No. _____

In The
Supreme Court of the United States

M.A., AS MOTHER OF J.D.,

Petitioner,

V.

THE HONORABLE JOSÉ PADILLA,

Respondent;

STATE OF ARIZONA, CHRISTOPHER ALLEN SIMCOX,

Real Parties.

On Petition for a Writ of Certiorari
to the Arizona Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Confrontation Clause, does a self-represented criminal defendant have the right to personally cross-examine his own child molestation victims at trial, even if it embarrasses or harasses them?

Under what circumstances may the court restrict a self-represented criminal defendant from personally cross-examining his own child molestation victims?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in Maricopa County Superior Court:

1. State of Arizona
2. Defendant Christopher Allen Simcox
3. A.S., as Mother of Z.S., is a participant in the proceedings.
4. Petitioner M.A., as Mother of J.D., is a participant in the proceedings.

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PETITION FOR WRIT OF CERTIORARI

M.A. ("Petitioner"), as Mother of minor victim J.D. ("Minor Petitioner"), respectfully petitions for a writ of certiorari to review the judgment of the Arizona Court of Appeals.

OPINIONS BELOW

The opinion of the Arizona Court of Appeals is published as *State ex rel. Montgomery v. Padilla*, 237 Ariz. 263, 349 P.3d 1100 (Ct. App. 2015), *as amended* (May 28th, 2015) and included in the Appendix at Exhibit "A". The order of the Arizona Supreme Court denying review is included in the Appendix at Exhibit "B" (December 1st, 2015).

STATEMENT OF JURISDICTION

The opinion and judgment of the Arizona Court of Appeals in this matter is dated May 8th, 2015. The Arizona Supreme Court denied a petition for review on December 1st, 2015. Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Defendant Christopher Allen Simcox ("Defendant") is charged with six felony counts[1] involving criminal sexual conduct with children who are between the ages of seven and nine years old.[2] His trial is scheduled to begin on April 4th, 2016. Defendant filed a Motion to represent himself on February 12th, 2015 in the Superior Court of Maricopa County, Arizona. The court granted his Motion and appointed advisory counsel ("standby counsel") to assist him.

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[1] Defendant was charged with three counts of Sexual Conduct with a Minor, "class 2" felonies in the State of Arizona; two counts of Child Molestation, also "class 2" felonies; and one count of Furnishing Harmful Items to Minors, a "class 4" felony.

[2] Minor Petitioner is eight years old and was between the ages of four and five when she was victimized. She disclosed that when she 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.

On March 6th, 2015, the State filed a Motion asking the trial court to order that Defendant's standby counsel read his cross-examination questions to his child victims, because allowing him to personally question them would harass and/or embarrass the witnesses. The State also filed letters from the victims' mothers describing the trauma that Defendant had caused to their children.[3] The trial court denied the State's Motion during oral argument on April 2nd, 2015. The court indicated that it believed that the issue was governed by this Court's ruling in *Maryland v. Craig*, 497 U.S. 836 (1990), in which the Court found that removing a child witness from the courtroom violated the Defendant's right to a face-to-face confrontation under the Confrontation Clause[4] — even though in this case, the State never asked to remove the child witnesses from the courtroom. On April 3rd, 2015, the State filed an interlocutory appeal (entitled "Petition for Special Action") of this ruling. The Arizona Court of Appeals accepted jurisdiction over the interlocutory appeal but denied relief on May 8th, 2015.[5] The Court of Appeals found that having the Defendant's standby counsel ask the Defendant's questions would be a "significant" restriction on his Confrontation Clause rights.[6] "…[B]ecause 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

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3 Appendix, Exhibit "C" (letter from Petitioner).

4 *See* Appendix, Exhibit "A" at page 5a, ¶6; published as *State ex rel. Montgomery v. Padilla*, 237 Ariz. 263, 266, 349 P.3d 1100, 1103 (Ct. App. 2015), as amended (May 28, 2015).

