SIMCOX, Real Party in Interest.	**Court of Appeals** **Division One** **No. 1 CA-SA 15-0087** **Maricopa County** **Superior Court** **No. CR2013- 428563-001** **VICTIM'S BRIEF** **(ORAL ARGUMENT REQUESTED)**

M.A., as mother of minor victim J.D. ("Victim"), hereby submits this brief in support of the State's Petition for Special Action.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

ARGUMENT

The *pro se* defendant in a child molestation trial must not be allowed to personally cross-examine his own child victims, and the conduct of such cross-examination *per se* violates the victim's right to dignity under the Arizona Constitution. Victim need not show any prejudice or likelihood of harm to invoke this, or any other right, under the Victim's Bill of Rights.

Defendant's cross-examination may still proceed in any manner that is consistent with the Sixth Amendment to the United States Constitution and Ariz. Const. art. 2, § 24. These authorities are satisfied where 1) the Defendant privately communicates his questions to standby counsel, who shall ask the Defendant's questions of the witness, subject only to counsel's own ethical obligations[1] as an officer of the court; and 2) the jury is instructed that the defendant remains in actual control of his defense.[2]

…

…

…

[1] In particular, ER 4.4 prohibits the asking of any question that has no substantial purpose other than to embarrass, delay, or burden the witness; and the Lawyer's Creed of Professionalism of the State Bar of Arizona prohibits using litigation or any other course of conduct to harass an opposing party.

[2] Although the State's issue on appeal concerns only cross-examination, this procedure should also be employed for the Defendant's making of objections during the child sexual abuse witness's direct and redirect examination.

I. Only the Defendant's right to self-representation, and not his confrontation right, is at issue

The method of accommodation endorsed above implicates only the defendant's right of self-representation, and not his right to confront the witnesses against him, or any other manner of due process afforded by law. *See* U.S.C.A. Const. Amend. VI; Ariz. Const. art. 2, § 24. Victim will be present in the courtroom and visible to the defendant, which satisfies the "face to face" confrontation requirement of both the Sixth Amendment and Art. 2 § 24 of the Arizona Constitution. By requiring standby counsel to actually ask the Defendant's questions – so that the Victim does not hear the Defendant's voice, and is not in his intimate presence – the Defendant's substantive right to control his defense and elicit testimony from the child victim witness is preserved, while only his "right" to have the victim hear his voice and be close to her are infringed. Of course, those same "rights" are infringed whenever a defendant is represented by counsel, since the defendant does not speak and stays in his seat while his counsel questions or approaches the witness. Because the defendant would be entitled to those "rights" only because he has chosen to represent himself, the constitutional right at issue here must be characterized as the Defendant's right to self-representation, and not his right to confront the witnesses against him.

II. By subjecting a child victim to her own molester's intimate personal control during cross-examination, the victim's right to dignity under the Arizona Constitution is violated *per se*

The Victim's Bill of Rights provides that a victim has the right "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process." Ariz. Const. art. II, § 2.1. "Arizona has been a national leader in providing rights to crime victims, and courts should conscientiously protect those rights provided by law." *State ex rel. Montgomery v. Chavez ex rel. Cnty. of Maricopa*, 234 Ariz. 255, 258, 321 P.3d 420, 423 (2014). Finally, "safeguarding the victim's interests is especially important in cases of child sexual abuse." *State v. Krum*, 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995).

Every crime is in some sense an offense against the dignity of its victim, but only certain crimes—like harassment, stalking, sexual assault, or child molestation—*are* that offense against a victim's dignity, which the law serves specifically to discourage. The offender's motive in committing these crimes is not to cause physical harm to his victim or their property, and oftentimes he does not; but rather, his goal is to have intimacy and control over his victim, to shame them, to subvert their will, and to destroy their dignity.

A skilled litigator knows that the purposes of an effective cross-examination are much the same. A good cross-examiner controls the witness's answers, and induces the witness to share their most intimate secrets with him, in an effort to show that the witness is not worthy of being trusted or believed, and to lower their esteem in the eyes of the jury. And while attorneys or judicial officers who normally conduct the questioning of witnesses are conscious of a host of ethical obligations, including ER 4.4 ("Respect for Rights of Others")[3] and ER 3.1 ("Meritorious Claims and Contentions")[4], and will violate them only at the peril of losing their professions and livelihood; a *pro se* defendant is neither aware of nor subject to the same regulations or sanctions. In cross-examining a witness, even a *pro se* defendant with good intentions is susceptible to confusing his duty to conduct an effective cross-examination with a license to personally harass and humiliate the witness—or worse, a *pro se* defendant with bad intentions

[3] "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person." 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 4.4(a).

[4] A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law. 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 3.1.

can view cross-examination as a vehicle to intimidate his victim, or even as a way of achieving intimacy with the victim once again.

The basic problem before the Court is that the process of cross-examination affords to a *pro se* child molester the opportunity, and in fact a compulsory process, of accomplishing the same thing that he is accused of – obtaining personal intimacy with his child victim, having immediate control over her, and weakening and debasing her.

By requiring a child sexual abuse victim to submit to their own molester's personal cross-examination, the child victim's right to dignity under the Arizona Constitution is therefore violated *per se*, as a matter of law.

III. Victim need not show prejudice to invoke her right to dignity

Victim need not show that she would actually by prejudiced or harmed as a result of being personally cross-examined by her own molester, which the trial judge seemed to feel was required by *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). The State has correctly argued that the trial court's application of the ruling in *Maryland v. Craig* to this case was in error, because the defendant's right to confrontation is not at issue in this case, as it was in *Maryland*. Only the defendant's right to self-representation is being implicated here; and so as the State has argued, the

ruling from *Fields v. Murray* should be applied instead (holding that the Court does not need to hear "[p]sychological evidence of the probable emotional harm to each" child molestation victim in order to prevent them from being personally cross-examined by their own molester). *Fields v. Murray*, 49 F.3d 1024, 1037 (4th Cir. 1995).

The Victim's Bill of Rights resolves this issue even more definitively. In order for a victim to exercise his or her rights under the Victim's Bill of Rights, including the right to dignity, the victim does not have to show that he or she would be prejudiced by the failure to grant that right. For example, in order for the Court to allow a victim's home address to be redacted from a document that will be disclosed to the defendant,[5] the victim need not prove some actual likelihood that the defendant will come to his or her home, or make some other use of their address to harm them. This is because what violates the Victim's right to dignity is not the actual harm done by the disclosure, but rather the disclosure itself. Similarly, Victim does not have to prove that she would actually be harmed by being personally cross-examined by the Defendant, because the actual harm that may result from the cross-examination is not what violates her dignity, but rather the cross-examination itself.

[5] Pursuant to Ariz. R. Crim. P. 39(b)(10).

