

# A BALANCING ACT: Providing the Proper Balance Between a Child Sexual Abuse Victim's Rights and the Right to Personal Cross-Examination in Arizona

Tyler D. Carlton\*

## I. INTRODUCTION

A victim of child sexual abuse takes the stand, and the abuse begins again—this time with the sanction of law. In some cases, abusers exercise the right of self-representation to personally cross-examine their victim. One fifteen-year-old victim of sexual abuse stated: “It made it harder. He would give me that look and question me and dig into me . . . . It makes you feel like you’re the victim again. It hurt a lot.”<sup>1</sup> Many victims share this feeling of distress in response to a defendant’s decision to personally cross-examine them.<sup>2</sup> In fact, the issue has even reached popular culture. In the acclaimed crime drama *Law & Order: Special Victims Unit*, when an adult victim of sexual assault learns of the defendant’s plan to personally cross-examine her, she replies: “First he rapes me, then he gets to interrogate me in front of everybody.”<sup>3</sup> In the real world, a twenty-one-year-old woman, who was sexually abused as a toddler, attempted to commit suicide by jumping off the courthouse roof when the defendant sought to personally cross-examine her.<sup>4</sup>

---

\* J.D. Candidate, 2018, Sandra Day O’Connor College of Law, Arizona State University. Many thanks to Professors Paul Bender, Tamara Herrera, and Steve Twist for their insightful comments and to the staff of the *Arizona State Law Journal* for their excellent edits. Of course any errors are my own.

1. Jolayne Houtz, *When Children Face Attackers in Court—Advocates Say Victims’ Trauma Weighs Heavily*, SEATTLE TIMES (Aug. 4, 1991, 12:00 AM), <http://community.seattletimes.nwsources.com/archive/?date=19910804&slug=1298066>.

2. See, e.g., *id.* (collecting stories of child victims who were personally cross-examined); cf. Jodi A. Quas & Gail S. Goodman, *Consequences of Criminal Court Involvement for Child Victims*, 18 PSYCHOL. PUB. POL’Y & L. 392, 394–95 (2012) (discussing the potential for trauma from merely seeing the defendant).

3. *Law & Order: Special Victims Unit: Legitimate Rape* (NBC television broadcast Mar. 27, 2013).

4. See Jennifer Sullivan, *Rape Victim’s Threat to Jump Off Courthouse Roof May Derail Case*, SEATTLE TIMES (Nov. 4, 2010, 9:13 PM), <http://www.seattletimes.com/seattle-news/rape-victims-threat-to-jump-off-courthouse-roof-may-derail-case/>.

Child sexual abuse is a particularly hard crime to prosecute.<sup>5</sup> Because there is often no physical evidence of the sexual abuse, the child's testimony is key to prosecution.<sup>6</sup> Moreover, in many cases, once the abuse is exposed, the child becomes confused and may even refuse to testify against the abuser.<sup>7</sup> Constitutional rights add another layer to the complications inherent in child sexual abuse cases. The U.S. Constitution grants defendants the rights to confrontation and self-representation.<sup>8</sup> The U.S. Supreme Court has held that face-to-face confrontation—the right to be present in the courtroom and to look upon each witness during testimony—is at the core of the confrontation right and its truth-seeking goal, which is essential to the defendant's right to fundamental fairness.<sup>9</sup> Some courts also recognize a right to personal cross-examination, the right of the pro se defendant to personally question witnesses, including the victim.<sup>10</sup> In fact, some defendants represent themselves solely for the purpose of personally cross-examining the victim.<sup>11</sup>

The U.S. Supreme Court has recognized that protecting child sexual abuse victims from trauma is an important public policy that allows for limitation of face-to-face confrontation.<sup>12</sup> A limitation on face-to-face confrontation allows the child victim to testify without looking at the defendant, which is usually done outside the courtroom by closed-circuit television.<sup>13</sup> This limitation is permitted when the prosecution makes a case-specific showing of necessity, meaning that it is necessary for the child victim to testify outside the defendant's presence to avoid trauma.<sup>14</sup> After the U.S. Supreme Court's decision to allow limitations on face-to-face confrontation, many lower courts reasoned that a pro se defendant could be limited from personally cross-examining a child sexual abuse victim as well.<sup>15</sup> A limitation on personal cross-examination prevents the defendant from personally questioning the victim. The defendant is still allowed to create all the

---

5. Margaret H. Shiu, Note, *Unwarranted Skepticism: The Federal Courts' Treatment of Child Sexual Abuse Accommodation Syndrome*, 18 S. CAL. INTERDISC. L.J. 651, 652–53 (2009).

6. *Id.* at 652.

7. See discussion *infra* Section II.D.

8. U.S. CONST. amend. VI; *Faretta v. California*, 422 U.S. 806, 807 (1975); see discussion *infra* Sections II.A.1, II.A.2.

9. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 857 (1990).

10. See discussion *infra* Section II.A.3.

11. See, e.g., *Fields v. Murray*, 49 F.3d 1024, 1026 (4th Cir. 1995) (en banc).

12. See *Craig*, 497 U.S. at 844–45; discussion *infra* Section II.A.1.

13. See *Craig*, 497 U.S. at 844–45, 860.

14. See *id.* at 845, 860.

15. See discussion *infra* Section II.A.3.

questions, which are presented through the defendant's standby counsel—a court-appointed attorney who helps the pro se defendant during trial.<sup>16</sup>

To clarify, a limitation on personal cross-examination prevents the defendant only from personally questioning the child victim—the defendant still prepares the questions asked by standby counsel during cross-examination, while a limitation on face-to-face confrontation allows the witness to testify outside the presence of the defendant. Moreover, the analysis of whether to limit face-to-face confrontation is separate from the analysis of whether to limit personal cross-examination and vice-versa when a defendant is pro se. For example, a limitation on face-to-face confrontation only means that the defendant must conduct personal cross-examination outside the victim's presence—most likely through two-way closed-circuit television.<sup>17</sup>