5 Appendix at Exhibit "A," page 3a, ¶¶ 1-2; page 16a, ¶26.

6 *Id.*

at that."[7] *State ex rel. Montgomery v. Padilla*, 237 Ariz. 263, 269 (Ct. App. 2015), *as amended* (May 28, 2015)(internal citations omitted). [8]

On June 1st, 2015, Petitioner filed a Petition for Review with the Arizona Supreme Court, which was denied on December 1st, 2015.[9]

Pursuant to the trial court's finding that *Maryland v. Craig* governed, the State requested an evidentiary hearing to prove that the child witnesses would be traumatized if Defendant personally cross-examined them, which was held on July 7th and July 13th, 2015. (In *Craig*, this Court found that removing a child witness from the courtroom, even though it infringed on the Defendant's right to a face-to-face confrontation, could be justified if it were shown to be necessary to protect the witness from "trauma." *Craig*, 497 U.S. at 855.) During the evidentiary hearing, an expert on child maltreatment and sexual abuse cases (and on "children's memory and testimony and reactions to legal involvement in such cases") testified named Dr. Gail S. Goodman.[10] Dr. Goodman testified that there are no studies "specifically on the [trauma brought on by the] defendant cross-examining child witnesses," in part because "in many countries, it's not even allowed, which also makes it harder to study." However, she testified that it would likely increase the child's risk of post-testimony trauma.

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[7] *Id.*

[8] Appendix at Exhibit "A," pages 12a – 13a, ¶13.

[9] Appendix, Exhibit "B."

[10] This Court cited Dr. Goodman's work in *Maryland v. Craig*, 497 U.S. at 855, 856.

Nevertheless, the trial court again ruled after the hearing that the Defendant could not be restricted from personally cross-examining his own victims. The trial court found that Minor Petitioner "is not likely to suffer harm beyond that which is experienced by any other child witness in a case of this nature"— meaning, presumably, any other child being cross-examined by their own molester. The trial court also found it significant that Minor Petitioner "has a supportive parent and is not related to the defendant," in concluding that she would not be "more" traumatized than another child being questioned by their own molester, and denying relief.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented are of First Impression and Purely Constitutional Law

When this Court first acknowledged the *Faretta* right to self-representation in 1975, it left "open a host of other procedural questions," *Faretta v. California*, 422 U.S. 806, 852 (1975),[11] including whether a defendant may be restricted from personally questioning his own victims, including victims of child molestation. Whether the Sixth Amendment right of a *pro se* defendant "to be confronted with the witnesses against him" also entails a right to personally confront witnesses, as the Arizona Court of Appeals has found, is also a question of first impression in this Court. These are both important questions of purely constitutional law that have not been, but should be, settled by this Court.

[11] Justice Blackmun, dissenting.

As detailed below, every state and federal appellate court that has been called to pass upon this issue,[12] other than the Arizona Court of Appeals in this case, has found that it is constitutionally permissible to restrict a *pro se* defendant from personally cross-examining his own child victims, so long as his *Faretta* right to self-representation is otherwise assured. The issue implicates only the defendant's right to self-representation under *Faretta*, and not his Confrontation Clause rights. Under *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the defendant's *Faretta* rights are assured so long as he remains in control of the questioning, and the jury is advised that he is still appearing in the status of a *pro se* defendant. The defendant's standby attorney, or even the court, may ask the defendant's questions for him.

The basic reasoning in support of these opinions is that the defendant, in choosing to represent himself, accedes to no greater rights than his own lawyer. And courts retain wide discretion to direct the manner in which counsel examines a witness under Rule 611(a), and to otherwise regulate attorneys as officers of the court, under its inherent powers. For example, the court may order that counsel examine a witness who is hard-of-hearing by submitting counsel's questions in writing to the

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[12] *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995); *Partin v. Commonwealth*, 168 S.W. 3d 23 (KY 2005); *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, 570 N.E.2d 1384, 1390-91 (1991); *Depp v. Commonwealth*, 278 S.W. 3d 615 (2009); *see also Coronado v. State*, 351 S.W.3d 315, 330 n.83 (Tex. Crim. App. 2011).

witness,[13] which the court may then hand to the witness and/or read aloud. In the same fashion, the court has the discretion to order that counsel submit written questions to a child witness, should the court find that it will serve the purposes of "determining the truth," avoiding waste of time, or protecting the witness from "harassment or undue embarrassment" under Rule 611(a). Since the defendant accedes to no greater rights than his counsel, the court is well within its discretion to order that a self-represented defendant submit his questions in writing for someone else to read, just as it could have ordered his counsel to do so.

