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## **Standing By to Protect Child Abuse Victims: Utilizing Standby Counsel in Lieu of Personal Cross-Examination**

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## Comments

# Standing By to Protect Child Abuse Victims: Utilizing Standby Counsel in Lieu of Personal Cross-Examination

Claire Murtha\*

### ABSTRACT

Child abuse is a pervasive problem in the United States. Often, the abused child's word is the only evidence to prove the abuse in court. For this reason, the child's testimony is critical. Testifying can pose a challenge for the abused child who must face her abuser in the courtroom, especially if that abuser personally questions her.

The United States Supreme Court has recognized the legitimate and strong interest the state has in protecting the psychological and physical well-being of children. When a child will face significant trauma and cannot reasonably communicate in the courtroom, the child can be questioned outside the presence of the defendant through alternative contemporaneous methods such as closed-circuit television ("CCTV"). Using closed-circuit television implicates the right to confrontation, which guarantees the opportunity for a defendant to confront his accuser. Despite

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\* J.D. Candidate, Penn State University Dickinson Law, 2022. Thank you to the friends and family who supported me and helped make this comment what it is. I am grateful for all of you.

this guarantee, the court may limit the face-to-face exposure for the child's protection when the child would face a significant level of trauma. Many states have codified the use of closed-circuit television in CCTV statutes. A court may also sua-sponte impose limits on a self-represented defendant's ability to personally question child witnesses. Such limits instead require standby counsel to conduct the questioning, which courts have held does not violate the right to self-representation.

This Comment explores the permissible limitations of the right to confrontation and self-representation. Particularly, it looks at the Pennsylvania Supreme Court decision *Commonwealth v. Tighe* and argues the court misclassified the above-mentioned rights. Based on the Fourth Circuit decision in *Fields v. Murray*, the Pennsylvania Supreme Court should have classified these rights as distinct which would require different levels of necessity to limit. This Comment ultimately proposes a prohibition against personal cross-examination by pro se defendants and the passing of a pro se provision to the CCTV statute.

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## I. INTRODUCTION

Child abuse is a pervasive problem in the United States with approximately 678,000 instances each year.<sup>1</sup> However, experts believe this number may be underreported.<sup>2</sup> For most abused children, the abuse comes at an early age and from a parent.<sup>3</sup> Abuse occurs in many forms; 61 percent of children are neglected, 10 percent are physically abused, 7 percent are sexually abused, and nearly 15 percent of children face 2 or more forms of abuse.<sup>4</sup> On average, about 21.4 percent of child abuse cases go to court in the United States with around 100,000 children testifying each year.<sup>5</sup> Children as young as three years old can testify.<sup>6</sup> Some children can benefit from the experience because testifying can provide closure to children and allow a sense of control, but this is not true for every child.<sup>7</sup>

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1. *National Statistics on Child Abuse*, NAT'L CHILDREN'S ALLIANCE, (2019), <https://bit.ly/3mAcDkz> [<https://perma.cc/79DR-NNLE>].

2. *Id.*

3. *Id.* The author recognizes children of any gender may be abused, however for the sake of clarity only the female pronoun will be used when referring to child victims.

4. *Id.*

5. Robert H. Pantell, *The Child Witness in the Courtroom*, 139 AM. ACAD. PEDIATRICS 1, 1–2 (2017).

6. Barry Nurcombe, *The Child as Witness: Competency and Credibility*, 25 J. AM. ACAD. CHILD PSYCHIATRIST 473, 473 (1986).

7. L. Christine Bannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. the Accused's Right to Confrontation*, 18 L. & PSYCH. REV. 439, 441 (1994).

Even though testifying can have some benefit to the child, some suggest a child who testifies needs more protection, particularly protection from testifying in front of her abusers.<sup>8</sup> A child witness's added concern for confronting her abuser can increase any negative feelings surrounding testifying such as stress, fear, or dread.<sup>9</sup> A frightened or nervous child will often struggle to answer questions and may feel testifying has had an adverse effect.<sup>10</sup> The United States Supreme Court has recognized the possible adverse effect on children who testify and that the state has an interest in protecting them from such trauma.<sup>11</sup>

In addition to the protections available for witnesses, an individual charged with a criminal offense receives certain protections.<sup>12</sup> The Sixth Amendment holds one of the greatest protections for a criminal defendant.<sup>13</sup> It states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>14</sup> This right is known as the Confrontation Clause, or right to confrontation, and applies to both federal and state criminal prosecutions.<sup>15</sup> The Confrontation Clause has many elements including the right to face-to-face confrontation and the right to cross-examine statements by witnesses.<sup>16</sup>

History—dating as far back as the Roman period—recognizes the right to face one's accusers.<sup>17</sup> This tradition protects against communications or testimony without cross-examination by the de-

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8. *Id.*

9. *Id.* at 441-42

10. Pantell, *supra* note 5 at 7.

11. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 860 (1990) (recognizing there is a significant state interest in protecting the psychological and emotional welfare of children). *See infra* Section II.A & II.B (discussing the foundation and possible limitations of the Confrontation Clause and the right to self-representation).

12. *See, e.g., U.S. CONST. amend. X* (protecting the right against self-incrimination); *U.S. CONST. amend. XI* (affording the right to a speedy trial and the right to counsel).

13. *U.S. CONST. amend. XI*.

14. *U.S. CONST. amend. XI*; *see* CHRISTOPHER B. MUELLER, ET. AL., *EVIDENCE UNDER THE RULES TEXT, CASES AND PROBLEMS* 383 (Wolters Kluwer, 9th ed. 2019) (explaining the Confrontation Clause guarantees a defendant the ability to be confronted with the witnesses against him, the ability to perceive the witness and have the witness perceive the defendant, and the ability to protect against hearsay).

15. *U.S. CONST. amend. XI*; *see Crawford v. Washington*, 541 U.S. 36, 42 (2004) (referring to part of the Sixth Amendment as "The Confrontation Clause"); *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (holding the Sixth Amendment applies to state and federal prosecutions).

16. *U.S. CONST. amend. XI*.

17. Frank R. Herrmann, S.J. Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 *VA. J. INT'L L.* 481, 482 (1994). The right to face one's accuser is present in the Bible in the Acts of the

fense and ensures the jury may observe witness testimony.<sup>18</sup> By ensuring a defendant can cross-examine his accusers, the testimony becomes more reliable, in part because the jury can observe witness behavior and judge witness credibility.<sup>19</sup>

The Constitution provides another form of protection for criminal defendants—the right to self-representation, known as proceeding pro se.<sup>20</sup> Proceeding pro se allows a defendant to put on his own defense and control the manner of that defense.<sup>21</sup> Self-representation cannot be used to abuse the court’s dignity or to ignore relevant rules, but instead can be used to allow the defendant to present what he believes to be his best possible defense.<sup>22</sup> When a defendant abuses the right, a judge may revoke it.<sup>23</sup>

These rights—to confrontation and self-representation—have been challenged in cases where a child testifies against her alleged abuser.<sup>24</sup> Child abuse victims can have severe levels of trauma and the presence of the abuser can exacerbate this trauma and inhibit their ability to communicate.<sup>25</sup> In response to this, the states have created methods to protect children from further trauma in the

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Apostles 25:16 and indicates that under Roman Law no man was to die without meeting his accuser face-to-face and being given a chance to defend himself. *Id.*

18. *Mattox v. United States*, 156 U.S. 237, 242 (1895).