Because the U.S. Supreme Court has not addressed what the appropriate showing for limiting personal cross-examination should be, courts have developed different approaches. The majority approach views the rights as distinctly different and requires less evidence to grant a limitation on personal cross-examination than for face-to-face confrontation as a result.<sup>18</sup> The minority approach applies the same test to limitations on both rights, reasoning limitations on either right are equally constitutionally significant.<sup>19</sup>

Arizona recently joined the minority approach. In 2015, the Arizona Court of Appeals held in *State ex rel. Montgomery v. Padilla (Simcox I)* that a limitation on personal cross-examination required the prosecution to show a case-specific necessity—just like limitations on face-to-face confrontation.<sup>20</sup> Subsequently, in 2016 when the case came back up on appeal, the Arizona Court of Appeals held in *State ex rel. Montgomery v. Padilla (Simcox II)* that this case-specific showing must be made by clear and convincing evidence—the same standard of proof required to show a case-specific necessity for a limitation on face-to-face confrontation.<sup>21</sup> *Simcox I* articulated *what* the prosecution must show to limit personal cross-examination—a case-specific

---

16. See *Fields*, 49 F.3d at 1034; discussion *infra* Section II.A.3.

17. See *State ex rel. Montgomery v. Padilla (Simcox II)*, 371 P.3d 642, 644 (Ariz. Ct. App. 2016) (requiring the defendant to conduct personal cross-examination outside the victims' presence where there was a case-specific showing of necessity that face-to-face confrontation would traumatize the victims), *cert. denied*, 137 S. Ct. 1204 (2017).

18. See, e.g., *Fields*, 49 F.3d at 1036–37; discussion *infra* Sections II.A.3.a, II.A.3.c.

19. See, e.g., *State v. Folk*, 256 P.3d 735, 746 (Idaho 2011); discussion *infra* Sections II.A.3.b, II.A.3.c.

20. *State ex rel. Montgomery v. Padilla (Simcox I)*, 349 P.3d 1100, 1107 (Ariz. Ct. App. 2015), *cert. denied*, 136 S. Ct. 2486 (2016).

21. *Simcox II*, 371 P.3d at 645–46.

showing of necessity—while *Simcox II* established that the prosecution must prove this case-specific showing of necessity by clear and convincing evidence.

The *Simcox II* court's ruling is problematic because it did not account for victims' rights under the Arizona State Constitution. The Arizona Victims' Bill of Rights (VBR) provides various rights to Arizona crime victims, and Arizona courts have interpreted the VBR to require a balancing of defendants' rights and victims' rights.<sup>22</sup> The *Simcox II* court did not perform the required balancing under the VBR, and thus, it failed to properly account for the interests at stake.

This Comment argues the standard to show a case-specific necessity should not be the same for face-to-face confrontation and personal cross-examination because each right implicates different concerns; therefore, the standards for imposing limitations on them should also be different. First, limitations on personal cross-examination are less intrusive on the defendants' rights than limitations on face-to-face confrontation.<sup>23</sup> Second, child sexual abuse victims have rights under the VBR to avoid harassment and abuse, and personal cross-examination puts them at a higher risk for trauma than face-to-face confrontation.<sup>24</sup> Therefore, properly balancing the rights shows the prosecution's burden should be less onerous when it seeks a limitation on personal cross-examination versus one on face-to-face confrontation given that the child's interests are higher and the defendant's interests are lower. Thus, legislation should be passed to lower the standard of proof for limitations on personal cross-examination to provide the proper balance the VBR demands.

Part II discusses the law, policy, and research that animates the discussion about what the appropriate standard for limitations on personal cross-examination should be. Part III then applies the law, policy, and research to show that the *Simcox II* court did not properly account for the interests at stake. Finally, Part IV proposes a statute that will lower the standard required to limit personal cross-examination to balance the defendant's right to personal cross-examination with the child sexual abuse victims' rights under the VBR. Part V concludes.

---

22. ARIZ. CONST. art. 2, § 2.1; see discussion *infra* Section II.B.2.

23. See discussion *infra* Section III.A.

24. See discussion *infra* Section III.A.

## II. BACKGROUND

Conflicts can arise between defendants' rights and victims' rights.<sup>25</sup> This Part first explores the defendant's rights under the U.S. Constitution. Next, it discusses how Arizona courts have tried to establish a proper balance between defendants' rights and victims' rights consistent with the history of the VBR's adoption. It then explains the current law regarding the right of personal cross-examination in Arizona. It concludes by analyzing what the research indicates about what effect personal cross-examination has on child sexual abuse victims.

### A. Defendants' Rights

Defendants have rights under the U.S. Constitution that are designed to give them a fair trial.<sup>26</sup> This Section explores the defendant's rights to confrontation and self-representation. An understanding of these two rights is essential to an analysis of the rights to face-to-face confrontation and personal cross-examination. Then, it explains how two different approaches have developed regarding the right to personal cross-examination.

#### 1. The Confrontation Right

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>27</sup> The U.S. Supreme Court has held that “the central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”<sup>28</sup> The confrontation right can be broken down into four parts: “physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.”<sup>29</sup> These four features provide an adversarial

---

25. Linda Mohammadian, *Sexual Assault Victims v. Pro Se Defendants: Does Washington's Proposed Legislation Sufficiently Protect Both Sides*, 22 CORNELL J.L. & PUB. POL'Y 491, 492–93 (2012) (discussing the conflict between defendants' rights and protecting victims from “revictimization”).

26. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.”).