In over two hundred years of Sixth Amendment jurisprudence, this Court has never found that the Confrontation Clause grants defendants the right to personally cross-examine witnesses against them, much less their own child molestation victims. But that is exactly what the Arizona Court of Appeals found in this case. In doing so, the Arizona Court of Appeals has subjected courts to having to meet a different, much more stringent standard than described above for restricting a defendant from personally cross-examining his own victims. Before it could do so, the court would have to "consider[] evidence and make[] individualized findings that such a restriction is necessary to protect the witness from trauma." *Padilla*, 237 Ariz. at 265 (referring to

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[13] *See e.g. Todd v. State*, 380 So. 2d 370, 371 (Ala. Crim. App. 1980)(finding that a person who is hard-of-hearing "to a very significant degree" "may give his testimony by the procedure of written questions to him," and that it is "permissible for such witness to testify against the objections that the party against whom such testimony is given will be put to great disadvantage in cross-examination to test the witness's credibility").

Craig, 497 U.S. at 855).[14] As discussed below, this standard is not only constitutionally unwarranted, but it is unavailingly stringent, and it cannot be met in many cases or even defined (despite the benefit of expert testimony). Further, the application of this standard acts to undermine several important public policies, including helping victims to recover from their ordeals, and protecting witnesses from shame and embarrassment.

The issue here is not whether Defendant will ask harassing or embarrassing questions of the witness, or even what questions Defendant will ask. The issue is that allowing the Defendant to cross-examine his victims is embarrassing and harmful, in and of itself. His victims will be forced to listen to him, to answer him, to be close to him, to focus on him and on what he is saying. He will be telling them what to do, and they will have to do it. The damage to these children – and to their esteem for a judicial system that forces them to do this – is incalculable.

The questions presented for review apply even more broadly than to just victims of child molestation; they apply with equal vigor to adult victims, and especially to victims of crimes like sexual assault, stalking, harassment or domestic abuse. The public policy behind these crimes is to discourage contact, familiarity or control by or between the defendant and his victims. The victims of these crimes are particularly vulnerable, and are often ashamed to report them and to assist in their prosecution. To guarantee that every rapist, stalker,

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[14] Appendix, Exhibit "A," page 3a, ¶2.

batterer or child molester has a constitutional right to personally and publicly question his own victims, unless it can be proven that it will "traumatize" them—and irrespective of the clear embarrassment and harassment that it will cause them—discourages victims from coming forward who are already reluctant to do so. The Arizona Court of Appeals has granted criminal defendants not only a right, but a compulsory process, by which to embarrass and harm their victims, in every case. This goes against clear public policy and jeopardizes the public's esteem in the effective functioning of the judicial system.

II. The Arizona Court of Appeals Erred

Every other appellate court to review this issue, both state and federal, has expressly held or indicated that a court may restrict a *pro se* criminal defendant from personally cross-examining his own child victims, without infringing on or even implicating the defendant's Confrontation Clause rights. *See Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995)[15]; *State v. Estabrook*, 68 Wash. App. 309

[15] In which "a majority of an 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." *Partin v. Commonwealth*, 168 S.W. 3d 23 (KY 2005)(describing *Fields*). "Instead, the trial court permitted standby counsel to conduct the cross-examination and to ask questions written by the defendant." *Id. Fields* also specifically found that it is not "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 [the defendant] personal cross-examination was necessary to protect them," distinguishing *Craig*. *Fields v. Murray*, 49 F.3d 1024, 1036-37 (4th Cir. 1995).

(1993)[16]; *Partin v. Commonwealth*, 168 S.W. 3d 23 (KY 2005)[17]; *State v. Taylor*, 562 A.2D 445, 454 (R.I. 1989)[18]; *Contra Commonwealth v. Conefrey*, 410 Mass 1, 13 (1991)[19]; *Depp v. Commonwealth*, 278 S.W. 3d

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[16] In *State v. Estabrook*, "the defendant had no standby counsel, and the trial judge read the defendant's questions to the victim. Applying the *McKaskle* [*v. Wiggins*, 465 U.S. 168 (1984)] test, the [Washington Court of Appeals] concluded that the procedure did not violate the defendant's right of self-representation." *Partin v. Com.*, 168 S.W.3d 23, 28 (Ky. 2005)(describing *Estabrook*).

[17] In *Partin*, the Kentucky Supreme Court discussed *Fields* and *Estabrook*, before finding that "[t]he trial court's decision to require counsel to actually pose the questions to the victims was not an abuse of discretion and did not violate Appellant's right of self-representation." *Partin v. Com.*, 168 S.W.3d 23, 29 (Ky. 2005).