19. *See Maryland v. Craig*, 497 U.S. 836, 848 (1990) (recognizing the Confrontation Clause guarantees the reliability of evidence, the key concern protected by the hearsay doctrine). James P. Timony, *Demeanor Credibility*, 49 CATH. UNIV. L. REV. 903, 904 (2000) (“The trier of fact uses the witness’s demeanor to determine the truth of the testimony.”). For the sake of clarity, the pronoun “he” will be used when referring to defendants generally.

20. *See, e.g., Faretta v. California*, 422 U.S. 806, 814–15 (recognizing the Sixth Amendment holds an implicit right to self-representation). For further discussion about the right to self-representation, see *infra* Section II.B and accompanying notes.

21. *Faretta*, 422 U.S. at 815.

22. *Id.* at 834.

23. *Martinez v. Ct. of Appeal of California, Fourth App. Dist.*, 528 U.S. 152, 161–62 (2000) (stating the right to self-representation is not absolute because the government has an interest in ensuring the integrity and efficiency of trial, and the judge may terminate self-representation as necessary).

24. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 840–44 (1990) (challenging the use of a closed-circuit television statute that restricted the child’s ability to see the defendant as a violation of the Confrontation Clause and finding the statute constitutional and not a violation of the Confrontation Clause); *Fields v. Murray*, 49 F.3d 1024, 1025–28 (4th Cir. 1994) (challenging the use of standby counsel to ask questions to the child witnesses instead of allowing the self-represented defendant to ask the questions as a violation of the right to self-representation). The use of standby counsel was not a violation of the right to self-representation. *Id.* at 1037.

25. *See Gail S. Goodman et al., Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS FOR SOC’Y RSCH. CHILD DEV. 1, 93 (1992) (finding younger children struggle to answer questions in court, and a child’s feelings about the defendant affected her ability to answer questions).

courtroom.<sup>26</sup> Most notably, this includes using alternative contemporaneous methods by which the child can testify, such as closed-circuit television (“CCTV”), upon a showing of necessity.<sup>27</sup> Testifying via CCTV protects a child from having to see her abuser in court.<sup>28</sup> Some judges appoint standby counsel to cross-examine the child. Using standby counsel protects the child against potential trauma stemming from being questioned directly by the defendant during cross-examination.<sup>29</sup> Procedural challenges arise in a case with a pro se defendant when a child witness could testify via closed-circuit television if the state does not have a pro se provision in its statute.<sup>30</sup> Courts may also struggle to balance the rights to confrontation and self-representation against the protection of the psychological wellbeing of children.<sup>31</sup>

This Comment will explore the right to confrontation found in the Confrontation Clause and the implicit right to self-representation.<sup>32</sup> It will address the use of closed-circuit television statutes and examine Texas’ and Pennsylvania’s use of these statutes.<sup>33</sup> Next, it will overview the use of standby counsel, specifically in the context of the Pennsylvania Supreme Court’s 2020 case, *Commonwealth v. Tighe*.<sup>34</sup> This case arguably conflicts with other jurisprudence by classifying the right to self-representation as equal to the right to

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26. Pantell, *supra* note 5, at 2 (recognizing some states have a CCTV statute allowing for testimony via CCTV and all states allow support people or comfort objects and exclusion of the press).

27. *Craig*, 497 U.S. at 853–54. 24 states allow for one-way CCTV testimony: Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, and Vermont. *Id.* at 854 n.3. Eight states allow two-way screening in which the child can see the courtroom and the defendant: California, Hawaii, Idaho, Minnesota, New York, Ohio, Virginia, and Vermont. *Id.* at 854 n.3–4.

28. *Id.* at 835–54.

29. *See, e.g., Fields*, 49 F.3d at 1028 (ruling the defendant was not allowed to ask the children the questions himself but instead could write the questions down for the attorney to ask the child witnesses).

30. *See* Deborah Siri, *Pro Se Defendants in Child Sexual Abuse Cases*, 22 U.C. DAVIS L. REV. 1073, 1088 (1989) (explaining the purpose of a CCTV statute is to prevent emotional damage to the child but without a pro se provision that purpose is frustrated). An accompanying pro se provision would give clear guidance on the procedure for when a defendant appears pro se. *See, e.g., TEX. CODE CRIM. PROC. ART. 38.071 § 1* (1983).

31. *See Commonwealth v. Tighe*, 224 A.3d 1268, 1279 (“[I]f there is a parallel between the limitation on the confrontation and self-representation rights . . . relevant evidence would presumably be required to justify those limitations in any given case.”).

32. *Infra* Section II.A & II.B.

33. *Infra* Section II.C.

34. *Commonwealth v. Tighe*, 224 A.3d 1268 (Pa. 2020).

confrontation for purposes of limiting personal cross-examination.<sup>35</sup> This Comment will then explain the distinction between the rights to confrontation and self-representation. Ultimately, it will conclude by suggesting Pennsylvania should create a prohibition on personal cross-examination by pro se defendants and create a pro se provision for its CCTV statute.<sup>36</sup>

## II. BACKGROUND

### A. *The Confrontation Clause*

#### 1. *The United States Constitution Guarantees a Right of Confrontation to Criminal Defendants*

The Confrontation Clause carries certain constitutional guarantees.<sup>37</sup> It does the following:

Ensures that the witness will give his statements under oath . . .  
Forces the witness to submit to cross-examination . . . [and] Permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.<sup>38</sup>

As part of these guarantees, the United States Supreme Court ruled in *Coy v. Iowa*,<sup>39</sup> the right to confrontation guarantees the defendant a face-to-face meeting with a witness before the trier of fact.<sup>40</sup> In *Coy*, the Court explained that a proceeding in which a screen was placed between the defendant and the witness was unconstitutional because it denied the defendant the opportunity for a face-to-face confrontation.<sup>41</sup>

The right to confrontation guarantees the defendant the opportunity to show testimonial defects through cross-examination.<sup>42</sup> The Constitution gives a defendant the chance to demonstrate to the fact-finder any reason to mistrust or give little weight to the wit-

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35. *Infra* Section II.D.

36. *Infra* Section III.