Ironically, the United States Supreme Court's analysis of the defendant's own right to self-representation provides a useful framework for understanding when a victim's right to "dignity" is violated, and whether actual harm from the violation must be shown. Like the Victim's constitutional right to dignity, the defendant's constitutional right to self-representation is likewise premised on the right "to affirm [his own] dignity." *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S. Ct. 944, 950, 79 L. Ed. 2d 122 (1984). In *McKaskle*, the United States Supreme Court held that the failure to allow a defendant to effectively exercise his right of self-representation is not amenable to a "harmless error" analysis, because "[t]he right is either respected or denied; its deprivation cannot be harmless." *Id.*, 465 U.S. at 177 f. 8, 104 S. Ct. at 950 f. 8, 79 L. Ed. 2d 122 f. 8. "The purpose of the right is to protect the defendant's personal autonomy, not to promote the convenience or efficiency of the trial"; and "[t]hus, a denial of the right automatically prejudices the defendant's freedom interest." *Bittaker v. Enomoto*, 587 F.2d 400, 403 (9th Cir. 1978). "[Proving] [m]ore is unnecessary." *Id.* Likewise, the Victim's Bill of Rights exists to protect the victim's right to dignity and "autonomy," and not for some other substantive purpose—and so a denial of that right automatically prejudices the victim's freedom interest, such that no actual showing of harm must be made.

This analogy continues further: in *Bittaker*, the Ninth Circuit remarked that it is usually impossible to prove prejudice caused by denial of the right to self-representation, since in reality defendants are nearly always better off with counsel. "To require such a showing could make the right to conduct one's own defense virtually unenforceable on appeal in the majority of cases." *Bittaker*, 587 F.2d at 402. Likewise, in the majority of cases where a victim's right to dignity is violated, it would be impossible to show that actual prejudice results – especially since the defendant may ultimately be convicted and incarcerated anyway, and thereby prevented from causing further harm to the victim. (This does not factor into the case at bar, however, since the threatened harm will occur during the defendant's trial, and his subsequent sentencing and incarceration will not prevent it.)

A. Requiring Victim to prove harm or prejudice results in a further violation of her rights

While the actual prejudice to the Victim of being cross-examined by her own molester can easily be shown, and was in fact shown (by letters written by Victim's Mother that were submitted to the trial court)[6]; it is critical that the Court recognize that there is no need to have such a showing, because in the very process of having to make that showing, Victim's right

[6] *See* Attachment "A" to Appendix "B" to State's Petition for Special Action, "State's Request for Certain Victim Trial Accommodations Based on the Pro Per Status of Defendant – Supplement: Victim Letter on Behalf of Victim J.D."

to dignity will be further violated. For example, Victim's counselor—or even the minor Victim herself—would have to publicly testify regarding the trauma caused to Victim by Defendant, and about the stress and pain that this case continues to cause her—all in the presence of Defendant and the general public, compounding the harm. Airing these kinds of private matters is one of the most egregious violations of a victim's right to dignity, and clearly runs contrary to the explicit legislative intent of assisting crime victims with "healing of their ordeals" that underlies enforcement of the Victim's Bill of Rights. Laws 1991, Ch. 229, § 2 (2).[7]

IV. The Sixth Amendment and Art. 2 § 24 of the Arizona Constitution allow counsel to participate in the presentation of a pro se's defense, even over defendant's objection, so long as there is no significant interference with the defendant's actual control over his defense, and the his appearance in the status of defending himself will not be intolerably eroded

In *McKaskle v. Wiggins*, the United States Supreme Court ruled that standby counsel may "participate" in the *pro se* defendant's presentation of his defense over his objection, so long as there is no substantial interference

[7] The legislative intent of the Victim's Rights Implementation Act was to "[e]nsure that article II, § 2.1, Constitution of Arizona [the Victim's Rights Act] is fully and fairly implemented and that all crime victims are provided with basic rights of respect, protection, participation and healing of their ordeals." Laws 1991, Ch. 229, § 2 (2).

The Victim's Bill of Rights itself was enacted as a constitutional amendment via popular initiative by the voters of Arizona. *State v. Roscoe*, 185 Ariz. 68, 70, 912 P.2d 1297, 1299 (1996).

with the defendant's actual control over his defense, and his appearance in the status of a *pro se* defendant is not intolerably eroded. 465 U.S. 168, 185, 104 S. Ct. 944, 954, 79 L. Ed. 2d 122 (1984). "In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." *Id*., 465 U.S. at 177, 104 S. Ct. at 950. "[N]o absolute bar on standby counsel's unsolicited participation is appropriate or was intended. The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. Both of these objectives can be achieved without categorically silencing standby counsel." *Id.*, 465 U.S. at 176-77, 104 S. Ct. at 950.

By allowing Defendant full control over the questions asked of Victim (subject only to the ethical limitations of his advisory counsel in actually asking them), there will be no substantial interference with Defendant's right to control his defense. First, only the questions that Defendant wants his counsel to ask will be asked, allowing Defendant to retain full and absolute control over the substance of his defense. Second, permitting the Defendant's questions to pass through his counsel's ethical "filter" does not infringe on the right to self-representation, since that right does not

encompass the right "to abuse of the dignity of the courtroom" or not to "comply with relevant rules of procedural and substantive law" to begin with. *Faretta v. California*, 422 U.S. 806, 834 n. 46, 95 S. Ct. 2525, 2541 n. 46, 45 L. Ed. 2d 562 n. 46 (1975).

Requiring standby counsel to ask the Defendant's questions also does not intolerably erode the Defendant's appearance in the eyes of the jury as a *pro se* Defendant, especially if the Court instructs the jury that Defendant retains control over his own defense and that standby counsel is asking the questions that Defendant wants him to ask. It should be apparent to the jury when standby counsel walks over to the Defendant or leans in to hear his instructions, or when Defendant passes his written questions over to him. Further, Defendant will retain the right to personally cross-examine all other witnesses besides the minor child victims; the right to do his opening and closing remarks by himself; and to otherwise to appear in the status of a *pro se* defendant throughout the trial, in every way.

This method of accommodation is sufficient to satisfy the requirement under the Victim's Bill of Rights that a witness be treated with "dignity"; and in no way does it offend the Defendant's right to self-representation, as the United States Supreme Court has articulated that right in both *Faretta* and *McKaskle*.

V. There is no "direct conflict" between the Victim's Bill of Rights and the Sixth Amendment, or Art. 2 § 24 of the Arizona Constitution

The Defendant's right to self-representation under the State and federal Constitutions, and the Victim's rights under the Victim's Bill of Rights, are not in "direct conflict" (and are in a "false conflict" here, to borrow a phrase from conflict-of-laws analysis[8]). Because while victims have the absolute right to be treated with dignity under the Arizona Constitution, the right to self-representation is not absolute, and harbors a tolerable degree of "erosion." *McKaskle v. Wiggins*, 465 U.S. 168, 185, 104 S. Ct. 944, 954, 79 L. Ed. 2d 122 (1984); *see also Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995)("Moreover, it is universally recognized that the self-representation right is not absolute").