[18] In *Taylor*, the Rhode Island Supreme Court wrote, "[i]n a case where a defendant states at an early date and in an unequivocal manner that he or she wishes to proceed pro se, standby counsel will be appointed to conduct the examination of the child victim. Through the use of headsets or other techniques affording two-way communication, the questions posed to examine the child victim may be authored by the defendant." *State v. Taylor*, 562 A.2d 445, 454 (R.I. 1989). This "does not violate a defendant's right of self-representation, as he or she is able to undertake selfrepresentation, albeit in a slightly modified form." *Id.*

[19] In *Conefrey*, the Massachusetts Supreme Court found that while the trial court's "mere belief" that the witness could be intimidated or harmed by the defendant personally cross-examining her was insufficient to restrict him from doing so, that if there were evidence to support interference "with the rights of the [witness]" or the "truth-seeking function of the trial," then "the judge might have been correct in limiting the form of the defendant's cross-examination." *Com. v. Conefrey*, 410 Mass. 1, 13 (1991).

615 (2009)[20] ("[i]t 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"). The court may direct the defendant's "standby" attorney to ask the defendant's questions of the witness (*see Partin v. Commonwealth*; *State v. Taylor*), or the court can ask the defendant's questions for him (*see Depp v. Commonwealth*; *State v. Estabrook*). In neither event does the court infringe on the defendant's Confrontation Clause rights, because this issue implicates only the defendant's right to self-representation. *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 standby 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*., 278 S.W.3d at 619 ("[a] defendant 'confronts' an alleged victim by his presence during questioning,

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[20] "…[T]he attorney would be conducting the questioning of the victim witness," but the defendant "would have input." *Depp v. Com.*, 278 S.W.3d 615, 619 (Ky. 2009), *as modified* (Mar. 10, 2009). The Kentucky Supreme Court found that "[t]his was a decision well within the trial court's discretion under *Partin,* and does not require a separate hearing any more than most 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." *Id.* (internal quotations omitted).

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").[21] Accordingly, the trial court may restrict the defendant from personally cross-examining his victims upon finding that it is necessary to protect the witnesses from harassment or undue embarrassment under Rule 611(a), so long as the defendant's *Faretta* rights are otherwise assured. His *Faretta* rights are assured when the trial court orders that the defendant remain in control of the questioning,[22] and it instructs the jury that the defendant is in control of the question-

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[21] When the defendant's "standby" attorney (or the judge) asks the defendant's questions, the defendant's substantive rights to control his defense and elicit testimony from the child victim witness are preserved, while only his "rights" to have the witness hear his voice and be closer to her are infringed. Of course, those same "rights" are infringed whenever a defendant is represented by counsel. Because the defendant would be entitled to these "rights" only because he has chosen to represent himself, they logically belong to the defendant's right to self-representation, and not to his rights under the Confrontation Clause.

[22] The defendant could write, type (instant-message), or even quietly communicate his questions to his counsel or to whoever asks them, in real time and/or in advance of the questioning.

ing and of his case. *See e.g. Estabrook*, 68 Wash. App. at 318.[23]

In determining that this issue implicates the defendant's Confrontation Clause rights, the Arizona Court of Appeals has subjected courts and victims to much more stringent Confrontation Clause standards, which are not "easily dispensed with." *Craig*, 497 U.S. at 850. First, it must be shown that restricting the defendant's Confrontation Clause rights is necessary to achieve an important public policy. *Id.*, 497 U.S. at 837. While the Arizona Court of Appeals readily admits that "protect[ing] child witnesses from…trauma" should qualify as such a policy, citing *Craig*,[24] it would seem that victims of stalking, rape, domestic abuse—or even of violent crimes like robbery or assault—may not enjoy the same protections, since there is no corresponding precedent to *Craig*

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[23] "…[T]he trial court directed [the defendant, Mr. Estabrook] to submit his cross examination questions in writing to the court. The judge then asked those questions after advising the jury that:

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

State v. Estabrook, 68 Wash. App. 309, 314-15 (1993).