37. U.S. CONST. amend. XI. The Sixth Amendment guarantees the right to a speedy and public trial, trial by an impartial jury, to be informed of the criminal charges against the defendant, and the right to witnesses and to be represented by a lawyer. *Id.*

38. *See* *California v. Green*, 399 U.S. 149, 158 (1970) (allowing prior statements by witnesses to be used to does not violate the Confrontation Clause so long as cross-examination is preserved).

39. *Coy v. Iowa*, 487 U.S. 1012 (1988).

40. *Id.* at 1016.

41. *Id.* at 1022.

42. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985).



ness's testimony.<sup>43</sup> Face-to-face confrontation can expose such infirmities.<sup>44</sup>

## 2. *Limitations Upon the Right to Confrontation*

Despite being at the core of the right to confrontation, *face-to-face* confrontation is not an absolute right, and the United States Supreme Court has never regarded it as such.<sup>45</sup> In fact, the Court expressly recognized face-to-face confrontation is not essential to the right to confrontation.<sup>46</sup> Instead, there exists a preference for face-to-face confrontation, but important public policy can trump such preference.<sup>47</sup> Face-to-face confrontation is an element of confrontation, but it is not an indispensable element.<sup>48</sup>

When a child displays a certain level of trauma, such as serious emotional distress, that is so strong the child cannot communicate in the courtroom, a court may restrict a defendant's right to confrontation in order to protect the child.<sup>49</sup> A judge may restrict a defendant's right to confrontation when the state's interest in the wellbeing of child abuse victims outweighs the right to confrontation.<sup>50</sup> However, to justify restricting a defendant's right to face his accusers in court, a prosecutor must demonstrate a case-specific finding of necessity that the child would face more than *de minimis* trauma brought on by the presence of the defendant, not merely the courtroom itself.<sup>51</sup>

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43. *Id.*

44. *See infra* Sections II.A.2 & II.C.1–2 and accompanying notes.

45. *Fensterer*, 474 U.S. at 22.

46. *See Maryland v. Craig*, 497 U.S. 836, 845 (1990) (“Although face-to-face confrontation forms ‘the core of the values furthered by the Confrontation Clause,’ [citation omitted] we have nevertheless recognized that it is not the *sine qua non* of the confrontation right.”); *see e.g.*, *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (“[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’s testimony.”).

47. *See Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (declining to decide explicitly what exceptions exist to the face-to-face requirement but stating such exceptions “would surely be allowed only when necessary to further an important policy”); *Craig*, 497 U.S. at 849 (recognizing the preference for face-to-face confrontation must give way to important public policy considerations).

48. *Craig*, 497 U.S. at 849.

49. *See id.* at 860 (holding the use of CCTV was constitutional because the child would be traumatized by the presence of the defendant).

50. *Id.* at 853.

51. *Id.* at 855–56 (recognizing *de minimis* trauma as “‘mere nervousness or excitement or some reluctance to testify’”) (quoting *Wildermuth v. Maryland*, 530 A.2d 275, 289 (Md. 1987)).

## B. *The Right to Self-Representation*

### 1. *Faretta v. California and the Right to Proceed Pro Se*

The Sixth Amendment implicitly contains the right to represent oneself in a criminal action, known as proceeding pro se.<sup>52</sup> The Sixth Amendment states an accused may “have the Assistance of Counsel for his defense.”<sup>53</sup> This statement, known as the Counsel Clause, includes the implied right to conduct one’s own defense without the assistance of counsel, thus forming the right to self-representation.<sup>54</sup> The right to self-representation means a defendant must be allowed to control his own defense, including presenting motions, arguing law, conducting voir dire and witness examination, and addressing the jury and judge.<sup>55</sup> Such protection affirms the defendant’s dignity and autonomy.<sup>56</sup>

In *Faretta v. California*,<sup>57</sup> a criminal defendant desired to put forth his own defense, but the state of California “force[d] a lawyer upon him.”<sup>58</sup> The United States Supreme Court had to decide whether the Constitution guaranteed defendants a right to self-representation in a criminal proceeding and whether a state could require a pro se defendant to have standby counsel.<sup>59</sup> In deciding, the Court looked to state constitutions, the Judicial Act of 1789<sup>60</sup>, English Common Law, and United States Court of Appeals decisions.<sup>61</sup> The Court explained that the trial court violated the right to proceed pro se by requiring standby counsel for the defendant despite the defendant’s knowing and voluntary waiver of his right to counsel.<sup>62</sup> The *Faretta* holding gives an accused criminal defendant the implicit right to represent himself provided he knowingly and

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52. See, e.g., *Faretta v. California*, 422 U.S. 806, 814 (1975); *McKaskle v. Wiggins*, 465 U.S. 168, 170 (1984) (referring to self-represented defendants as pro se).

53. *McKaskle*, 465 U.S. at 173.

54. *Id.*

55. *Id.*

56. *Id.* at 178.

57. *Faretta v. California*, 422 U.S. 806 (1975).

58. *Id.* at 807–09.

59. *Id.* at 807. Standby counsel may be appointed to assist a pro se defendant. See, e.g., *Locks v. Sumner*, 703 F.2d 403, n.3 (9th Cir. 1983) (“‘Standby’ counsel refers to the situation in which a *pro se* defendant is given the assistance of advisory counsel who may take over the defense if for some reason the defendant becomes unable to continue.”).

60. Judiciary Act of 1789, 1 Stat. 73, 92. The First Congress passed the act and President Washington signed it “one day before the Sixth Amendment was proposed, provided that ‘in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of . . . counsel . . . .’ The right is currently codified in 28 U.S.C. § 1654.” *Faretta*, 422 U.S. at 812–13.

61. *Faretta*, 422 U.S. at 816.

62. *Id.* at 835.

intelligently waives the right to counsel and agrees to abide by courtroom procedure.<sup>63</sup>

In its analysis, the *Faretta* Court looked to *Adams v. United States ex rel. McCann*,<sup>64</sup> which recognized that the right to counsel holds an implicit right to dispense with counsel's assistance.<sup>65</sup> By forcing a lawyer upon an unwilling defendant, the Court found the State in fact violated the defendant's right to present his own defense.<sup>66</sup>

## 2. Clarifying the Self-Representation Right

In *McKaskle v. Wiggins*<sup>67</sup>, the Supreme Court clarified the self-representation right as presented in *Faretta*.<sup>68</sup> Wiggins was proceeding pro se in a state robbery trial and the trial court appointed standby counsel.<sup>69</sup> Wiggins argued the presence of his standby counsel's assistance violated his Sixth Amendment right to self-representation.<sup>70</sup> Despite the self-representation right as put forth in *Faretta*, there exists no absolute bar against unsolicited participation of standby counsel.<sup>71</sup> Supporting this contention, the *McKaskle* Court relied on a footnote in *Faretta* stating a judge can appoint standby counsel to aid the defendant over the defendant's objection.<sup>72</sup>

To evaluate whether standby counsel's involvement has violated a defendant's right to self-representation, the court must ask "whether the defendant had a fair chance to present his case in his own way."<sup>73</sup> Unsolicited and excessive intrusion by standby counsel undermines the opportunity for a defendant to conduct his own defense.<sup>74</sup> Additionally, any use of standby counsel should not change the jury's perception of a defendant's pro se status and must be

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63. *See id.* at 835–36 (holding an accused must knowingly and intelligently waive the benefits of council and follow the "ground rules" of trial and courtroom procedure).

64. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942).

65. *Faretta*, 422 U.S. at 814 (quoting *Adams*, 317 U.S. at 269).

66. *Id.* at 835.

67. *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

68. *Id.* at 170–71. Wiggins appealed arguing the presence of standby counsel violated his right to present his own defense. *Id.* at 170–73.

69. *Id.* at 170.

70. *Id.* at 170–74.

71. *Id.* at 176.

72. *Faretta*, 422 U.S. at n.46 (referencing *United States v. Dougherty*, 473 F.2d 1113, 1124–26 (D.C. Cir.)).

73. *McKaskle*, 465 U.S. at 177.

74. *Id.*

conducted in a manner to preserve that viewpoint.<sup>75</sup> However, a court's appointment of standby counsel to overcome procedural challenges does not violate the self-representation right.<sup>76</sup> Ultimately, *McKaskle* held a judge can appoint standby counsel to promote procedural efficiency and explain courtroom protocol.<sup>77</sup>

### C. *The Use of Closed-Circuit Television*

#### 1. *The Use of Closed-Circuit Television Generally*

Recognizing the challenge of a child testifying in front of her alleged abuser, 24 states have created statutes that allow a child to testify via CCTV when the prosecutor demonstrates the child would be significantly traumatized by testifying in front of the defendant.<sup>78</sup> *Maryland v. Craig*<sup>79</sup> was the seminal case authorizing the use of this one-way CCTV practice.<sup>80</sup> *Craig* concerned a Maryland statute authorizing the use of one-way CCTV to conduct testimony by child victims when a judge finds a child would face severe emotional distress that would render the child unable to reasonably communicate in court.<sup>81</sup> The defendant was charged with child abuse and several sex offenses, and he challenged the use of the

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75. *Id.* at 178. Jury perception is an important part of the self-representation right because if the jury does not understand the defendant is representing himself it may erode the dignity value that self-representation promotes and it can undercut the defendant's presentation of his defense. *Id.* Despite these risks, standby counsel involvement does not need to take place outside the presence of the jury so long as it does not erode the perception of the defendant conducting his own defense. *Id.* at 181–82.

76. *Id.* at 183. Common procedural challenges standby counsel may assist in include evidentiary issues, such as introducing exhibits and objecting to testimony. *Id.*

77. *Id.* at 184.

78. *Maryland v. Craig*, 497 U.S. 836, 853–54, (1990). The following states allow one-way CCTV testimony: Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, and Vermont. *Id.* at n.3. Eight states allow two-way screening in which the child can see the courtroom and the defendant: California, Hawaii, Idaho, Minnesota, New York, Ohio, Virginia, and Vermont. *Id.* at n.3–4.

79. *Maryland v. Craig*, 497 U.S. 836 (1990).

80. Nat'l Ctr. for Prosecution of Child Abuse, *Closed-Circuit Television Statutes*, NAT'L DISTRICT ATTY'S ASSOC. 1, 1 (Aug. 2012) <https://bit.ly/3bqIIs1> [<https://perma.cc/7AHT-C29X>]. One-way CCTV allows only one party to be seen. *Id.* When used for child testimony, one-way CCTV is used so the courtroom can see the feed from the room when the child is, but the child is unable to see the courtroom and most importantly the defendant. *Id.*

81. *Craig*, 497 U.S. at 840. The Maryland statute expressly allows for children to testify via closed-circuit television when the child would feel such emotional distress that reasonable communication is not possible. MD. CODE ANN., CRIM PROC § 11-303 (2001).

Maryland CCTV statute for a six-year-old girl.<sup>82</sup> A CCTV statute allows a child to testify in a room with only the prosecutor and defense counsel; the testimony is broadcast to the courtroom where the defendant, jury, and judge observe the questioning through one-way CCTV broadcast.<sup>83</sup>

In *Craig*, the Court evaluated the Maryland statute to determine if it infringed upon the defendant's right to confrontation.<sup>84</sup> The Court held the Maryland Statute was constitutional because the state's interest in the wellbeing of children was sufficient to outweigh the defendant's right to confront his accuser.<sup>85</sup> The Court expressed there are more considerations beyond the preference for face-to-face confrontation; preference for face-to-face confrontation can give way to important public policy such as protecting children.<sup>86</sup> However, to limit this right, the prosecutor must demonstrate a showing of case-specific necessity.<sup>87</sup>

## 2. *State Use of CCTV—Texas and Pennsylvania*

Pennsylvania has a CCTV statute entitled Testimony by Contemporaneous Alternative Means,<sup>88</sup> which allows testimony by CCTV and other contemporaneous methods.<sup>89</sup> This statute allows a child to testify outside the courtroom when the presence of the defendant would cause the child to suffer "serious emotional distress that would substantially impair the child victim's or child material witness's ability to reasonably communicate."<sup>90</sup>

In *Commonwealth v. Williams*,<sup>91</sup> the Pennsylvania Supreme Court evaluated the use of the CCTV statute during a preliminary

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

83. *Id.* at 841.

84. *Id.* at 843 (citing to Maryland statute).

85. *Id.* at 860.

86. *Id.* at 863.

87. *Id.* at 587–88. Case-specific necessity requires the state to demonstrate a need for each individual child rather than a general rule allowing it for all children. *Id.* at 857–58.

88. 42 PA. CONS. STAT. § 5985 (2004).

89. *Id.* A scenarios when a child has testified outside the presence was a rape trial in which the psychotherapist testified the victim had significant mental health problems including depression, post-traumatic stress disorder, and suicidal thoughts and that if the victim were to testify in front of the defendant she would enter an "emotional tailspin." *Commonwealth v. Charlton*, 902 A.2d 554, 559 (Pa. Super. Ct. 2006). When a child only feels the mild trauma, anxiety, and fear that would ordinarily occur with witness testimony, then the threshold has not been met to invoke the statute. *See Commonwealth v. Loudon*, 638 A.2d 953, 955 (Pa. 1994) (stating subjective fear of a witness, without more, is insufficient grounds to restrict face-to-face confrontation).

90. 42 PA. CONS. STAT. § 5985(a)–(a.1) (2004).