The State correctly acknowledges that "when the defendant's constitutional right to due process conflicts with the Victims' Bill of Rights in a direct manner ... then due process is the superior right," a rule that originates with the Supremacy Clause. *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 236, 836 P.2d 445, 449 (App.1992). But the Victim's right to dignity and the Defendant's right to self-representation are not in

[8] A "false conflict" is when "only one jurisdiction has a legitimate interest in the application of its rule [or] decision," in which case "the law of the interested jurisdiction is applied." *Abogados v. AT&T, Inc*., 223 F.3d 932, 934 (9th Cir. 2000).

"direct conflict," because the Victim's rights can be accommodated without causing any more than the constitutionally tolerable level of infringement on the defendant's right to self-representation, per *McKaskle*, *supra* (see previous Section).

A thorough examination of whether the Victim's right to dignity is superior to the defendant's right of self-representation under *State ex rel. Romley* requires resort to federal preemption analysis, since the rule in that case was premised on the Supremacy Clause.[9]

A. The Sixth Amendment right to self-representation does not preempt the State Victim's Bill of Rights in this case

"The Supremacy Clause of the Constitution makes evident that state laws that conflict with federal law are without effect." *McClellan v. I-Flow Corp*., 776 F.3d 1035, 1039 (9th Cir. 2015)(internal quotations omitted). "There are three types of preemption: (1) express preemption,[10] (2) field preemption,[11] and (3) conflict preemption." *Id.* In general, to determine whether or not a state law is preempted, the Court "must (1) look to the

[9] "When there is a conflict, the due process clause of the U.S. Constitution prevails over a provision of a state constitution by virtue of the Supremacy Clause…" *Romley*, 172 Ariz. at 236, 836 P.2d at 449.

[10] Express preemption occurs when Congress "withdraw[s] specified powers from the States by enacting a statute containing an express preemption provision." *Arizona v. United States*, 132 S. Ct. 2492, 2500, 183 L. Ed. 2d 351 (2012).

[11] Field preemption precludes states "from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* at 2501.

purpose of Congress as the ultimate touchstone, while also (2) starting with the assumption that the historic police powers of the States were not to be superseded…unless that was the clear and manifest purpose of Congress." *McClellan*, 776 F.3d at 1039 (internal quotations and bracketing omitted).

Neither of the first two kinds of preemption, "express" preemption or "field" preemption, is implicated by the constitutional right to self-representation under the Sixth Amendment. In fact, the Sixth Amendment does not even expressly state that a defendant has the right to self-representation. (The right is implied "by the structure of the Amendment." *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975).) There is also no intent expressed in the Amendment or other federal law that the federal government shall exclusively regulate the self-representation right, and in fact the Constitutions of many states likewise guarantee this right to a defendant, including Arizona. *Faretta*, 422 U.S. at 828-29, 95 S. Ct. at 2538; Art. 2 § 24 of the Arizona Constitution; *see also* the following Section VI. There is therefore no indication that either "express" preemption or field preemption would be appropriate here.

This leaves "conflict" preemption. Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility, and in those instances where the challenged state law stands as

an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotations and citations omitted).

The first kind of conflict preemption—"where compliance with both federal and state regulations is a physical impossibility"—is not at issue here, because it is indeed possible to respect the Victim's right to dignity and the defendant's right to self-representation simultaneously, and to the level that is constitutionally required of both, as explained in Section IV above.

So we are left with just the second kind of conflict preemption, called "obstacle" preemption ("instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 2294, 147 L. Ed. 2d 352 (2000). "If the purpose of the [federal] act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Id*.

The Supreme Court's opinion in *McKaskle* made clear that the purpose of the right to self-representation is "to affirm the dignity and

autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense"; and that "[b]oth of these objectives can be achieved" when standby counsel participates in the defense, even over the defendant's objection, so long as there is no "significant" interference with the defendant's actual control, and the defendant's appearance in the status of defending himself is not "intolerably" eroded. *Id.*, 465 U.S. at 176-77, 183, 104 S. Ct. at 950, 954. Because the accommodation that Victim asks for in this case – merely to have standby counsel participate in asking the Defendant's questions instead of the Defendant – satisfies *McKaskle*, it is clear that this accommodation is not an obstacle of sufficient dimension to the Sixth Amendment to necessitate "obstacle" preemption. The Victim's Bill of Rights is therefore not preempted by the Sixth Amendment in this case.

VI. The Victim's Bill of Rights is also the superior right to Defendant's right to self-representation under the Arizona Constitution

Finally, the Victim's Bill of Rights also trumps the right to self-representation guaranteed by the Arizona State Constitution, found at Art. 2 § 24.

First of all, there is no reason why the logic of the *McKaskle* decision should not also be applied to Art. 2 § 24 of the Arizona Constitution. The

decision in *McKaskle* was not founded on any nicety in the Sixth Amendment that is not found in Art. 2 § 24, or on any other difference that exists between the two (including the more "implicit" structure of the Sixth Amendment). *McKaskle* was based on the view that the essence of the self-representation right is that a defendant should have the "fair chance to present his case in his own way." 465 U.S. at 168, 104 S. Ct. at 946. That is also the basic meaning to be found in Art. 2 § 24, which provides only that a defendant "shall have the right to appear and defend in person, and by counsel…" Because *McKastle* permits for the defendant's Sixth Amendment self-representation right to be tolerably infringed in this case, the result of applying *McKaskle* to Art. 2 § 24 must also be that defendant's self-representation right may be tolerably infringed under the Arizona Constitution, and is not in direct conflict with the accommodation requested here.[12]

Secondly, and perhaps more importantly—the Victim's Bill of Rights became effective as law on November 26, 1990; but Art. 2 § 24 has

[12] Even if for some reason *McKastle* could not be applied to Art. 2 § 24 — and even if a more "strenuous" confrontation-clause analysis, like the one used in *Craig v. Maryland,* were—then the stricter *Craig* analysis is still satisfied under these circumstances, as the court held in *Fields v. Murray*, 49 F.3d at 1035 (holding that the *Craig* confrontation-clause analysis was satisfied because (1) the purposes of the right would be "otherwise assured," and (2) denial of personal cross-examination "was necessary to further an important public policy").

remained unchanged since the Arizona Constitution was passed in 1912. "To the extent that statutes are in irreconcilable conflict, the general rule is that the more recent one prevails." *Mead, Samuel & Co. v. Dyar*, 127 Ariz. 565, 568, 622 P.2d 512, 515 (Ct. App. 1980). This same rule must apply when constitutional amendments are found to be in hopeless conflict with the original text—and in such a situation, the later amendment must control. Therefore, if the Victim's Bill of Rights is found to be in hopeless conflict with the self-representation clause of the original Arizona Constitution, then the Victim's Bill of Rights must prevail.