[24] "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." *Padilla*, 237 Ariz. at 267, 349 P.3d at 1104 (or Appendix, Exhibit "A," page 7a, ¶10).

for such cases. Second, even in cases involving potential trauma to children, the court must still "hear[] evidence and mak[e] case-specific findings" that the restriction is necessary "to protect each child from trauma." *Padilla*, 237 Ariz. at 267 (citing *Craig*).[25] As applied to this case, this would mean that the court must "hear[] evidence and mak[e] case-specific findings that restricting [defendant's] ability to personally cross-examine the witnesses was necessary to protect each child from trauma." *Id.* This is a very strict standard that appears to require some form of expert testimony—even though there is no scientific research on this subject, as Dr. Goodman testified at the evidentiary hearing conducted in this case. The *Craig* standard also largely overlooks whether cross-examination is embarrassing or shameful to the witness, unless it should rise to the level of being "traumatic." Finally, the standard takes into account only the witness's state of mind, and not how the public or jury views the cross-examination. This is problematic when a child is the witness, since the child may not realize when he or she is being subjected to something that other people find to be highly embarrassing or shameful. Finally, as this case has specifically demonstrated, the "trauma" standard serves to punish children for their efforts to recover from their ordeals, and for their family's efforts to support them. The court is apt to view such efforts as "mitigating" against the likely trauma from cross-examination, and to find that the child may therefore be cross-examined by her own molester—just as the trial court did in this case, when it found that because Minor Petitioner has a

[25] Appendix, Exhibit "A," page 8a, ¶ 11.

"supportive mother" she must undergo the cross-examination. This effectively punishes the child and her family for their efforts, and dis-incentivizes the child from pursuing her recovery. There is simply no compelling constitutional reason for courts to have to act in furtherance of such miserable ends.

As the Fourth Circuit remarked in *Fields v. Murray*, 49 F.3d 1024, 1036-37 (4th Cir. 1995), "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." In *Fields*, the Fourth Circuit found that the trial court properly restricted a self-represented criminal defendant from cross-examining his own victims, on the basis that the Indictment charged him with "raping, sodomizing, and sexually battering these girls," that the defendant had sent a letter to the court asking to cross-examine them. *Id.* "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," as was at issue in *Craig*. *Id.* Therefore, it is not "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 [the defendant] personal cross-examination was necessary to protect them." *Id.*

a. <u>The Confrontation Clause Guarantees Only a Face-to-Face Confrontation and "Opportunity" for Cross-Examination</u>

The Arizona Court of Appeals erroneously ruled that a restriction on the defendant's "right to personally cross-examine" witnesses is "a restriction

on his right to confrontation—and a significant one at that." *Padilla*, 237 Ariz. at 269.[26] Nowhere is this supposed right to be found in any of the rulings from this Court concerning the meaning of the Confrontation Clause. This Court's rulings have uniformly described the Clause as providing only "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); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). The Defendant's right to a "face-to-face" confrontation is clearly not at issue here, since neither Petitioner nor the State has ever requested that Minor Petitioner be allowed to testify from outside the courtroom. This leaves the latter right, the "right to conduct cross-examination." Of this right, the Court has said that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination," and that "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). The Court has recognized that the question of whether a cross-examination has been rendered "ineffective" for Confrontation Clause purposes arises only when a restriction "effective-

[26] Appendix at Exhibit "A," pages 12a – 13a, ¶13.

ly...emasculate[s] the right of cross-examination itself." *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985). In *Delaware v. Van Arsdall*, the Court found it to be a violation of the Confrontation Clause when the trial court prevented "*all* inquiry" into a particular line of cross-examination of an adverse witness. 475 U.S. at 679 (emphasis original). This Court has found cross-examination to be "ineffective" for Confrontation Clause purposes only where there is some kind of a limitation on the scope of cross-examination, as opposed to the "mode" or manner of cross-examination—i.e., only where the trial court limited "what" could be asked, instead of who could ask it; how fast or slow (or loud or soft) they could ask it; when they could ask it during trial; or where in the courtroom they could ask it. *See Fensterer*, 474 U.S. at 19; *see also Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)(citing *Delaware v. Fensterer*). This Court has never found that a limitation on the "mode" or manner of cross-examination rendered it "ineffective" for Confrontation Clause purposes, because it is hard to imagine a case in which this kind of restriction rises to the level of "effectively emasculat[ing] the right of cross-examination itself," such as is required for a truly "ineffective" cross-examination under the Confrontation Clause. *Fensterer*, 474 U.S. at 19. Finally, Confrontation Clause errors are subject to a harmless-error analysis. *Id.*, 475 U.S. at 684.