91. *Commonwealth v. Williams*, 84 A.3d 680 (Pa. 2014).

hearing.<sup>92</sup> The court determined the statute was not contrary to the Pennsylvania nor the United States Constitution because defense counsel still had the opportunity to cross-examine, and the defendant and fact-finder could observe the child's demeanor.<sup>93</sup> The court noted the statute requires a proper showing of necessity by the prosecution and still preserves the other important aspects of the Confrontation Clause such as testifying under oath, full and complete cross-examination, and the opportunity to be observed by the factfinder.<sup>94</sup> The Pennsylvania statute does not contain a provision addressing the procedure for pro se defendants when a child is allowed to testify via CCTV.<sup>95</sup>

Texas, like Pennsylvania and several other states, has a statute authorizing the use of alternative testimony methods for children who cannot testify in the presence of the defendant.<sup>96</sup> The Texas statute differs from the Pennsylvania statute by explicitly requiring the court to appoint standby counsel for pro se defendants.<sup>97</sup> Standby counsel's involvement only extends to the CCTV testimony and the defendant may conduct his defense and communicate with the standby counsel during the questioning.<sup>98</sup> The explicit pro se provision removes any doubt as to the procedure where there is a pro se defendant.<sup>99</sup>

#### D. *The Use of Standby Counsel*

Standby counsel can act as another procedural option to assist a pro se defendant and represent him upon any termination of self-representation, even against the protest of the defendant.<sup>100</sup> The

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92. *Id.* at 681–82.

93. *Id.* at 684.

94. *Id.* at 689.

95. See 42 PA. CONS. STAT. § 5985 (2004) (containing no provisions relating to pro se defendants).

96. TEX. CODE CRIM. PROC. ART. 38.071 § 1 (1983). Courts have held the provision for recorded testimony is unconstitutional. *Powell v. State*, 765 S.W.2d 435, 435 (Tex. Crim. App. 1989) (holding the provision for pre-recorded testimony as unconstitutional because it did not comply with the Confrontation Clause). However, courts have not taken issue with the standby counsel provision. See, e.g., *Coronado v. State*, 351 S.W.3d 315, 317 (Tex. Crim. App. 2011) (holding unconstitutional the use videotaped interviews of a child responding to interrogatories and holding the Confrontation Clause requires live testimony).

97. TEX. CODE CRIM. PROC. ART. 38.071 § 11.

98. *Id.*

99. Siri, *supra* note 30.

100. See *Faretta v. California*, 422 U.S. 806, 834 n.46 (1974) (“Of course, a State may—even over objection by the accused—appoint a ‘standby counsel’ to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.”) (citing *United States v. Dougherty*, 473 F.2d 1113, 1124–26

American Bar Association Project for Criminal Justice suggests “standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.”<sup>101</sup> As discussed earlier, the use of standby counsel does not violate a defendant’s right to self-representation so long as the defendant can retain control over the presentation of his defense, and the jury understands the defendant is conducting his own trial.<sup>102</sup>

In *Fields v. Murray*,<sup>103</sup> the Fourth Circuit decided whether prohibiting a pro se defendant from personally cross-examining witnesses violated the right to self-representation and the right to confrontation.<sup>104</sup> During trial the prosecution did not have to prove an individualized showing of trauma to limit the defendant from questioning the girls because of the state’s strong interest in protecting the child’s wellbeing.<sup>105</sup> *Fields* held personal cross-examination is but one element of the right to self-representation, which can be limited by a judge to further a compelling state interest.<sup>106</sup> The court explained that emotional trauma is easy to assume when the defendant would personally cross-examine the child.<sup>107</sup> The court further suggested the state’s interest in protecting children from personal confrontation may be stronger than the interest implicated in *Craig* of protecting a child from testifying in her abuser’s presence.<sup>108</sup> Further, the ability to conduct personal cross-examination is less fundamental than the right to confrontation, according to the court.<sup>109</sup>

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(D.C. Cir. 1972)). Self-representation may be terminated due to disruptive behavior. *U.S. v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972).

101. See *Standards Relating to the Function of the Trial Judge, Recommended by the Advisory Committee on the Judge’s Function*, AM. BAR ASS’N PROJECT FOR CRIM. JUST., § 6.7 (Tentative Draft of April 21, 1972, as approved by the House of Delegates, July 1971).

102. *Supra* Section II.B.

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

104. *Id.* at 1025.

105. See *id.* at 1037 (reasoning it was not essential to provide evidence to the girl’s probable emotional harm resulting from being questioned by the defendant to limit the defendant from doing so).

106. *Id.* at 1035.

107. *Id.* at 1036.

108. *Id.*

109. *Id.* The dissent states the majority has collapsed the distinction between the right to self-representation and confrontation by applying the *Craig* framework to the present issue. *Id.* at 1045 (Ervin, J., dissenting). Despite this characterization that the majority fails to distinguish the rights, the majority does recognize the distinction by stating “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.” *Id.* at 1036–37. Personal cross-examination is but one aspect of self-representation and if it lacks the “fundamental importance” of confrontation, then the rights to self-representation and confronta-

1. *Pennsylvania's Use of Standby Counsel—Commonwealth v. Tighe*

Pennsylvania allows the use of standby counsel when a defendant proceeds pro se.<sup>110</sup> In *Commonwealth v. Tighe*,<sup>111</sup> the Pennsylvania Supreme Court took up the issue of standby counsel for cross-examination in child abuse cases. In *Tighe*, the defendant was accused of sexually assaulting a 15-year-old girl.<sup>112</sup> The defendant's bail included a no-contact order prohibiting him from contacting the girl which he violated with a telephone call.<sup>113</sup> At trial, the judge appointed standby counsel despite the defendant's wish to proceed pro se.<sup>114</sup> The victim was to testify, and the Commonwealth argued in a motion that Tighe ought to be prohibited from questioning the girl personally because of the no-contact order violation.<sup>115</sup> In support of its motion, the Commonwealth offered evidence that the girl was frightened by the defendant's contact.<sup>116</sup> The trial court granted this motion and prohibited Tighe from directly questioning the girl.<sup>117</sup> Instead, the judge permitted him to write down questions and ask them through either his standby counsel or the judge.<sup>118</sup>

The Pennsylvania Supreme Court affirmed the lower court's ruling, explaining that because the defendant retained control of his defense there was no detriment in preventing the defendant from personally cross-examining the victim.<sup>119</sup> The opinion treats the right to self-representation and confrontation as nearly equivalent;

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tion are fundamentally distinct. *Fields* 49 F.3d at 1035. Despite using *Craig's* framework for limiting the right to confrontation, the court does find the rights are distinct. *Id.* at 1035–37.

110. PA. R. CRIM. P. 121(d).

111. *Commonwealth v. Tighe*, 224 A.3d 1268, 1268 (Pa. 2020). No other Pennsylvania Supreme Court decisions touch upon this issue as of the time of publication. Kevin McKeon & Dennis Whitaker, *Commonwealth v. Tighe (Allocatur Grant)*, PA. APP. ADVOC. (last visited Mar. 6, 2021) <https://bit.ly/3eenkrz> (“The Pennsylvania Supreme Court granted allocatur to review a matter of first impression decided by Superior Court.”).