VII. The same accommodation should be permitted in any crime of intimacy and personal control over the victim; including sexual offenses, stalking, and harassment

Finally, Victim advocates for a general rule that this same accommodation be available to the victim of any crime in which the defendant is accused of unlawfully obtaining or attempting to obtain personal control over and intimacy with his victim—like sexual assault, stalking, harassment, or sexual exploitation of a minor. These offenses raise similar issues to those encountered here; and the Victim's Bill of Rights therefore renders any personal cross-examination by a *pro se* defendant in those cases to be a violation of the victim's right to dignity. "Arizona has been a national leader in providing rights to crime victims," and this rule is

warranted by the Arizona Constitution. *State ex rel. Montgomery*, 234 Ariz. at 258, 321 P.3d at 423.

CONCLUSION

Courts have long provided security to witnesses from harm. Originally, the "Bar" referred to a gate that stood a sword's length away from the bench and the witness stand, to protect the judge and witnesses from attack. It is a core function of the court to protect any witness that comes before it.

To deny relief in this action would be to afford child molestation defendants not just the right, but a compulsory process to secure personal control over and intimacy with their victims once again, and to personally debase them, all under the Court's approving gaze – a clear abuse of the victim's right to dignity, and of the dignity of the court itself. This simply cannot be the outcome of the law, or of our state or federal Constitutions, under any gloss of the authorities. The people of Arizona, by and through the Victim's Bill of Rights, have mandated a different result here – and one which the federal Bill of Rights is will oblige.

Victim asks the Court to order that the accommodation requested by the State be granted, and that Defendant be prevented from personally cross-examining his own child sexual abuse victims, including Victim. The trial

court should be directed to follow the method of accommodation outlined herein for cross-examination, direct examination, and re-direct of the Victim in this case, in order to honor the rights of both Victim and Defendant under the Arizona and federal Constitutions.

RESPECTFULLY SUBMITTED this 20th day of April, 2015.

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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney, Petitioner, v. THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, Respondent Judge, CHRIS SIMCOX, a.k.a. CHRISTOPHER ALLEN SIMCOX, Real Party in Interest.	**Court of Appeals** **Division One** **No. 1 CA-SA 15-0087** **Maricopa County** **Superior Court** **No. CR2013- 428563-001** **CERTIFICATE OF COMPLIANCE FOR VICTIM'S BRIEF**

1. This certificate of compliance concerns a brief that is filed in the form of an amicus curiae brief under Rule 16(b)(4).

2. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 4,802 words.

3. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14.

RESPECTFULLY SUBMITTED this 20th day of April, 2015.

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CERTIFICATE OF SERVICE

I certify that a copy of the Certificate of Service for Victim's Brief filed by John D. Wilenchik, Esq. on behalf of M.A., as Mother of Minor

Victim J.D., was served by mail and (where available) email this 20th day of April, 2015, on the following recipients:

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Petitioner,

vs.

THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

CHRIS SIMCOX, aka CHRISTOPHER ALLEN SIMCOX

Real Party in Interest.

Court of Appeals

No. 1 CA-SA 15-0087

Maricopa County Superior Court
No. CR 2013-428563-001

PETITION FOR SPECIAL ACTION - REPLY

THE PRO PER DEFENDANT, CHRISTOPHER SIMCOX, IS NOT ENTITLED TO PERSONALLY CROSS EXAMINE HIS OWN CHILD VICTIMS, WHO ARE ALL UNDER NINE YEARS OLD.

Advisory counsel, on behalf of Defendant, filed a *Notice of Filing Response to State's Petition for Special Action* whereupon the Defendant's *Response to the State's Request for Trial Accommodations* was attached as Exhibit #1 to be considered by this Court as the Defendant's *Response to the State's Special Action*.

Defendant argues that the Respondent Judge did not commit error upon denying the State's request to prohibit the Defendant from *personally* cross-examining his own victims because he claims that such a request would violate his right to confrontation, as well as his right to self-representation. Neither the Defendant's constitutional right to confront witnesses nor his right to represent himself are violated by the State's request. The Defendant is simply not entitled.

No right of Defendant is disturbed by the State's request on behalf of the child victims, and the Respondent Judge's failure to grant such an accommodation in this case violates the children's constitutional rights pursuant to Article 2, Section 2.1 of the Arizona Constitution, also known as the Victims' Bill of Rights. Respondent Judge's ruling violates the Victims' right to be free from intimidation and harassment, as well as their right to be treated with dignity and fairness. Ariz. Const. Art. 2, §2.1 (A) (1) and (11).

Upon reviewing the *same accommodation* requested by the child victims in

2007, the Arizona Court of Appeals held that the defendant's right to self-representation is not violated upon utilizing advisory counsel to ask questions formulated by the pro-per defendant. *State v. Wassenaar*, 215 Ariz. 565 (2007).

In *State v. Wassenaar*, this Honorable Court held that a defendant's right to self-representation is not violated upon a trial court ordering pro per defendant's advisory counsel to ask questions formulated by the defendant. 215 Ariz. 565 (2007). In *Wassenaar*, the defendant moved to represent himself. The defendant was appointed advisory counsel. Over the defendant's objection, the trial court ordered advisory counsel to question the defendant should he decide to testify. Upon holding that such an accommodation did not violate the defendant's right to self-representation this Court stated:

> A defendant who represents himself with the assistance of advisory counsel 'must be allowed 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.' *McKaskle v. Wiggins,* 465 U.S. 168, 174, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). However, there is no absolute bar to advisory counsel's participation at trial over the objection of a defendant who is self-represented. *Id*. at 176, 104 S.Ct. 944. '[T]he primary focus must be on whether the defendant had a fair chance to present his case in his own way.'*Id*. at 177, 104 S.Ct. 944. A defendant's right to self-representation is not infringed simply because advisory counsel assists with a defendant's compliance with routine procedure, protocol or evidentiary matters. *Id*. at 183, 104 S.Ct. 944.

Further, a defendant's right to proceed without counsel must be balanced against the need that trial be 'conducted in a judicious, orderly fashion[.]' *State v. De Nistor,* 143 Ariz. 407, 412, 694 P.2d 237, 242 (1985) (quoting *United States v. Dujanovic*, 486 F.2d 182, 186 (9th Cir.1973)). The trial court has 'broad discretion' regarding its management of the manner in which trial will be conducted, and has a duty to exercise that discretion. *Cornell,* 179 Ariz. at 332, 878 P.2d at 1370.