Given the foregoing analysis, the Arizona Court of Appeals' decision that Confrontation Clause rights are implicated here must be premised on the notion that Defendant will be denied an "opportunity" for an "effective" cross-examination. However, requiring Defendant's standby counsel (or the court) to ask the Defendant's questions does not render his

cross-examination "ineffective" for Confrontation Clause purposes.

b. Requiring the Defendant's Standby Counsel or the Court to Ask the Defendant's Questions Does Not Render the Cross-examination "Ineffective" for Purposes of the Confrontation Clause

In general, the notion that it is a violation of the Defendant's confrontation rights for his lawyer to question an adverse witness instead of him leads to an absurd result, because then a defendant's confrontation rights would be violated every time he is represented by counsel. Clearly, having a lawyer question an adverse witness does not render a cross-examination "ineffective," in and of itself. The Arizona Court of Appeals' finding that it does in this case must necessarily arise out of the separate *Faretta* requirement that Defendant remain in control of the questioning. At least, the Court of Appeals' quotation of *State v. Folk*, 256 P.3d 735, 745 (Idaho 2011) seems to suggest as much: "[c]ross-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."[27] But this quotation, and in fact the entire *State v. Folk* decision, are of dubious value.[28] In *Folk*, the defendant was directed to write

[27] At ¶19 of its Opinion, Exhibit "A" to Appendix.

[28] The court in *Folk* did not reach the issue at bar: "We need not decide the circumstances that would permit a court to prevent a pro se defendant from personally cross examining the alleged child abuse victim." *State v. Folk*, 151 Idaho 327, 338 (2011). *Folk* concerned a child being removed from the courtroom to testify via CCTV—something that involves a true

down questions for his lawyer to ask the child victim witness, who testified via CCTV. *Folk*, 151 Idaho at 337. The defendant complained that he could not concentrate while the witness was answering his questions, because he said that he would already be writing down his next question. *Id.* But there was,

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Confrontation Clause right, the defendant's right to face his accuser. *Id.*, 151 Idaho at 337. However, the *pro se* defendant in *Folk* failed to object to the child being removed from the courtroom, and so the court found that he failed to preserve that issue for appeal. *Id.* On the other hand, the defendant objected to not being allowed to personally cross-examine the child (telephonically) while the child testified via CCTV, and the defendant also raised his dubious objection to having to write and listen at the same time. *Id.* In its zeal to reach the real constitutional issue in that case—the violation of the defendant's right to a face-to-face confrontation under *Craig*—the Idaho Supreme Court focused on the trial court's refusal to allow the defendant to "personally cross-examin[e]the child while the child is on closed circuit television" (even though the defendant never actually objected to the "closed circuit television" part). *Id.*, 151 Idaho at 338. In what can be charitably described as a tortuous analysis intended to "back into" the *Craig* issue, the court remarked that if *Craig* applied to cross-examining a child on CCTV, then it must also apply to "personally cross-examining the child while the child is on closed circuit television"; and finding that the defendant had preserved an objection to this issue, the court proceeded to address whether the lower court had ever satisfied *Craig* to begin with. Finding that "there was no evidence supporting the use of closed-circuit television" to begin with, as required by *Craig*, the court found the arrangement to be constitutionally impermissible. *Id.* Separately, the court also found that having the defendant conduct his cross-examination by written questions to his lawyer violated his *Faretta* rights, "absent evidence that would justify doing so." *Id.* However, the court did not reach the issue of under what circumstances preventing the *pro se* defendant from personally cross-examining the alleged child abuse victim (in court) would be permissible under *Faretta*, an issue directly addressed by the cases cited by Petitioner in footnote 15, above. *Id.*

very simply, no reason why the defendant in *Folk* could not wait to listen to each witness's answer before writing down his next question. A good lawyer always listens to his witness's answer before asking his next question, or in this case writing it down. This was really just a sign 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 the kind of problem that rises to the level of "effectively emasculat[ing] the right of cross-examination itself." *Fensterer*, 474 U.S. at 19. It does not, therefore, state a true Confrontation Clause violation. Further, even if the defendant were actually questioning the witness, he would still have to take notes during her testimony—which 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 down questions for his attorney "would extend the time it would take to cross-examine [the] Child." *Id.*, 151 Idaho at 337. "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 (or type, instant-message, or even just whisper into his lawyer's ear[29]) questions for his attorney to ask can and probably will extend the time for cross-examination, this can hardly be said to result in a cross-examination that is so "ineffective" as to violate the defendant's Confrontation Clause rights. A slight

[29] Another option is to have the defendant whisper into a microphone at counsel's table, which wirelessly transmits into an earpiece that counsel wears.

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 a genuine concern of any kind.