27. U.S. CONST. amend. VI.

28. *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

29. *Id.* at 846.

proceeding, which serves the Confrontation Clause's "truth-seeking goal."<sup>30</sup> Physical presence allows for face-to-face confrontation—which forms the core of the Confrontation Clause's truth-seeking goal and drives the adversarial proceeding that is "essential to a fair trial."<sup>31</sup> In fact, confrontation only includes "a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination."<sup>32</sup>

The confrontation right is not absolute; thus, face-to-face confrontation may be limited to meet other legitimate public policy concerns.<sup>33</sup> The typical limitation is to allow the child to testify outside the courtroom while instantaneously broadcasting the testimony into the courtroom.<sup>34</sup> One legitimate interest that has been sufficient to limit the confrontation right is protecting children's "physical and psychological well-being."<sup>35</sup> The U.S. Supreme Court has specifically reached this issue twice. First, the Court held in *Coy v. Iowa* that a general statutory presumption of trauma allowing limitation of face-to-face confrontation violates the defendant's right to confrontation.<sup>36</sup>

Subsequently, in *Maryland v. Craig*, the Court held that a limitation on face-to-face confrontation may be appropriate upon a case-specific showing of necessity.<sup>37</sup> The *Craig* Court upheld a testimonial accommodation where the child victim testified through one-way closed-circuit television outside the courtroom.<sup>38</sup> The statute satisfied a case-specific showing of necessity

---

30. See, e.g., *id.* at 846.

31. See *id.* at 846–47 (citing *California v. Green*, 399 U.S. 149, 157 (1970)); see also *Coy v. Iowa*, 487 U.S. 1012, 1018 (1988) ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"). But see *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974) (describing "[t]he main and essential purpose of confrontation is . . . for . . . cross-examination"). The Court has even cited Shakespeare to show face-to-face confrontation is central to the meaning of confrontation. *Coy*, 487 U.S. at 1016 ("Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak.'" (quoting WILLIAM SHAKESPEARE, *RICHARD II*, act 1, sc. 1)). The Court has also traced face-to-face confrontation back to the Roman Empire. *Id.* at 1015–16 (quoting *Acts* 25:16 ("It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face . . .")).

32. *Craig*, 497 U.S. at 847 (alterations in original) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985)).

33. *Id.* at 849 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

34. Meridith Felise Sopher, Note, "*The Best of All Possible Worlds*": *Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case*, 63 *FORDHAM L. REV.* 633, 649 (1994).

35. *Craig*, 497 U.S. at 853.

36. *Coy*, 487 U.S. at 1020–21.

37. *Craig*, 497 U.S. at 845.

38. *Id.* at 860.

because it required the trial court to determine whether requiring the child to testify in the defendant's presence would lead to "serious emotional distress such that the child cannot reasonably communicate."<sup>39</sup> While the defendant's right to face-to-face confrontation was clearly abridged, the other features—oath, cross-examination, and observation of the witness's demeanor—largely satisfied the truth-seeking function of the Confrontation Clause.<sup>40</sup> In fact, the Court noted that the child's inability to reasonably communicate as a result of the defendant's physical presence could actually impede the Confrontation Clause's truth-seeking function.<sup>41</sup> The Court also indicated that there is a "compelling" public policy of protecting child sexual abuse victims "from further trauma and embarrassment."<sup>42</sup> The Court determined that a case-specific showing of necessity required that the child face more than "*de minimis* harm" or the type of trauma that is normal when testifying in court as a result of testifying in the defendant's presence.<sup>43</sup> Thus, *Craig* established face-to-face confrontation may be limited by allowing the child to testify outside the courtroom where there is a case-specific showing that it is necessary to avoid trauma.<sup>44</sup>

In sum, the U.S. Supreme Court has noted that face-to-face confrontation—the right to be physically present in the courtroom with each witness—drives the Confrontation Clause's truth-seeking goal, helping to ensure the defendant's right to fundamental fairness. However, important issues of public policy can override the defendant's right to face-to-face confrontation, especially where face-to-face confrontation will undermine the Confrontation Clause's truth-seeking goal.

## 2. The Right of Self-Representation

Unlike the confrontation right, which is explicit in the Sixth Amendment, the right of self-representation is implicit.<sup>45</sup> The right of self-representation is the right to represent oneself and make one's own defense.<sup>46</sup> In *McKaskle v. Wiggins*, the U.S. Supreme Court identified two features of the right: (1) the defendant is entitled to maintain "actual control" over the case and

---

39. *Id.* at 840–41.

40. *Id.* at 851.

41. *See id.* at 857 (citing *Coy*, 487 U.S. at 1032 (Blackmun, J., dissenting)).

42. *Id.* at 852; *see infra* notes 156–57 and accompanying text.

43. *Craig*, 497 U.S. at 855–56.

44. *Id.* at 859–60.

45. *Faretta v. California*, 422 U.S. 806, 819 (1975).

46. *Id.*

(2) standby counsel “[cannot] be allowed to destroy the jury’s perception that the defendant is representing himself.”<sup>47</sup> While the defendant has the right to make a personal defense, the defendant’s right to self-representation is not violated when standby counsel is appointed to help the pro se defendant meet “routine procedural or evidentiary obstacles” or other courtroom protocols.<sup>48</sup> The U.S. Supreme Court has also held that “standby counsel may participate in the trial proceedings, even without the express consent of the defendant, as long as that participation does not ‘seriously undermin[e]’ the ‘appearance before the jury’ that the defendant is representing himself.”<sup>49</sup> The Court has emphasized that the right to self-representation is not absolute and has noted that “the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.”<sup>50</sup>

### 3. Personal Cross-Examination

When the defendant exercises the right to self-representation, there is a question as to whether the defendant has a right to personally cross-examine the victim. Because the U.S. Supreme Court has not yet answered this question,<sup>51</sup> lower courts have crafted various ways to deal with this situation. The typical limitation on personal cross-examination is to require the defendant’s standby counsel to read questions prepared by the defendant.<sup>52</sup> There are two main approaches as to when personal cross-examination may be limited. This Section first discusses the majority approach, which treats the rights to face-to-face confrontation and personal cross-examination differently. Then, it explains the minority approach, which applies the same analysis to both limitations on face-to-face confrontation and personal cross-examination. This Section concludes by applying each approach to a fact pattern to evaluate the differences between them.<sup>53</sup>

---

47. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

48. *Id.* at 183.

49. *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000) (quoting *McKaskle*, 465 U.S. at 187).

50. *Id.*; *McKaskle*, 465 U.S. at 176–77 (indicating that the self-representation right is not absolute).

51. *Cf. People v. Daniels*, 874 N.W.2d 732, 740 (Mich. Ct. App. 2015) (holding that there is no right to personal cross-examination).