We find no violation of Defendant's right to self-representation in the requirement that he testify through questions asked by counsel. Arizona Evidence Rule 611(a) provides in relevant part that a trial court must exercise reasonable control over the mode in which witnesses testify so as to 'make the interrogation and presentation effective for the ascertainment of the truth [and to] avoid needless consumption of time[.]' The trial court held that Defendant must present his evidence within the confines of the rules of evidence and that Defendant would testify in the same manner as every other witness who appeared at trial. The court noted that it had a responsibility to make sure the jury was presented with admissible evidence and that the only way to do this during Defendant's direct examination was to use a question-and-answer method. This would allow the jurors and the State to know each question before any answer or information was elicited, and to allow the jurors and State to anticipate the scope of the answer. As noted above, the trial court informed Defendant that he would be required to use this method a month before he testified. The court informed Defendant that he was in complete control of what questions advisory counsel would ask and even gave Defendant several ideas on how this could be accomplished. The trial court could reasonably determine that the best method to comply with the requirements of Rule 611(a) and provide for the orderly admission of Defendant's testimony was to have advisory counsel ask Defendant questions.

> We reject Defendant's contention that testifying in this fashion made it appear that advisory counsel was representing him and that Defendant was not in control of his own defense. At Defendant's request, the trial court instructed the jury, 'Mr. Wassenaar is the next witness. On my order, I order that his testimony be done by way of question and answer. So Mr. Curry is going to be asking the questions of Mr. Wassenaar.' The court also informed the jury that Defendant, rather than advisory counsel, would make any objections. Defendant raised numerous objections during his cross-examination, many of which were sustained. Therefore, the jury understood that Defendant still represented himself. Further, by the time of Defendant's examination, the jury had observed him make his own opening statement, examine witnesses, introduce evidence and raise many objections (a large number of which were sustained) for more than a month. It was clear that Defendant was representing himself and that he was in control of his own case during his testimony. This was reinforced by the fact that the day after the completion of Defendant's testimony, the jury observed Defendant make his own closing argument.

Wassenaar, 573-74.

Certainly, if this Court has approved the method of questioning described in *Wassenaar*—which was designed to ensure that the trial court was exercising "reasonable control over the mode in which witnesses testify so as to 'make the interrogation and presentation effective for the ascertainment of the truth [and to] avoid needless consumption of time[]'"—then an accommodation equally consistent with Rule 611 – particularly Rule 611 (3) stating, "The court shall exercise reasonable control over the mode and order of examining witnesses and

presenting evidence *so as to protect witnesses from harassment or undue embarrassment"* would also comply with the *Wassenaar* decision. *Id*.; *see also*, Ariz. Const. Art. 2 §2.1 (A) (11) ("To preserve and protect victims' rights to justice and due process, a victim of crime has a *right [t]o have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights* …." (emphasis added).

Furthermore, as *Wassenaar* points out, the trial court can inform the jury of the role of advisory counsel. *Id*. at 574. In the instant case, such a use of advisory counsel would be even more seamless. Here, the jury will be informed by the trial court that the role of advisory counsel is to assist Defendant at trial. The jury will witness advisory counsel not only questioning the victims but also Defendant. By the time the child victims testify, the jury would have witnessed Defendant handle voire dire and opening statements as well as questioning other witnesses. The jury will witness advisory counsel assisting the Defendant throughout the trial and the jury will see Defendant make his own closing arguments. It will be clear to the jury that Defendant is representing himself and is control of his own case.

In fact, as discussed in the State's Petition, upon the State outlining the *Wassenaar* advisory counsel accommodation, the Respondent Judge informed the Defendant that, should he testify, advisory counsel would be utilized to question the Defendant. *Wassenaar* at 574. The Respondent Judge did not require any sort

of evidentiary hearing to order this accommodation —the accommodation was made in the interest of judicial efficiency. To the contrary, for the Crime Victims to be afforded the same accommodation, the Respondent Judge indicates that such an accommodation violates both the Defendant's right to confrontation as well as his right to self-representation. The Respondent Judge is wrong. Under the facts of this case, no right of the Defendant is violated by the State's requested accommodation. This is not a zero-sum game because the rights of the child victims and the rights of Defendant can be protected by utilizing the procedure already sanctioned by this Court for Defendant's own testimony.

As discussed by the Fourth Circuit in *Fields v. Murray*:

> [T]he State had an extremely important interest in preventing Fields from personally cross-examining the young girls here. 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 denial of this face-to-face confrontation was necessary to protect the children from "emotional trauma." *Craig*, 497 U.S. at 853-55, 110 S.Ct. at 3167-69. *The State's interest here in protecting child sexual abuse victims from the emotional trauma of being cross-examined by their alleged abuser is at least as great as, and likely greater than, the State's interest in Craig of protecting children from the emotional harm of merely having to testify in their alleged abuser's presence. We have little trouble determining, therefore, that the State's interest here was sufficiently important to outweigh Fields' right to cross-examine personally witnesses against him if denial of this cross-examination*

was necessary to protect the young girls from emotional trauma.

This determination accords with those of other courts who have considered the issue. *See State v. Taylor,* 562 A.2d 445, 454 (R.I.1989) (holding that a defendant charged with abusing a child could be denied the right personally to cross-examine the victims when such cross-examination would harm victims); *State v. Estabrook,* 68 Wash.App. 309, 842 P.2d 1001, 1006 (same), *review denied,* 121 Wash.2d 1024, 854 P.2d 1084 (1993); *cf. Commonwealth v. Conefrey,* 410 Mass. 1, 570 N.E.2d 1384, 1390-91 (1991) (refusing to reach issue because trial court failed to make adequate finding that personal cross-examination would harm child victims).

…

We recognize that it may be argued *Craig* requires a more elaborate finding by the trial court that denial of face-to-face confrontation was necessary to prevent emotional harm to the child witnesses; the Court in *Craig* indicated that the trial court should "hear evidence," *Craig,* 497 U.S. at 855, 110 S.Ct. at 3169, and conclude whether each child would be traumatized "by the presence of the defendant" in the courtroom during her testimony, *id.* at 856, 110 S.Ct. at 3169.

The case at bar is different however. It is far less difficult to conclude that a child sexual abuse victim will be emotionally harmed by being personally cross-examined by her alleged abuser than by being required merely to testify in his presence. Further, the right denied here, that of cross-examining witnesses personally, lacks the fundamental importance of the right denied in Craig, that of confronting adverse witnesses face-to-face. As a result, we do not believe it was essential in this case that psychological evidence of the probable emotional harm to each of the girls be presented in order for the trial court to find that denying Fields personal cross-

> *examination was necessary to protect them.*[1]
>
> In sum, the purposes of Fields' self-representation right, to allow Fields to affirm his dignity and autonomy and to present what he believes is his best possible defense, would have been "otherwise assured," *Craig*, 497 U.S. at 850, 110 S.Ct. at 3166, even though he was prevented from cross-examining personally the girls who were witnesses against him.
>
> Further, the trial court adequately found that preventing this cross-examination was necessary to further the State's important interest in protecting child sexual abuse victims from further trauma. Under *Craig*, therefore, the trial court was not required to allow Fields to cross-examine personally the girls who were witnesses against him. Because Fields concedes that this personal cross-examination was his sole purpose in representing himself, the trial court committed no error even if Fields invoked his self-representation right clearly and unequivocally.