Further, in the case of a deaf witness (or witness who is sensitive to noise or otherwise hearing-impaired), it would be well within the trial court's authority under Rule 611(a) to order that the defendant's counsel submit written questions to the witness instead of asking them. *See e.g. Todd v. State*, 380 So. 2d 370, 371 (Ala. Crim. App. 1980)(finding that a person who is hard-of-hearing "to a very significant degree" "may give his testimony by the procedure of written questions to him," and that it is "permissible for such witness to testify against the objections that the party against whom such testimony is given will be put to great disadvantage in cross-examination to test the witness's credibility"). If it is permissible for the court to restrict counsel in such a fashion, then it is certainly permissible for the court to restrict the *pro se* Defendant here.

c. The Issue is Not Whether Defendant Will Ask Questions that Embarrass or Harm the Witness, but Rather that Allowing Defendant to Perform the Cross-examination is Itself Embarrassing and Harmful

The *Folk* court also expressed concern that the trial court lacked evidence "indicating that if Defendant were permitted to conduct the cross-examination, he would seek to intimidate or embarrass Child or otherwise abuse the right of cross-

examination." *Folk*, 151 Idaho at 339.[30] This critically misses the mark, because the issue is not whether the defendant's cross-examination questions will embarrass the witness – it is that allowing the Defendant to ask those questions is embarrassing and harassing to the minor witness, because he is accused of molesting her. Rule 611(a) allows the court to exercise broad control over the "mode and order" of examining witnesses, which includes control not just over what questions are asked, but also over who asks them and how they are asked, in order to "protect witnesses from harassment or undue embarrassment." Surely, if the defendant's attorney happened to have some embarrassing history with a particular witness—for example, if the witness insisted that he had molested her as a child and that he not be allowed to cross-examine her—then the trial court would be well within its discretion to order that the lawyer's co-counsel question that witness instead of him, or to otherwise disqualify him from questioning her directly. The same situation obtains here, with the added distinction that under *Faretta*, the defendant must remain in control of the questioning, and that the jury must be so informed.

[30] Similar concerns were expressed by the court in *Conefrey*, 410 Mass at 13 ("[t]he 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").

A related problem arises when the *pro se* defendant himself testifies, and he wishes to "question himself" on the stand. The Court may feel that this is embarrassing to the defendant, and order that his standby counsel ask his questions for him. This has been held to be constitutionally permissible, and not to impermissibly infringe on the defendant's right to self-representation. *See e.g. State v. Wassenaar*, 215 Ariz. 565, 573 (Ct. App. 2007)("[w]e find no violation of Defendant's right to self-representation in the requirement that he testify through questions asked by counsel"). The Opinion of the Arizona Court of Appeals in the instant case tried to distinguish *Wassenaar*, on the grounds that *Wassenaar* did not "affect the self-represented defendant's right to conduct the examination of other witnesses." *Padilla*, 237 Ariz. at 268.[31] "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.* This is a doubtful statement, since a *pro se* defendant certainly can question himself on the stand (or testify in narrative format), even though it may evoke thoughts of a Woody Allen comedy. What the lower court really seems to be saying is that its interest in saving a defendant from the mild embarrassment of questioning himself on the stand is somehow more important than its interest in saving a child from the embarrassment of being publicly interrogated by the man who molested her. It is hard to rationalize the lower court's position here, except to view it as the consequence of ignoring even its own precedent concerning permissible restrictions of the *Faretta* right.

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[31] Appendix, Exhibit "A," page 11a, ¶17.

Finally, when attorneys cross-examine a witness, they are subject to a host of ethical obligations, including ABA 4.4 ("Respect for Rights of Third Persons") and ABA 3.1 ("Meritorious Claims and Contentions"). An attorney violates these duties only at the risk of losing his profession and livelihood. Attorneys are also subject to extensive screening and criminal background checks before becoming members of the bar. On the other hand, *pro se* defendants who cross-examine witnesses are not as conscious of these rules, if at all; nor are they subject to the same level of risk in violating them, since they are not professional lawyers. They are also much more motivated to break these rules, having more to gain personally, and less to lose. They cannot therefore be expected to "self-regulate" in the same way that attorneys do. As a result of this, the questions that the defendant asks will not pass through the same kind of ethical "filter" that an attorney has, before the victim hears them. This gives rise to particular concern in child molestation cases. Child molesters often "groom" their victims with threats to silence them, the details of which may be recalled by his minor victim and triggered by specific references. For example, the defendant may ask, "what are your parent's names?" which appears to be facially non-objectionable. However, the defendant may have threatened the victim with harming her parents if she ever told anyone the truth, and his intent in asking the question may be solely to force her to recall his threat. It is very difficult, if not impossible, to police the defendant's intent in asking these kinds of questions; but at least if the defendant's counsel or the court asks them, then it is much less likely that they will have the intended effect. Finally, having

counsel or the court ask the defendant's questions provides an ethical "filter," since counsel or the court may reasonably refuse to ask any question that is clearly abusive or inappropriate. This is permissible under *Faretta*, because even the Defendant's *Faretta* rights do not encompass the right "to abuse of the dignity of the courtroom," or not to "comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834 n. 46.