52. *See, e.g., Fields v. Murray*, 49 F.3d 1024, 1034 (4th Cir. 1995) (en banc). *But cf. State v. Estabrook*, 842 P.2d 1001, 1005–06 (Wash. Ct. App. 1993) (holding that trial judge’s posing of defendant’s questions, while unorthodox, was not unconstitutional).

53. One key distinction between the approaches is that the majority approach analyzes personal cross-examination as part of the right to self-representation while the minority approach



*a. Majority Approach*

The majority approach reasons that limitations on personal cross-examination are less intrusive on the defendant's constitutional rights than limitations on face-to-face confrontation and that personal cross-examination presents more risk of trauma to child victims than face-to-face confrontation.<sup>54</sup> Thus, the majority approach allows limitations on personal cross-examination with less evidence of trauma than limitations on face-to-face confrontation.<sup>55</sup> There are two views within the majority approach.

First, some courts reason that it is within the trial court's discretion to limit personal cross-examination under Evidence Rule 611(a)(3) to protect the child victim from "harassment or undue embarrassment."<sup>56</sup> While some jurisdictions simply do not recognize a right to personal cross-examination, others reason that it is part of the self-representation right.<sup>57</sup> For instance, in *State v. Estabrook*, the Washington Court of Appeals upheld a limitation on the defendant's right to personal cross-examination in a child sexual abuse case after applying the *McKaskle* test for limits on the right to self-representation.<sup>58</sup> First, the defendant was allowed to control his case because he was allowed to create the questions asked.<sup>59</sup> Second, it did not "destroy the jury's perception that [the defendant was] representing himself" because the court instructed the jury that the defendant was exercising the right to self-representation.<sup>60</sup> Thus, the limit on personal cross-examination was

---

analyzes it as mainly part of confrontation. *Compare Fields*, 49 F.3d at 1035 (analyzing defendant's right to personal cross-examination under the right to self-representation), *with State v. Folk*, 256 P.3d 735, 745–46 (Idaho 2011) (analyzing the defendant's right to personal cross-examination under both the confrontation and self-representation rights). This Comment is not concerned with this distinction because it evaluates the defendant's interests in conducting personal cross-examination under both the right to confrontation and self-representation in Section III.a.

54. *See, e.g., Fields*, 49 F.3d at 1036–37.

55. *Id.*

56. *See* FED. R. EVID. 611(a)(3); *Partin v. Commonwealth*, 168 S.W.3d 23, 29 (Ky. 2005) (citing KY. R. EVID. 611(a)(3)); *Daniels*, 874 N.W.2d at 739 (citing MICH. R. EVID. 611(a)(3)); *Estabrook*, 842 P.2d at 1005 (citing WASH. R. EVID. 611(a)(3)); *cf.* *Commonwealth v. Conefrey*, 570 N.E.2d 1384, 1390 (Mass. 1991) (reasoning that personal cross-examination can be limited upon a showing that the defendant may violate the rules of evidence).

57. *Compare Daniels*, 874 N.W.2d at 741 (holding that there is no right to personal cross-examination), *with Estabrook*, 842 P.2d at 1005–07 (holding the defendant has a right to personal cross-examination under self-representation).

58. *Estabrook*, 842 P.2d at 1002, 1006 (citing *McKaskle v. Wiggins*, 465 U.S. 177 (1984)); *see* discussion *supra* Section II.A.2.

59. *Estabrook*, 842 P.2d at 1006.

60. *Id.* (alteration in original).

constitutional because the defendant's right to self-representation was secured.<sup>61</sup>

The other view within the majority approach applies the *Craig* test to the right of self-representation.<sup>62</sup> For example, in *Fields v. Murray*, the Fourth Circuit, sitting en banc, determined that personal cross-examination was part of the right to self-representation.<sup>63</sup> The defendant was charged "with raping, sodomizing, and sexually battering" several girls.<sup>64</sup> The trial court limited personal cross-examination because one victim "had wet the bed repeatedly" and cried during a preliminary hearing, due to the close relationship between the defendant and child victims, and due to the nature of the repeated abuse.<sup>65</sup> Like the U.S. Supreme Court in *Craig*, the *Fields* court looked to the purpose behind the right at stake and the policies furthered by limiting it.<sup>66</sup> The *Fields* court reasoned the self-representation right's purpose of maintaining the defendant's dignity and autonomy and his ability to present his best possible defense was otherwise assured because the defendant was simply limited from personally asking the questions, a very minimal limitation compared to a limitation on face-to-face confrontation.<sup>67</sup>

The *Fields* court also reasoned that protecting child victims from further trauma is an important public policy interest.<sup>68</sup> The court found that the State's interest was at least as strong as in *Craig*, where the child victim was "merely" testifying in the accused's presence.<sup>69</sup> In fact, the court noted it is more likely that a child victim would be traumatized by personal cross-examination than from face-to-face confrontation.<sup>70</sup> Moreover, the court indicated that the right to personal cross-examination "lacks the fundamental importance of the right . . . of confronting adverse witnesses face-to-face."<sup>71</sup> Thus, the court held that a limitation on personal cross-examination requires

---

61. *Id.*

62. *United States v. Brown*, 528 F.3d 1030, 1033 (8th Cir. 2008); *Fields v. Murray*, 49 F.3d 1024, 1034 (4th Cir. 1995) (en banc); *Lewine v. State*, 619 So. 2d 334, 335–36 (Fla. Dist. Ct. App. 1993).

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

64. *Id.* at 1036.

65. *Id.*

66. *Id.* at 1034 (citing *Maryland v. Craig*, 497 U.S. 836, 850 (1990)).

67. *See id.* at 1035–36; *cf. Lewine*, 619 So. 2d at 336 (reasoning that solely restricting the defendant from personally questioning was "a reasonable solution" that did not infringe defendant's rights).

68. *Fields*, 49 F.3d at 1036.

69. *Id.* (citing *Craig*, 497 U.S. at 853–55); *cf. United States v. Brown*, 528 F.3d 1030, 1033 (8th Cir. 2008) (noting personal cross-examination would be more traumatizing to a child victim than face-to-face presence (citing *Fields*, 49 F.3d at 1036)).

70. *See Fields*, 49 F.3d at 1036–37.