112. *Tighe*, 224 A.3d at 1269.

113. *Id.* at 1270.

114. *See id.* at 1269 (appointing counsel pursuant to rule PA. R. CRIM. P. 121(d)).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1282 (affirming the lower court, which relied on *Fields* and held when there is an important state interest personal cross-examination can be restricted). The Superior Court was not persuaded that the defendant's right to self-representation was infringed because he retained control over his defense. *Commonwealth v. Tighe*, 184 A.3d 560, 570 (Pa. Super. Ct. 2018). The Superior Court



the court states that if there exists a parallel between the two rights, then a similar showing of necessity would be required in each instance.<sup>120</sup> The lower court did not inquire into the level of trauma the child would face by the defendant conducting the questioning, so the Pennsylvania Supreme Court declined to decide expressly if the limitation on confrontation has a “parallel paradigm” within the right to self-representation.<sup>121</sup> The court declined to offer what level of necessity would be required for a court to limit self-representation but suggested that limiting self-representation would require the same level of necessity as to limit the right to confrontation.<sup>122</sup> The Pennsylvania Supreme Court upheld the lower court’s decision on the narrow grounds that the right to self-representation is limited in nature, and Tighe forfeited his right to self-representation through his violation of the no-contact order outside of court.<sup>123</sup> The court declined to define the bounds of standby counsel and child victim testimony.<sup>124</sup>

### III. ANALYSIS

#### A. *The Right to Self-Representation and the Right to Confrontation Are Distinct*

In interpreting the rights to self-representation and confrontation, states have taken two approaches.<sup>125</sup> The majority approach views the two rights as distinct and require different levels of necessity to limit self-representation or face-to-face confrontation.<sup>126</sup> Alternatively, the minority approach views the rights as requiring the same showing of necessity for limiting face-to-face confrontation

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agreed with *Fields* that when confrontation can be limited based on trauma, so may personal cross-examination. *Id.* at 568.

120. *Tighe*, 224 A.3d at 1279.

121. *Id.* (“We are hesitant to determine whether the permissible limitation on the confrontation right as it applies to child victims of sexual abuse, see *Craig*, has a parallel paradigm applicable to the self-representation right.”).

122. *See id.* (suggesting limiting personal cross-examination, would require a level of severe emotional distress). “If there is a parallel between the limitation on the confrontation and self-representation rights . . . relevant evidence would presumably be required to justify those limitations in any given case.” *Id.*

123. *Id.* at 1280–82.

124. *See id.* at 1279 (“Accordingly, this case is a poor vehicle to decide [the parallel between limitations on confrontation and self-representation], as there simply was no evidentiary showing with respect to [the victim’s] emotional response to direct questioning by appellant.”).

125. Tyler D. Carlton, Comment, *A Balancing Act: Providing the Proper Balance Between a Child Sexual Abuse Victim’s Rights and the Right to Personal Cross-Examination in Arizona*, 49 ARIZ. ST. L.J. 1453, 1461–64 (2017).

126. *Id.* at 1461–62.

and personal cross-examination.<sup>127</sup> The Fourth Circuit's *Fields* decision creates one basis for the majority viewpoint; it classifies an intrusion on the right to self-representation through standby counsel as a lesser intrusion than an imposition on the right to confrontation.<sup>128</sup> Supreme Court jurisprudence supports this, recognizing the right to confrontation may be limited after demonstrating a high level of necessity, but the right to self-representation may be limited by a need for procedural efficiency.<sup>129</sup> Jurisdictions that use the majority approach require less evidence when restricting personal cross-examination because limiting personal cross-examination is viewed as less intrusive on Sixth Amendment rights than limiting face-to-face confrontation.<sup>130</sup>

The right to confrontation and self-representation have different rationales.<sup>131</sup> The right to confrontation ensures the reliability of evidence through cross-examination.<sup>132</sup> Conversely, the right to self-representation is implicit in the right to counsel and promotes individual choice and dignity.<sup>133</sup> The right to self-representation does not affect the reliability of evidence nor a fair trial, unlike the right to confrontation.<sup>134</sup>

Courts should treat the rights to self-representation and confrontation as distinct.<sup>135</sup> The right to personal cross-examination “lack[s] the fundamental importance of the right . . . of confronting adverse witnesses face-to-face.”<sup>136</sup> As such, a lower level of neces-

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127. *See id.* at 1463 (indicating that only Arizona and Idaho apply the minority approach).

128. *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995). The *Fields* court makes clear that while the right to confrontation is explicitly in the Sixth Amendment, self-representation is only an implicit right and is therefore not absolute. *Id.*

129. *Compare Craig*, 497 U.S. at 860 (stating there must be a high level of necessity to limit the Confrontation Clause), *with McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984) (recognizing self-representation may be limited for procedural efficiency).

130. *Carlton*, *supra* note 125. States using this philosophy include Kentucky, Michigan, Washington, and Massachusetts. *Id.*

131. *Compare Crawford v. Washington*, 541 U.S. 36, 61 (recognizing the “ultimate goal” of the Confrontation Clause is to protect the reliability of evidence), *with McKaskle*, 465 U.S. at 176–78 (stating the right to self-representation is to promote individual dignity).

132. *Crawford*, 541 U.S. at 61.

133. *McKaskle*, 465 U.S. at 176–78.

134. *See id.* at 176–77 (reasoning 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).

135. *See Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995) (classifying the rights as distinct).

136. *Id.* at 1035–36.

sity ought to be required when a lower level of intrusion occurs.<sup>137</sup> Any infringement on a defendant's ability to personally cross-examine a victim destroys neither a defendant's control over his own case nor the perception of the jury that he is proceeding pro se.<sup>138</sup>

### 1. *Tighe Inconsistently Classified the Self-Representation and Confrontation Rights with Fields*

The *Tighe* decision, despite relying on *Fields*, which classifies the right to self-representation and confrontation as distinct,<sup>139</sup> alludes to the idea that these rights require the same level of necessity for restriction.<sup>140</sup> The *Tighe* court reasoned that if there exists any similarity between the self-representation and confrontation rights, then limiting self-representation would require the same evidence as limiting confrontation.<sup>141</sup> This analysis fails to account for the difference in the rights.<sup>142</sup> While not central to the holding, the suggestion that the confrontation and self-representation rights are identical is arguably inconsistent with *Fields*.<sup>143</sup>

*Fields* made clear the rights are distinct because limiting personal cross-examination is less intrusive than limiting face-to-face confrontation.<sup>144</sup> A lesser intrusion warrants a lesser level of necessity to limit that right; thus, a restriction of personal cross-examination should require a lesser showing of necessity than a restriction of face-to-face confrontation.<sup>145</sup> Because it relied on *Fields*, the *Tighe* court ought to have made the distinction between the right to self-representation and confrontation but failed to do so.<sup>146</sup> Other courts that rely upon *Fields* distinguish between the right to self-

137. *See id.* (stating the self-representation right can still be preserved with the use of standby counsel and that the state interest in protecting children from personal cross-examination is just as important if not more important than protecting children from face-to-face contact like in *Craig*).