d. The Defendant's *Faretta* Rights Would Not be Impermissibly Infringed

In having someone else read the Defendant's questions for him, the court does not impermissibly infringe on the Defendant's *Faretta* right to self-representation. In *McKaskle v. Wiggins*, the 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 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. at 185. "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. "[N]o absolute bar on standby counsel's unsolicited participation is appropriate or was intended." *Id.*, 465 U.S. at 176-77.

By giving Defendant full control over the questions that his counsel asks the Minor Petitioner, the lower court will ensure that there is no "substantial interference" with the Defendant's right to control his defense. His counsel will ask only the questions that Defendant wants him to ask, allowing Defend-

ant to retain full and absolute control over the substance of his defense. (In obedience to his ethical obligations, however, counsel could refuse to ask a question that is clearly abusive or inappropriate.)

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, given that the court will instruct the jury that Defendant retains control over his own defense and the questioning. Further, it should be visibly apparent that standby counsel is asking the questions that Defendant is communicating to him. The jury will see 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 (or types or instant-messages them to him). Further, Defendant will retain the right to personally cross-examine all other witnesses besides the minor child victims, as well as the right to do his opening and closing remarks by himself; and to otherwise appear in the status of a *pro se* defendant in all respects, throughout the trial.

* * *

In deciding that *pro se* criminal defendants have a Confrontation Clause right to personally cross-examine their own victims, the Arizona Court of Appeals has incorrectly decided an important question of federal law that has not been, but should be, settled by this Court. The decision of the Court of Appeals in this matter is in error and will sow the seeds of more harmful precedent to come, for the most vulnerable victims of every crime, unless reversed.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

M.A., AS MOTHER OF J.D.,

Petitioner,

V.

THE HONORABLE JOSÉ PADILLA,

Respondent;

STATE OF ARIZONA, CHRISTOPHER ALLEN SIMCOX,

Real Parties.

On Petition for a Writ of Certiorari
to the Arizona Court of Appeals

APPENDIX

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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
May 8, 2015.
As Amended May 28, 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.

HOWE, 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. J.D.'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.

APPENDIX B

Supreme Court
STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

December 1, 2015

RE: STATE ex rel MONTGOMERY v HON. PADILLA/SIMCOX

Arizona Supreme Court No. CV-15-0166-PR

Court of Appeals, Division One No. 1 CA-SA 15-0087

Maricopa County Superior Court No. CR2013-428563-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 1, 2015, in regard to the above-referenced cause:

ORDERED: Request for Oral Argument (Petitioner State ex rel. Montgomery) = DENIED.

FURTHER ORDERED: Request for Oral Argument (Petitioners A.S./Z.S.) = DENIED.

FURTHER ORDERED: Petition for Review of a Special Action Decision on the Court of Appeals (Petitioners M.A./J.D.) = DENIED.

FURTHER ORDERED: Petition for Review of a Special Action Decision of the Court of Appeals (Petitioner State ex rel. Montgomery) = DENIED.

FURTHER ORDERED: Petition for Review of a Special Action Decision of the Court of Appeals (Petitioners A.S./Z.S.) = DENIED.

These orders are without prejudice to petitioners seeking relief from the court of appeals regarding any issues relating to the superior court's August 19, 2015 order issued after the Maryland v. Craig hearing.

Janet Johnson, Clerk

TO:
Keli B Luther
Amanda M Parker
John D Wilenchik
Colleen Clase
Hon. Jose S Padilla

Chris A Simcox, P982577, Maricopa County Jail, Lower Buckeye

Robert S Shipman

Sheena Singh Chawla

Elizabeth B Ortiz

David J Euchner

Kathleen E Brody

Mikel Steinfeld

Amy Michelle Kalman

Ruth Willingham

kd

APPENDIX C

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 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,

[SIGNATURE]

Michelle A. [REDACTED]