71. *Id.*

a less “elaborate” showing of case-specific necessity than face-to-face confrontation.<sup>72</sup>

The dissent in *Fields* took issue with the majority’s use of the *Craig* test to limit the self-representation right.<sup>73</sup> Unlike *Craig*, where the defendant only lost the right to “face” or look at his accuser, here, the defendant lost the right to personally question his accuser, a right—the dissent argued—inherent in the right to self-representation.<sup>74</sup> Thus, the *Fields* dissent concluded limiting personal cross-examination affects the defendant’s control over the case and the jury’s perception that the defendant is in control, violating his right to self-representation.<sup>75</sup>

*b. Minority Approach*

The minority approach applies the same test on limitations for both face-to-face confrontation and personal cross-examination.<sup>76</sup> Only Arizona and Idaho apply this approach.<sup>77</sup>

In *State v. Folk*, the Idaho Supreme Court held that limiting the defendant’s right to personally cross-examine the victim constituted a “significant impairment” of the defendant’s confrontation right.<sup>78</sup> In *Folk*, the defendant was charged with child sexual abuse.<sup>79</sup> The trial court found it was necessary to limit the defendant’s right to personal cross-examination to protect the child from trauma because the child had a nightmare after the abuse and because the defendant covered the child’s mouth during the abuse because he “did not want anyone to know.”<sup>80</sup>

The *Folk* court reasoned that any limitation on personal cross-examination must go through the same analysis as one for face-to-face confrontation under *Craig*.<sup>81</sup> The court did not explain why this was true; it simply held that the Confrontation Clause requires a case-specific showing of necessity for both limitations on face-to-face confrontation and personal cross-examination.<sup>82</sup> In fact, the court specifically equated personal cross-examination with the

---

72. *See id.*

73. *Id.* at 1038 (Ervin, C.J., dissenting).

74. *Id.* at 1045.

75. *Id.* at 1046–47.

76. *See, e.g., State v. Folk*, 256 P.3d 735, 745 (Idaho 2011).

77. *See Simcox I*, 349 P.3d 1100, 1107 (Ariz. Ct. App. 2015), *cert. denied*, 136 S. Ct. 2486 (2016); *Folk*, 256 P.3d at 735.

78. *Folk*, 256 P.3d at 745.

79. *Id.* at 747. By trial, the child was six years old. *Id.* at 744 n.5.

80. *Id.* at 735.

81. *Id.* at 746.

82. *Id.*

right to face-to-face confrontation, holding that because there was no specific evidence that the child would suffer trauma from face-to-face confrontation, there was also no specific evidence that the child would suffer trauma from personal cross-examination.<sup>83</sup> Thus, because there was no case-specific finding of necessity, the court held the defendant's right to confront the child victim was violated.<sup>84</sup>

*c. Explaining the Difference*

Applying the tests to a fact pattern illustrates the difference between the less "elaborate" showing employed by the *Fields* court and the case-specific showing required by *Folk*. In *Smith v. Smith*, Smith was charged with sexually assaulting his ten-year-old daughter, *L*.<sup>85</sup> On habeas review, a federal district court judge found that Smith's personal cross-examination right was not infringed after applying the *Fields* test.<sup>86</sup> The court found that it was necessary to limit Smith from personally cross-examining *L* to avoid traumatizing her because: (1) Smith was her father, (2) the nature of the charges, and (3) Smith had exhibited anger in the courtroom.<sup>87</sup> Thus, the *Smith* court rejected defendant's argument that his right to personal cross-examination was violated.<sup>88</sup>

In contrast, under *Folk*, it is unlikely that a court would find a case-specific necessity allowing limitation of personal cross-examination in *Smith*. In *Folk*, there was no specific evidence that the child would suffer trauma from personal cross-examination.<sup>89</sup> Similarly, under the *Smith* fact pattern, there was no evidence that shows *L* would be traumatized from personal cross-examination. Under the minority view, the fact that Smith is *L*'s father is irrelevant. Like the nightmare in *Folk*, Smith being *L*'s father does not necessarily show that she will be subjected to trauma from personal cross-examination.<sup>90</sup> In fact, as will be discussed, when the *Simcox I* court adopted the *Folk* test, it stated evidence of "the nature of the crimes and the

---

83. *Id.*

84. *Id.* at 746–47.

85. *Smith v. Smith*, No. 05-CV-74045-DT, 2007 WL 1585653, at \*1 (E.D. Mich. May 31, 2007). While *L*'s name is in the court's opinion, I refer to her as *L* to protect her privacy.

86. *Id.* at \*7.

87. *Id.*

88. *Id.* (citing *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995) (en banc)).

89. *State v. Folk*, 256 P.3d 735, 746–47 (Idaho 2011).

90. *Compare Smith*, 2007 WL 1585653, at \*7, with *Folk*, 256 P.3d at 746–47.

defendant's relationship with the victims" is too general to support a case-specific showing of necessity.<sup>91</sup>

Thus, the key difference between the two approaches is that minority jurisdictions require that the prosecution show particularized evidence that trauma will result from personal cross-examination while majority jurisdictions do not.<sup>92</sup> Minority jurisdictions view limitations on face-to-face confrontation and personal cross-examination as equally constitutionally intrusive; consequently, they require the same case-specific showing of necessity to avoid trauma to limit either right.<sup>93</sup> Majority jurisdictions require a less "elaborate" showing because they reason a limitation on personal cross-examination is a minimal intrusion on the defendant's rights compared to face-to-face confrontation and that it is more likely that a child will suffer trauma from personal cross-examination.<sup>94</sup> In sum, the approaches differ as to their views of the interests implicated by personal cross-examination, which then drives what showing each approach requires before allowing a limitation on it.

### B. *Victims' Rights and the Arizona Victims' Bill of Rights*

This Section examines how Arizona courts have interpreted the Arizona Victims' Bill of Rights (VBR) given the history of its passage. It also explains the importance Arizona courts have placed on properly balancing defendants' rights and victims' rights after passage of the VBR.