Fields, 1035-36.

In this case, the Respondent Judge erred by failing to protect the constitutional rights of the Crime Victims when he denied the State's request for accommodations. Defendant is not entitled to personally cross examine his own child victims.

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[1] "We also recognize that in *Conefrey*, the Supreme Judicial Court of Massachusetts held insufficient a trial court's finding that denial of personal cross-examination to a *pro se* sexual abuse defendant would harm the child victim/witness where the trial court had before it the facts that the child was eleven, the child was the defendant's daughter, and the defendant was charged with indecent assault and battery. *Conefrey*, 570 N.E.2d at 1390-91. *To the extent that Conefrey is inconsistent with our holding here, we decline to follow it* (emphasis added)." *Id*., footnote 13.

THE STATE'S REQUESTED ACCOMODATION DOES NOT IMPLICATE THE DEFENDANT'S RIGHT TO CONFRONT WITNESSES BECAUSE THE CHILDREN WILL BE PRESENT IN THE COURTROOM – FACE TO FACE – WITH THE PRO PER DEFENDANT.

The United States Fourth Circuit, in an en banc decision, held that a pro per defendant *does not* have the right to *personally* cross examine his child victims. *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995) and thus, under these facts, does not implicate the confrontation clause or the right to self-representation. The Fourth Circuit stated:

> If a defendant's Confrontation Clause right can be limited in the manner provided in Craig, *we have little doubt that a defendant's self-representation right can be similarly limited.*

Fields, 49 F.3d at 1035.

The Fourth Circuit recognized that prohibiting the defendant from personally cross examining the child victims *did not implicate the defendant's right to confrontation* – the only right possibly implicated was the defendant's right to self-representation. Under these facts, the Fourth Circuit (as well as other courts) found that the defendant was not entitled to personally cross examine his own victim. The issue presently before this Court does not involve Defendant's right to confrontation. The Respondent Judge conflated the right to confrontation and the right to self-representation and improperly applied *Maryland v. Craig* – a case

dealing with a request to have the child victims testify *outside the presence* of the defendant. 497 U.S. 836 (1990).

The Crime Victims in this case are not seeking an out of court accommodation; thus, *Maryland v. Craig* is only helpful in that it recognizes that the constitutional rights of the defendant, in some circumstances, may be restricted in order to further an important public policy. *Craig*, 497 U.S. at 850.

CONCLUSION

Given the child victims' right to be free from intimidation, harassment, and abuse, the State respectfully requests this Court to reverse the trial court's ruling and order the trial court to prohibit Defendant from personally cross examining the children in this case. The State has demonstrated avenues by which Defendant's right to self-representation can continue to be protected while still giving effect to the Crime Victim's state constitutional rights. The constitutional balance remains true.

RESPECTFULLY SUBMITTED this 22nd day of April, 2015.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY:/s/
Keli Luther
Deputy County Attorney

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA ex rel. WILLIAM G. MONTGOMERY,
Maricopa County Attorney, *Petitioner*,

v.

THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent Judge,

CHRIS SIMCOX, a.k.a. CHRISTOPHER ALLEN SIMCOX,
Real Party in Interest.

No. 1 CA-SA 15-0087

FILED 5-8-2015

Petition for Special Action from the Superior Court in Maricopa County
No. CR2013-428563-001
The Honorable Jose S. Padilla, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

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OPINION

Judge Randall M. Howe delivered the opinion of the Court, in which Presiding Judge Margaret H. Downie and Judge Patricia K. Norris joined.

H O W E, Judge:

¶1 The State of Arizona seeks special action relief from the trial court's refusal to restrict Defendant Chris Simcox from personally cross-examining the child victims and witness in his trial on several sex charges. We accept jurisdiction because the State has no adequate remedy by appeal and the issue is one of first impression and statewide importance. Ariz. R.P. Spec. Act. 1(a); *Ariz. Dep't of Econ. Sec. v. Superior Court (Angie P.)*, 232 Ariz. 576, 579 ¶ 4, 307 P.3d 1003, 1006 (App. 2013).

¶2 We deny relief, however. A trial court may exercise its discretion to restrict a self-represented defendant from personally cross-examining a child witness without violating a defendant's constitutional rights to confrontation and self-representation. It can do so, however, only after considering evidence and making individualized findings that such a restriction is necessary to protect the witness from trauma. Because the State did not present such evidence—and in fact eschewed the opportunity to present evidence when invited—the trial court had no basis to restrict Simcox from cross-examining the child witnesses.

FACTS AND PROCEDURAL HISTORY

¶3 The State has charged Simcox with three counts of sexual conduct with a minor, two counts of child molestation, and one count of furnishing harmful items to minors. The alleged victims are Simcox's 8-year-old daughter Z.S. and Z.S.'s 8-year-old friend, J.D. The State plans to call Z.S. and J.D. to testify about the incidents that form the bases of the charges. The State also plans to call as a witness Z.S.'s 7-year-old friend E.M. to testify about an alleged incident she had with Simcox. The State will seek to admit E.M.'s testimony under Arizona Rule of Evidence 404(c) to show that Simcox has an aberrant sexual propensity to commit the charged offenses.

¶4 Simcox requested that he be allowed to represent himself in the criminal proceedings pursuant to the Sixth Amendment to the United States Constitution and *Faretta v. California*, 422 U.S. 806 (1975). The trial court granted the request but nevertheless appointed advisory counsel to assist him.

¶5 In response to Simcox's invocation, the State requested that the trial court accommodate the child witnesses by restricting Simcox from personally cross-examining them and requiring that his advisory counsel conduct the cross-examinations. The State supported its request with email correspondence from (1) Z.S.'s mother, explaining her outrage that Simcox would cross-examine Z.S., recounting Z.S.'s fear that Simcox would "hurt her feelings again," and stating that personal cross-examination would severely hinder Z.S.'s psychological recovery; (2) J.D.'s mother, explaining how the incident with Simcox has negatively affected J.D.'s behavior and stating that she feared that allowing Simcox to address J.D. would set J.D. "back in her healing and quite possibly exacerbate her symptoms and anxiety/panic attacks"; and (3) E.M.'s mother, stating that E.M. is as much a victim as Z.S. and should not "be punished, more than once, by any adult who used the tenure of age and trust against her." Simcox objected, arguing

that restricting him from personally conducting the cross-examinations would interfere with his right of self-representation.