138. *McKaskle*, 465 U.S. at 178.

139. *See supra* Section II.D & III.A (regarding *Fields*' treatment of the rights and *Tighe*'s reliance on the *Fields* decision).

140. *See Commonwealth v. Tighe*, 224 A.3d 1268, 1279 (Pa. 2020) (noting if there is a parallel between the confrontation and self-representation rights then relevant evidence would be needed to limit self-representation as there is for confrontation, but the court declined to decide the matter explicitly).

141. *Id.*

142. *Id.* at 1280.

143. *Fields*, 49 F.3d at 1036 (stating personal cross-examination "lacks the fundamental importance of the [confrontation] right.").

144. *Id.* at 1037.

145. *See id.* at 1036–37 (reasoning significant evidence was not required to limit the defendant from personally cross-examining the child victims because it is not difficult to imagine the resulting trauma). While requiring a lesser degree of emotional trauma, the court still used a *Craig* analysis. *Id.* at 1035.

146. *See Commonwealth v. Tighe*, 224 A.3d 1268, 1279 (Pa 2020).

representation and confrontation and require the state to show different levels of necessity when trying to limit confrontation or personal cross-examination.<sup>147</sup> The Pennsylvania Supreme Court misinterpreted *Fields* by suggesting that to limit self-representation would require the state to show a level of necessity equal to that which is required to limit confrontation.<sup>148</sup>

*B. The Prohibition of Personal Cross-Examination Protects Both the Right to Confrontation and the Right to Self-Representation*

A criminal defendant has a right to confront his accusers and represent himself if he so chooses, but the state also has an interest in protecting the psychological and physical wellbeing of children.<sup>149</sup> As discussed above, a child can be traumatized by facing her abuser in court and even more so if questioned directly by her abuser.<sup>150</sup> A prohibition of personal cross-examination would protect the right to confrontation and self-representation and also allow the state to protect children.<sup>151</sup> Courts have recognized that standby counsel questioning a child witness does not violate the right to self-representation.<sup>152</sup> *Fields* made clear the compelling need to protect a child from being personally questioned by her alleged abuser and held there does not need to be as high a showing of emotional trauma to limit self-representation as there needs to be to limit confrontation.<sup>153</sup> The *Fields* court did not say there needs to be any individual showing of trauma and instead spoke broadly about what can be assumed of any child victim-witness:

It is far less difficult to conclude that a child sexual abuse victim will be emotionally harmed by being personally cross-examined

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147. Carlton, *supra* note 125.

148. *Id.*

149. *See, e.g.,* Faretta v. California, 422 U.S. 806, 814 (stating the right to an attorney carries an implicit right to represent one's self); Maryland v. Craig, 497 U.S. 836, 849 (1990) (discussing the state's interest in the physical and psychological wellbeing of children as significant enough to outweigh the Confrontation Clause in some instances).

150. *See supra* Section I and accompanying notes.

151. *See* Fields v. Murray, 49 F.3d 1024, 1034 (4th. Cir. 1995) (stating that restricting a defendant's right to confrontation by preventing personal cross-examination and face-to-face confrontation still meets the purpose of the Confrontation Clause when it is necessary to further an important public policy).

152. *Id.* at 1037.

153. *Id.* at 1036–37 (recognizing limiting self-representation does not hold the same importance as limiting Confrontation and that it is not necessary to show particular evidence that the children would be traumatized by being questioned by the defendant directly).

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.<sup>154</sup>

Because personal cross-examination carries a clear risk of trauma for an abused child, there should be no need for an elaborate showing of necessity as with limiting confrontation.<sup>155</sup> Prohibiting pro se defendants from personally questioning child witnesses still fulfills the promises of confrontation and self-representation rights.<sup>156</sup> When standby counsel cross-examines a child, the defendant can still control the questioning by giving the attorney the cross-examination questions, ensuring a defendant's ability to both confront his accuser and control his own defense.<sup>157</sup> Witness examination is only one piece of a trial, and any concerns over jury perception regarding the defendant conducting his own case will be mitigated by the defendant controlling the rest of his own defense because standby counsel will not be present if only used for the victim cross-examination.<sup>158</sup>

1. *Proposed Solution: Pennsylvania Should Create a Categorical Prohibition Against Child Abuse Defendants Personally Questioning Victims*

To address the state's interest in protecting the psychological wellbeing of children and the right to confrontation and self-representation, Pennsylvania should create a prohibition on pro se defendants' questioning of child witnesses. In *Tighe*, the Pennsylvania Supreme Court miscategorized the right to self-representation and confrontation as requiring the same showing of emotional trauma necessary to limit the right. This holding is inconsistent with

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154. *Id.*

155. *See id.* (classifying the intrusion on self-representation as lacking the fundamental importance of denying the right to face-to-face confrontation).

156. *See id.* at 1034 (reasoning face-to-face confrontation is but one element of the right to confrontation and that the right can be satisfied with this element).

157. *See id.* at 1035 (stating while 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 still control his defense, including the questions asked during cross-examination).

158. *Id.*

*Fields*.<sup>159</sup> *Fields* makes clear the two rights are distinct and that the state has a far higher interest in protecting children from personal cross-examination.<sup>160</sup> As such, the state should protect that interest by making an absolute prohibition in all child abuse proceedings against pro se defendants personally questioning child victim-witnesses.<sup>161</sup> Such a rule would not only protect the children who may have severe trauma but also any other children who would be negatively impacted by this experience.<sup>162</sup> A categorical prohibition would remove any judicial uncertainty or unequal treatment, as well as protect the child's wellbeing while still accomplishing the goals of both self-representation and confrontation.<sup>163</sup>

C. *The Purpose of a CCTV Testimony Statute is Best Fulfilled with an Accompanying Standby Counsel Provision*

Prohibiting personal cross-examination is not the only way to protect children in abuse cases; CCTV testimony statutes also protect a child from facing her alleged abuser.<sup>164</sup> When a child testifies via CCTV, the child is questioned in a separate room with only the prosecutor, defense attorney, and appropriate technical staff present.<sup>165</sup> But when a defendant is pro se, the only person to question the child is the defendant himself.<sup>166</sup> The purpose of a CCTV statute is to protect children from emotional trauma upon facing an alleged abuser.<sup>167</sup> But without a provision for the occurrence of a pro se defendant, any use of the statute would be futile.

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159. See *supra* Section III.A. (detailing the difference between the right to self-representation and confrontation).

160. *Fields*, 49 F.3d at 1036–37.

161. See *id.* (making clear the need to protect child abuse victims and the lack of an intrusion on any self-representation or confrontation right by requiring the use of standby counsel).