The victims' rights movement grew out of disillusionment with the criminal justice system's focus on the two main players in criminal prosecutions: the prosecution and the defendant.<sup>95</sup> As Professor Steven J. Twist puts it, the criminal justice system used to treat victims as "passive observer[s]."<sup>96</sup> The victims' rights movement criticized the lack of concern for victims' interests and argued for victims to have a more central position in the criminal justice system.<sup>97</sup>

In 1982, President Ronald Reagan created the President's Task Force on Victims of Crime (Task Force) to investigate the victim's role in the criminal

---

91. *Simcox I*, 349 P.3d 1100, 1106 (Ariz. Ct. App. 2015), *cert. denied*, 136 S. Ct. 2486 (2016); *see infra* note 131 and accompanying text.

92. *See* discussion *supra* Sections II.A.3.a, II.A.3.b.

93. *See* discussion *supra* Sections II.A.3.a, II.A.3.b.

94. *See* discussion *supra* Section II.A.3.a.

95. *See* Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 ARIZ. ST. L.J. 421, 424 (2015).

96. *Id.*

97. *See id.*

justice system.<sup>98</sup> The Task Force found that “the criminal justice system has lost an essential balance.”<sup>99</sup> Consequently, the Task Force proposed a federal constitutional amendment,<sup>100</sup> but the victims’ rights movement ended up acting at the state level to test how victims’ rights should interact with defendants’ rights.<sup>101</sup>

In 1990, Arizona amended its constitution to provide victims with constitutional rights, which became known as the Victims’ Bill of Rights.<sup>102</sup> The VBR is contained in Article 2, Section 2.1 of the Arizona Constitution.<sup>103</sup> The VBR grants both procedural and substantive rights to victims.<sup>104</sup> Consistent with the Task Force’s report, the framers of the VBR sought to remedy the issues victims historically had with the criminal justice system due to past insensitivity towards victims and seeks to create a balance between defendants’ rights and victims’ rights to rectify this past indifference.<sup>105</sup> The VBR grants crime victims in Arizona due process rights, which includes “rights that protect victims from harassment and abuse throughout the criminal justice process.”<sup>106</sup> The Legislature also has power to pass legislation to implement the rights secured by the VBR.<sup>107</sup>

While the goals behind the VBR and its implementing legislation are laudable, the real work started when the courts began to apply its provisions.<sup>108</sup> For the most part, Arizona courts have applied the VBR and its implementing legislation broadly.<sup>109</sup> The Arizona Supreme Court has specifically cautioned against creating ad hoc exceptions to the VBR that would undermine its purpose of protecting victims and their rights.<sup>110</sup> Arizona courts have approached conflicts between defendants’ rights and victims’

---

98. PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, at ii (1982), <https://ojp.gov/ovc/publications/presdntstskforcrprt/87299.pdf>.

99. *Id.* at 114. One victim testified: “They explained the defendant’s constitutional rights to the nth degree . . . And I wondered what mine were. And they told me, I haven’t got any.” *Id.*

100. *Id.*

101. See Twist & Williams, *supra* note 95, at 422.

102. Gessner H. Harrison, *The Good, the Bad, and the Ugly: Arizona’s Courts and the Crime Victims’ Bill of Rights*, 34 ARIZ. ST. L.J. 531, 531 (2002).

103. ARIZ. CONST. art. 2, § 2.1.

104. Twist & Williams, *supra* note 95, at 421.

105. See Harrison, *supra* note 102, at 534 (internal citation omitted).

106. *Id.*; see Twist & Williams, *supra* note 95, at 424–25.

107. ARIZ. CONST. art. 2, § 2.1(D); see Harrison, *supra* note 102, at 534.

108. See Twist & Williams, *supra* note 95, at 423.

109. See Knapp v. Martone, 823 P.2d 685, 687 (Ariz. 1992); Twist & Williams, *supra* note 95, at 426–27.

110. Knapp, 823 P.2d at 687.

rights carefully in order to uphold an essential balancing between defendants' and victims' interests consistent with the VBR's adoption.<sup>111</sup>

Arizona courts have balanced the rights by looking to the VBR's purpose. In *State ex rel. Romley v. Superior Court (Roper)*, the Arizona Court of Appeals stated: "[T]he [VBR] was appropriately amended to the Arizona Constitution as a shield for victims of crimes."<sup>112</sup> The *Roper* court noted, however, that it "should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense."<sup>113</sup> The *Roper* court specifically held that even in the sensitive area of the defendant's rights to cross-examination and fundamental fairness, the VBR demands balancing.<sup>114</sup> The State argued that the VBR prevented "compelling disclosure of the victim's medical records" while the defendant argued she needed to see them for an effective cross-examination.<sup>115</sup> The court determined an in camera inspection of the victim's medical records was appropriate to assess whether the defendant needed access to them for an effective cross-examination.<sup>116</sup> Thus, *Roper* illustrates the balancing the VBR requires to ensure that victims' rights are respected without eliminating the defendant's right to fundamental fairness.<sup>117</sup>

Consistent with this notion, the Arizona Supreme Court balanced the rights by examining the purpose behind the rights at stake in *State v. Riggs*.<sup>118</sup> In *Riggs*, the State argued that the victim has an absolute right to refuse a pretrial interview, and thus, the VBR precludes the defendant from all questioning regarding that refusal.<sup>119</sup> The *Riggs* court examined the purpose behind this right and found that its purpose was to reduce contact between the victim and the defendant.<sup>120</sup> The *Riggs* court also noted the federal confrontation right does not provide a blanket right to present cross-examination exactly how the defendant wishes.<sup>121</sup> Therefore, the court concluded the defendant may only question the victim about refusing the pretrial interview when the victim has some reason other than minimizing

---

111. Harrison, *supra* note 102, at 543.

112. 836 P.2d 445, 454 (Ariz. Ct. App. 1992).

113. *Id.*

114. *Id.* at 453.

115. *Id.* at 448, 451.

116. *Id.* at 453.

117. See Harrison, *supra* note 102, at 540–42; Twist & Williams, *supra* note 95, at 443–46.

118. See 942 P.2d 1159, 1163–64, 1166 (Ariz. 1997).

119. *Id.* at 1162.