¶6 At the hearing on the State's request, the trial court asked the State to present its evidence, but the State demurred, arguing that evidence was unnecessary. The trial court disagreed. It noted that the United States Supreme Court held in *Maryland v. Craig*, 497 U.S. 836, 855 (1990), that an order restricting a defendant's right to confront a child witness had to be "case-specific" and that the court must hear evidence to determine whether the restriction is necessary to protect the particular child. The State responded that *Craig* was inapplicable because the defendant in that case was not representing himself. The State relied on *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995), in which the circuit court held that a state trial court had not violated a defendant's rights by restricting him from personally cross-examining his child victim even though it had not considered any evidence that the victim would be traumatized.

¶7 The trial court denied the State's request "on the status of this record." The court acknowledged the mothers' letters, but ruled that "there is simply no showing that conf[ront]ing [Simcox] in and of itself will cause further trauma." The State moved to stay the proceedings, which the trial court denied. The State then petitioned this Court for special action relief and requested a stay of the trial. This Court denied the stay but affirmed the briefing schedule to consider the petition. Z.S.'s mother subsequently sought and obtained an emergency stay from the Arizona Supreme Court pending this Court's review of the petition.

DISCUSSION

¶8 The State argues that the trial court erred in denying its request to restrict Simcox from personally cross-examining the children. The State contends that a defendant charged with sex offenses against children may be categorically barred from personally cross-examining the child witnesses. We review purely legal or constitutional issues de novo, *State v. Booker*, 212 Ariz. 502, 504 ¶ 10, 135 P.3d 57, 59 (App. 2006), but defer to the trial court's factual findings unless they are clearly erroneous, *State v. Forde*, 233 Ariz. 543, 556 ¶ 28, 315 P.3d 1200, 1213 (2014).

¶9 On the record before it, the trial court did not err in refusing to restrict Simcox from personally cross-examining the children. A criminal defendant has the constitutional right to confront the witnesses against him face-to-face, and this right is implemented primarily through cross-examination. *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *State v. Vess*, 157

Ariz. 236, 237–38, 756 P.2d 333, 335–36 (App. 1988). When a defendant exercises his right to represent himself, he has the right to personally cross-examine the State's witnesses. *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984) ("The *pro se* defendant must be allowed . . . to question witnesses."); *see also Faretta*, 422 U.S. at 818 (providing that the Sixth Amendment "grants to the accused personally the right to make his defense").

¶10 Of course, this does not mean that the right of a self-represented defendant to personally conduct cross-examination is absolute. Although the face-to-face component of cross-examination is not "easily dispensed with," *Craig*, 497 U.S. at 850, denying a face-to-face confrontation will not violate the Confrontation Clause when it is "necessary to further an important public policy" and the reliability of the testimony is otherwise assured, *id.* The United States Supreme Court recognized in *Craig* that a state's interest in protecting the physical and psychological well-being of child abuse victims is sufficiently important to justify restrictions on cross-examination if the State makes an adequate showing of necessity. *Id.* at 853–55. Such a finding of necessity "must of course be a case-specific one," *id.* at 855, and the trial court must hear evidence to determine whether the restriction is necessary to protect the child's welfare, *see id.* at 855–56 (considering cross-examination by closed-circuit television). Necessity cannot be presumed without evidence. *See Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (rejecting "legislatively imposed presumption of trauma" when considering statutory limitations on cross-examination of child abuse victims; "something more than the type of a generalized finding underlying such a statute is needed").

¶11 In denying the State's request, the trial court recognized and followed the requirements of the Confrontation Clause and the Supreme Court precedent interpreting it. The court understood that it could not restrict Simcox from personally cross-examining the child witnesses without hearing evidence and making case-specific findings that restricting his ability to personally cross-examine the witnesses was necessary to protect each child from trauma. With that understanding, the court asked the State to present its evidence, but the State declined to do so. Without evidence, the court was constrained to deny the State's request. Although the State did present the correspondence from the children's mothers, the court interpreted the correspondence to explain the general trauma the children were suffering from Simcox's alleged actions and the trial. But general trauma is not sufficient to restrict cross-examination; the trauma must be caused specifically by the personal cross-examination. *See Craig*, 497 U.S. at 856 ("The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the

defendant."). Upon our review, we cannot say that the trial court clearly erred in its interpretation of the correspondence. *See Forde*, 233 Ariz. at 556 ¶ 28, 315 P.3d at 1213 (factual findings reviewed for clear error).

¶12 This procedure—restricting cross-examination of child witnesses only upon a case-specific showing that such a restriction is necessary—is nothing new. Arizona allows a child to testify in a criminal proceeding via closed-circuit television or by prior recording, A.R.S. § 13–4253, but only after the trial court makes "an individualized showing of necessity," *State v. Vincent*, 159 Ariz. 418, 429, 768 P.2d 150, 161 (1989) (relying on *Coy*, 487 U.S. at 1021, and *Vess*, 157 Ariz. at 238, 756 P.2d at 335). A generalized conclusion that any child would be traumatized by testifying in the presence of the defendant-parent is not sufficient to invoke the statute. *Vincent*, 159 Ariz. at 428, 768 P.2d at 160.

¶13 *Vincent* is instructive about the need for case-specific findings. There, two young children were witnesses in their father's trial for murdering their mother. *Id.* at 420, 768 P.2d at 152. Pursuant to § 13–4253, the State moved to record the children's testimony and to present it at trial. *Id.* at 426, 768 P.2d at 158. Without considering any evidence that the children would suffer trauma if required to testify at trial, the trial court permitted the recording, ruling that "children . . . of such tender age . . . could be traumatized due to the severe nature, [and] severity of the crime charged," and that it was in their best interests "not to look upon the face of their father" during their testimony. *Id.* The children's testimony was then recorded, with the prosecutor, defense counsel, the children's foster mother, and the trial judge present; the defendant was in another room observing the testimony and had telephonic access to his counsel. *Id.* at 157, 768 P.2d at 425.

¶14 The Arizona Supreme Court ruled this procedure violated the defendant's confrontation rights because the trial court had made no individualized finding that recording the children's testimony was necessary:

> *Coy* and *Vess* both tell us at a minimum that such generalized conclusions do not suffice to justify a substitute for face-to-face confrontational testimony. Because there were no particularized findings concerning the comparative ability of the Vincent children to withstand the trauma of face-to-face testimony, as contrasted with the trauma of a videotaped procedure with their father shielded from their view, we hold

> that A.R.S. § 13–4253 was applied in such a way as to violate the defendant's constitutional right to confrontation.

Id. at 428–29, 768 P.2d at 160–61. The principle is clear: restrictions on a defendant's confrontation rights cannot be justified without individualized findings.

¶15 Apparently to avoid this analysis, the State repeatedly notes that it is not seeking any accommodation under § 13–4253. But the issue is not whether the statute is invoked; it is whether the Confrontation Clause permits a trial court to restrict a self-represented defendant from personally cross-examining the witnesses against him. The United States Supreme Court in *Craig*, our supreme court in *Vincent*, and our own court in *Vess* hold that a defendant's right to cross-examine child witnesses may not be restricted unless the trial court makes case-specific findings that the restriction is necessary to protect them from the trauma caused by the cross-examination. *Craig*, 497 U.S. at 855; *Vincent*, 159 Ariz. at 428–29, 768 P.2d at 160–61; *Vess*, 157 Ariz. at 238, 756 P.2d at 335. Because the State did not present evidence from which the trial court could have made individualized, case-specific findings that the children here required protection from being personally cross-examined by Simcox, the trial court did not err by denying the State's request for a restriction.