162. *Id.*

163. See *id.* at 1034–35 (stating the goals of self-representation and the Confrontation Clause are met when standby counsel is used instead of personal cross-examination).

164. *Supra* section II.C.

165. *Maryland v. Craig*, 497 U.S. 836, 840 (1990).

166. See *Faretta v. California*, 422 U.S. 806, 814 (1975) (proceeding pro se is dispensing with a lawyer's help).

167. *Craig*, 497 U.S. at 840 (recognizing the purpose of a CCTV statute is to protect a child from facing her alleged abuser).

1. *Proposed Solution: Pennsylvania Should Enact a CCTV Statute Provision Mirroring Texas' to Require Standby Counsel for Pro Se Defendants*

As discussed above, Texas has a provision in its CCTV statute that expressly appoints standby counsel for a pro se defendant, which protects the purpose of the statute.<sup>168</sup> Pennsylvania should enact a similar statute to Texas to better fulfill the purpose of the CCTV statute.<sup>169</sup> Such a provision would ensure (1) that a child does not have to face her alleged abuser and (2) there is a uniform procedure.<sup>170</sup> The Pennsylvania CCTV statute states that the defendant shall not be present with the child, but it does not give guidance for a case involving a pro se defendant.<sup>171</sup> Instead, standby counsel should be appointed for the CCTV questioning only and given means to communicate with the defendant in the courtroom so the defendant could still control his own questioning.<sup>172</sup> The statute should read as follows:

In a proceeding under § 5985 (a) in which a child is questioned via an alternative contemporaneous method and the defendant is without an attorney, the court shall appoint counsel to represent the defendant at the proceeding for the purposes of the child's cross-examination.<sup>173</sup>

This proposed statutory language would guarantee that in a case with a pro se defendant, if necessary, a child could testify via CCTV without having to face her alleged abuser.<sup>174</sup> It would also ensure the defendant could cross-examine the child through a communication method between the attorney in the room and the defendant, such as text messaging.<sup>175</sup> The proposed statute preserves the right to self-representation because the standby counsel would

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168. *Supra* section II.C.2.

169. *See* 42 PA. CONS. STAT. § 5985 (2004) (lacking a provision for pro se defendants).

170. *See Craig*, 497 U.S. at 840 (recognizing the purpose of a CCTV statute is to protect a child from facing her alleged abuser).

171. 42 PA. CONS. STAT § 5985(a.2) (2004).

172. *See, e.g.*, ALA. CODE § 15-25-3 (h) (2012) (requiring the judge and defendant to be able to communicate with the attorneys in the room at all times via electronic method).

173. *See* TEX. CODE CRIM. PROC. ART. 38.071 § 1 (1983) (modeling language after Texas Rule of Criminal Procedure 38.071 § 1).

174. *See* TEX. CODE CRIM. PROC. ART. 38.071 § 11.

175. *See, e.g.*, MD. CODE ANN., CRIM PROC § 11-303(d)(3)(2001) (requiring the defendant to be able to communicate with those in the room via electronic method).

only be used for cross-examination of the child witness.<sup>176</sup> It would similarly protect the goal of a CCTV statute in preventing a child from being forced to be in a room with her abuser.<sup>177</sup> Finally, it satisfies the right to confrontation because with the proper communication the defendant would still have a full opportunity to cross-examine.<sup>178</sup> Additionally, a jury instruction should be given so as not to destroy the perception of a defendant conducting his own defense.<sup>179</sup> This jury instruction would instruct the jury to not let the presence of standby counsel undermine the defendant's pro se status and remind the jury that the defendant is self-represented<sup>180</sup>

#### IV. CONCLUSION

The state has a clear interest in protecting children from emotional trauma.<sup>181</sup> Protection can take the form of using CCTV for the child's testimony or using standby counsel to cross-examine the child on behalf of the pro se defendant.<sup>182</sup> These options can prevent a child from being retraumatized by the presence of the defendant, which could render the child unable to communicate.<sup>183</sup> Every criminal defendant has certain constitutional rights, and understandably the propositions outlined above can raise some concerns for the rights of a defendant.<sup>184</sup> Despite any concerns of the rights to self-representation or confrontation which must be protected to have a fair trial, the limited use of standby counsel does not violate

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176. See, e.g., *Commonwealth v. Tighe*, 224 A.3d 1268, 1281-82 (Pa. 2020) (finding no constitutional violation when standby counsel was used for cross-examination of a child victim-witness).

177. Siri, *supra* note 30.

178. See MD. CODE ANN., CRIM PROC § 11-303(d)(3)(2001) (requiring communication between the attorney in the room and the defendant would allow a defendant to be texting, for example, questions to the attorney to ask during the cross-examination because it is a live transmission).

179. See *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984).

180. Such a jury instruction could read: Members of the Jury you are not to consider the presence of the standby counsel during any part of the trial to negate the fact that the defendant has elected to present his own defense. The defendant has a right to conduct his own defense, and the presence of standby counsel is not to negate that right. No inference of guilt or incompetency is to be drawn from the presence of the standby counsel.

181. See generally, *supra* section II.

182. *Supra* section II.

183. *Supra* section I & II.

184. See *Fields v. Murray*, 49 F.3d 1024, 1047 (4th Cir. 1995) (Ervin, J., dissenting) (arguing while concern for children can bring about some modification of constitutional rights, the right to self-representation "is particularly important, not only to the defendant who is denied his right to defend himself . . . but also to our system of justice . . . which is made less fair by telling some defendants that they may not serve as their own defense.").



those rights. A defendant can still represent himself in a trial even with standby counsel cross-examining a child victim. With proper communication and preparation, the defendant will have as equal an opportunity to cross-examine as he would if he were personally cross-examining.<sup>185</sup> By limiting the standby counsel's participation to only the cross-examination of the child victim and allowing the defendant to control the questioning, this narrowly tailored provision achieves a specific goal of protecting the emotional wellbeing of child abuse victims.

In Pennsylvania, the state legislature can better fulfill the goals of its CCTV statute by passing a pro se provision to ensure clarity and uniformity.<sup>186</sup> Additionally, despite making a proper ruling in *Tighe* by prohibiting the defendant from cross-examining the child victim-witnesses, the court should have gone further in its analysis.<sup>187</sup> The *Tighe* court should have recognized the distinction between the right to self-representation and confrontation as the Fourth Circuit did in *Fields*.<sup>188</sup> This distinction allows the limitation of self-representation through the use of standby counsel while not infringing on confrontation.<sup>189</sup> Suggesting a categorical prohibition on personal cross-examination of a child witness by a pro se defendant is a strong recommendation that comes with obvious concerns for the defendant's rights. However, it is the only way to ensure a child never has to feel the terror of confronting her abuser directly.

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185. *Supra* section III.A & III.B.

186. *Supra* section II.C & III.C.

187. *Supra* section III.A & III.B.

188. *Supra* section III.A.

189. *Supra* section III.A & III.B.