120. *Id.*

121. *Id.* at 1163–64; see also discussion *supra* Section II.A.1.

contact with the defendant.<sup>122</sup> Thus, *Riggs* is an example of how examining the purpose behind each right allows for a balanced decision where victims' rights are allowed to coexist with defendants' rights to fundamental fairness.<sup>123</sup>

Thus, the VBR requires Arizona courts to look to the interests implicated by the defendant's rights and victim's rights to provide a balance between the two. However, in 2016, a decision by the Arizona Court of Appeals failed to apply the VBR, leading to an imbalanced result.

### C. *The Right of Personal Cross-Examination Under Arizona Law*

The Arizona Court of Appeals recently adopted the minority approach for limitations on personal cross-examination, which applies the same test for limitations on personal cross-examination as face-to-face confrontation.<sup>124</sup> The *Simcox* cases arose after the defendant was charged with two counts of child molestation against his eight-year-old daughter and her eight-year-old friend.<sup>125</sup> The defendant exercised his right to represent himself and sought to personally cross-examine the child victims, which the State sought to prevent.<sup>126</sup> The mothers of the two child victims testified that the children did not want to be personally cross-examined because they were afraid of the defendant and that it would set them back in their psychological healing.<sup>127</sup> The defendant argued he had a right to personally cross-examine the children.<sup>128</sup> The trial court denied the State's request.<sup>129</sup>

The *Simcox I* court held that a pro se defendant has the right to personal cross-examination and adopted the *Folk* test, which requires the same case-specific showing of necessity for both limitations on face-to-face confrontation—the right to be physically present in the courtroom with the child victim—and personal cross-examination—the right to personally question witnesses on cross-examination.<sup>130</sup> The *Simcox I* court specifically

---

122. *Riggs*, 942 P.2d at 1163.

123. *See id.*

124. *Simcox II*, 371 P.3d 642, 645 (Ariz. Ct. App. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *Simcox I*, 349 P.3d 1100, 1103–04 (Ariz. Ct. App. 2015), *cert. denied*, 136 S. Ct. 2486 (2016); *see discussion supra* Section II.A.3.

125. *Simcox I*, 349 P.3d at 1102.

126. *Id.* at 1103.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1103–04. The court analyzed the issue principally under the Confrontation Clause, but it did note that part of the right of self-representation is the right to question witnesses. *Id.*



rejected the *Fields* test noting that its reliance on the evidence of “the nature of the crimes and the defendant’s relationship with the victims” is akin to a generalized presumption of trauma that does not satisfy the case-specific showing of necessity required by *Craig v. Maryland*.<sup>131</sup> Thus, the *Simcox I* court refused to apply the VBR because it viewed the case-specific showing as mandated by the U.S. Constitution, which meant the defendant’s federal constitutional rights preempted the victim’s state constitutional rights.<sup>132</sup> On remand, there was an evidentiary hearing, and the trial court again denied the limitation on personal cross-examination.<sup>133</sup>

On appeal in *Simcox II*, the Arizona Court of Appeals held that this case-specific showing must be made by clear and convincing evidence.<sup>134</sup> The court noted the U.S. Supreme Court has not specified a “constitutionally mandated standard of proof.”<sup>135</sup> However, the court reasoned that the clear and convincing evidence standard was appropriate “[g]iven the constitutional significance of limiting a defendant’s right to confront witnesses face-to-face and a pro se defendant’s right to personally cross-examine those witnesses,” again equating the interests behind the two rights.<sup>136</sup> The court then cited to ten other states which allow for limitation of a defendant’s right to face-to-face confrontation—not personal cross-examination—where a case-specific necessity must be shown by clear and convincing evidence.<sup>137</sup> Thus, *Simcox II* added that the case-specific showing required to limit personal cross-examination must be shown by clear and convincing evidence.<sup>138</sup>

The *Simcox II* court did not even mention the VBR in its analysis of what the appropriate standard should be. Thus, the proper balancing of defendants’ rights and victims’ rights that the VBR demands was absent from the *Simcox II* court’s analysis. *Simcox II* was issued in 2016, so it is unclear how trial courts will apply it.<sup>139</sup> But, the VBR sought to give victims of crime a voice in the criminal justice system that had been lacking in American legal history. The next Section describes why giving the child sexual abuse victims a voice is so important.

---

(citing *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984) (“The *pro se* defendant must be allowed . . . to question witnesses.”)).

131. *Id.* at 1106.

132. *Id.* at 1106–07.

133. *Simcox II*, 371 P.3d 642, 645 (Ariz. Ct. App. 2016), *cert. denied*, 137 S. Ct. 1204 (2017).

134. *Id.* at 645–46.

135. *Id.* at 645 (citing *Maryland v. Craig*, 497 U.S. 836, 855 (1990)).

136. *Id.*

137. *Id.* at 645–46 (collecting statutes).

138. *Id.*

139. *See id.* at 642.

*D. The Science Behind Child Sexual Abuse Cases*

The nature of child sexual abuse makes it difficult to prosecute, which necessitates special care in dealing with child sexual abuse victims.<sup>140</sup> This Section investigates why children often recant by evaluating Child Sexual Abuse Accommodation Syndrome (CSAAS).<sup>141</sup> Then, it discusses the potential trauma a child victim faces during testimony.

1. Child Sexual Abuse Accommodation Syndrome

There are many difficulties in prosecuting a child sexual abuse case. Evidence is often limited to the child victim's testimony because there is no physical evidence or other witnesses.<sup>142</sup> Consequently, a key challenge in child sexual abuse cases is explaining the great pressure on the child to recant or to not report instances of sexual abuse.<sup>143</sup>

CSAAS is a theory proposed in 1983 by Roland M. Summit to explain that certain behavior of child sexual abuse victims—such as delay in disclosure and recantation—is not necessarily proof of a false allegation.<sup>144</sup> There are five components to CSAAS: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retraction.<sup>145</sup> The first two components are “psychological consequences of abuse” while the last three components are the result of these psychological consequences.<sup>146</sup> Thus, CSAAS explains the complex nature of child sexual abuse where the sexual abuse is often “contained in a shroud of secrecy through threats, coercion, and ‘exploitation of the helpless and

---

140. Shiu, *supra* note 5, at 652–53.

141. *Id.*

142. *See, e.g., id.* at 652 (describing that child sexual abuse is “one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim”) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)); Am. Acad. of Pediatrics, *Guidelines for the Evaluation of Sexual Abuse of Children: Subject Review*, 103 PEDIATRICS 186, 188 (1999) (noting a lack of physical evidence even when the abuser “admits to penetration of the child’s genitalia”).