¶16 The State's contention that no such case-specific findings are necessary misapprehends the nature of a criminal defendant's rights. First, the State argues that restricting Simcox from personally cross-examining the children does not affect his Sixth Amendment right to represent himself because that right does not include a right to personally conduct cross-examination. The State claims this is so because the trial court has the authority under Arizona Rule of Evidence 611 to require advisory counsel to conduct witness examination without infringing on a defendant's right of self-representation. The State cites *State v. Wassenaar*, in which we held that the trial court did not violate a defendant's right to self-representation by requiring that advisory counsel conduct the direct examination of the defendant. 215 Ariz. 565, 573 ¶ 29, 161 P.3d 608, 616 (App. 2007).

¶17 But *Wassenaar* does not affect the self-represented defendant's right to conduct the examination of other witnesses. Advisory counsel's participation in that case was necessary because of the question-and-answer format of direct examination; the defendant could hardly be expected to question himself on the stand. *Id.* at ¶ 29, 161 P.3d at 616. But no such necessity existed with witnesses other than the defendant; the defendant personally examined the other witnesses. *Id*. Here, except when

Simcox testifies himself, his right to self-representation presumptively allows him to personally examine—and cross-examine—the witnesses. *McKaskle*, 465 U.S. at 174 ("The *pro se* defendant must be allowed . . . to question witnesses.").

¶18 Second, the State argues that the restriction does not affect Simcox's right to confront witnesses because while he would be barred from conducting the cross-examination personally, he would remain in the courtroom and have a face-to-face confrontation with the children, which is all the Confrontation Clause guarantees him. This argument, however, fails to account for the effect that the right to self-representation has on the right to confront witnesses.

¶19 The State is correct that when a defendant is represented by counsel, his confrontation rights are satisfied if he is in the courtroom and can face the witness while his counsel conducts cross-examination. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."). But because a self-represented defendant has the right to personally cross-examine the witnesses, *McKaskle*, 465 U.S. at 174, restricting a defendant from doing so *is* a restriction on his right to confrontation—and a significant one at that. *State v. Folk*, 256 P.3d 735, 745 (Idaho 2011) ("Cross-examination is often a fluid process, and the person forming the questions must be able to concentrate on the answers and what further questions are necessary to elicit the desired information."). Moreover, imposing an unusual arrangement such as requiring advisory counsel to cross-examine critical witnesses in place of the defendant could affect the jurors' perception of the defendant. *Cf. Estelle v. Williams*, 425 U.S. 501, 504–05 (1976) (fearing the jurors' judgment may be affected by viewing defendant in jail clothing). Because a self-represented defendant's right to personally cross-examine witnesses is so important in the trial process, any restriction on that right can occur only upon a showing that the restriction is necessary to achieve an important public policy—here, to protect child witnesses from the trauma of being personally cross-examined by the defendant.

¶20 Third, the State argues that the restriction is appropriate because no case-specific or individualized findings are necessary in cases involving child abuse or sex offenses against children. Although not so stated, the State essentially argues that a court should presume trauma when child witnesses are involved. This argument directly counters the holdings of *Coy*, *Vincent*, and *Vess* that trauma will *not* be presumed and

that restrictions on cross-examination must be based on individualized findings of necessity. *Coy*, 487 U.S. at 1021; *Vincent*, 159 Ariz. at 428–29, 768 P.2d at 160–61; *Vess*, 157 Ariz. at 238, 756 P.2d at 335.

¶21 The authority that the State cites to support its position, *Fields v. Murray*, has dubious value. In *Fields*, the Fourth Circuit Court of Appeals considered a state defendant's claim on habeas corpus review that the state court had denied him his right to personally cross-examine the child victims who had alleged that he had sexually abused them. 49 F.3d at 1028. The state court had precluded him from doing so without hearing evidence and based its ruling on the nature of the crimes and the defendant's relationship with the victims. *Id.* at 1036.

¶22 The circuit court ruled that the state court's decision did not violate the right to confrontation. *Id.* The circuit court recognized that the state court should have made a "more elaborate finding" as *Craig* requires, but noted that "[i]t is far less difficult to conclude that a child sexual abuse victim will be emotionally harmed by being personally cross-examined by her alleged abuser than by being required merely to testify in his presence." *Id.* This conclusion, however, rests merely on a general presumption of trauma, which is directly contrary to *Coy*, *Vincent*, and *Vess*. Thus, it is not good law in Arizona and we are not bound to follow it. *See State v. Montano*, 206 Ariz. 296, 297 n.1, 77 P.3d 1246, 1247 n.1 (2003) (holding that the Arizona Supreme Court is not bound by federal circuit court's interpretation of the federal constitution).

¶23 The State also justifies its argument on the Victim's Bill of Rights, highlighting a victim's right to be free from intimidation, harassment, and abuse. Self-representation and confrontation of witnesses, however, are bedrock constitutional rights of our criminal justice system and are not lightly restricted. If victims' rights conflict with a defendant's constitutional rights, the defendant's rights must prevail. *State v. Riggs*, 189 Ariz. 327, 330–31, 942 P.2d 1159, 1162–63 (1997) ("[I]f, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, the victim's rights must yield. The Supremacy Clause requires that the Due Process Clause of the U.S. Constitution prevail over state constitutional provisions.").

¶24 This does not mean that victims cannot be protected. If the State believes that a defendant's personal cross-examination of a witness is intimidating or harassing the witness, it may always ask the court to control the examination. *See* Ariz. R. Evid. 611(a)(3) (providing that the court

should "exercise reasonable control" over the mode of examining witnesses to "protect witnesses from harassment or undue embarrassment"). If the State believes that a defendant's personal cross-examination of a witness would cause particular trauma to the witness, it can—consistent with the United States Constitution—present evidence that the trauma will occur and ask the trial court to make case-specific findings that will justify restricting the defendant from personally cross-examining the witness.

¶25 The trial court invited the State to present evidence of trauma, but the State declined the opportunity. Without evidence showing that the child witnesses would suffer particular trauma from being personally cross-examined by Simcox, the trial court had no constitutional basis to restrict Simcox from doing so. Thus, on this record, the trial court properly denied the State's request.[1]

CONCLUSION

¶26 For these reasons, we accept jurisdiction but deny relief.

[1] If the State subsequently discovers evidence that it believes would justify restricting Simcox's right to personally cross-examine the child witnesses, however, nothing in this opinion would preclude the State from making a new request to the trial court.