143. *See* Roland M. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD SEXUAL ABUSE & NEGLECT 177, 185 (1983) (describing that the child victim “is given the power to destroy the family and the responsibility to keep it together”).

144. *See generally id.* (discussing Summit’s theory of CSAAS).

145. *Id.* at 181.

146. Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 PSYCHOL., PUB. POL’Y, & L. 194, 195 (2005).

dependent child.”<sup>147</sup> The entrapment and accommodation component explains that the healthy child’s response is to accommodate the sexual abuse by “learn[ing] to accept the situation and to survive.”<sup>148</sup> In intra-familial sexual abuse, the child’s situation includes functioning as preserver of the family and/or protector of the abuser—often a part of the grooming process.<sup>149</sup> This relationship turns societal values upside down, where the “ultimate virtue” is maintaining secrecy while the “ultimate sin” is telling the truth.<sup>150</sup> Thus, the first three components of CSAAS explain the last two, the child has immense pressure to preserve secrecy of the abuse and to recant when it is exposed.<sup>151</sup>

## 2. Trauma from Secondary Traumatization

Supporters of testimonial accommodations for child sexual abuse victims also assert the interest in protecting these children from trauma due to secondary traumatization during testimony. “Secondary traumatization” is the process by which victims of crime undergo extreme stress due to unresponsiveness to their needs by both legal and non-legal systems.<sup>152</sup> Numerous adverse long-term results can come from secondary traumatization such as: “poor mental health, low academic achievement, insecure attachment, and relationship problems.”<sup>153</sup> In fact, research shows that secondary traumatization can cause even more harm to child victims than the criminal act itself.<sup>154</sup> Research indicates the courtroom’s effect on the

---

147. Shiu, *supra* note 5, at 653 (quoting Thomas D. Lyon, *Scientific Support for Expert Testimony on Child Abuse Accommodation*, in CRITICAL ISSUES IN CHILD SEXUAL ABUSE: HISTORICAL, LEGAL, AND PSYCHOLOGICAL PERSPECTIVES 107, 109 (J.R. Conte ed., 2002)).

148. Summit, *supra* note 143, at 184.

149. Mary L. Paine & David J. Hansen, *Factors Influencing Children to Self-Disclose Sexual Abuse*, 22 CLINICAL PSYCHOL. REV. 271, 277 (2002); *see* Summit, *supra* note 143, at 185.

150. Paine & Hansen, *supra* note 149, at 284.

151. London et al., *supra* note 146, at 195.

152. *See, e.g.*, R. Campbell & S. Raja, *Secondary Traumatization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261, 261–63 (1999) (noting in “unresponsive model[s] of case processing, victims are often blamed for the assault and denied help, which further traumatizes survivors and slows recovery”). Note that other authors use different terms such as “secondary victimization,” Bernd Schünemann, *Protection of Children and Other Vulnerable Victims Against Secondary Victimization: Making it Easier to Testify in Court*, 10 ERA F. 387, 388 (2009), and “re-traumatization,” Mary Fan, *Adversarial Justice’s Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 814 (2014).

153. Quas & Goodman, *supra* note 2, at 395.

154. Schünemann, *supra* note 152, at 388.

child depends on many factors, and thus, the extent of secondary traumatization must be determined on a case-by-case basis.<sup>155</sup>

Child sexual abuse victims are at great risk of secondary traumatization. In *Maryland v. Craig*, the U.S. Supreme Court specifically upheld a limitation on face-to-face confrontation due to the potential for secondary trauma.<sup>156</sup> The Court noted that it “ha[s] sustained legislation aimed at protecting the physical and emotional well-being of youth even . . . in the sensitive area of constitutionally protected rights.”<sup>157</sup> In fact, research indicates a sexually abused child may feel “shame, guilt, and especially betrayal” when testifying against a once trusted adult who turned out to be an abuser.<sup>158</sup> Personal cross-examination by one’s abuser may reinforce and amplify feelings of helplessness the child victim faced during the sexual abuse, and thus, it has a greater potential to be traumatic than mere face-to-face confrontation.<sup>159</sup> One victim of child sexual abuse climbed to the courthouse roof to commit suicide in order to avoid personal cross-examination.<sup>160</sup> Indeed, other common law countries have passed legislation that prevents defendants from personally cross-examining child sexual abuse victims.<sup>161</sup> Thus, research indicates that secondary traumatization can cause great harm to the child sexual abuse victim.<sup>162</sup>

---

155. See Quas & Goodman, *supra* note 2, at 394–95. Research indicates that the two most “pervasive predictors” of secondary trauma are age and severity of abuse. See Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, in MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, at v, v (Soc’y for Research in Child Dev., Ser. No. 229, 1992).

156. See *Maryland v. Craig*, 497 U.S. 836, 842–43, 856–57 (1990).

157. *Id.* at 852.

158. Julie A. Anderson, *The Sixth Amendment: Protecting Defendants’ Rights at the Expense of Child Victims*, 30 J. MARSHALL L. REV. 767, 779 (1997) (citing Brief for American Psychological Ass’n as Amici Curiae in Support of Neither Party at 15–16, *Maryland v. Craig*, 497 U.S. 836 (1990) (No. 89-478) [hereinafter APA Brief]).

159. *Fields v. Murray*, 49 F.3d 1024, 1035–36 (4th Cir. 1995) (en banc); Anderson, *supra* note 158, at 779 (citing APA Brief, *supra* note 158, at 16); see Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1411 & n.292 (2005).

160. Sullivan, *supra* note 4; see *supra* note 4 and accompanying text.

161. Lininger, *supra* note 159, at 1413; see also *Carr Plea for Speed on Rape Victim Bill*, FAIRFAX SUN-HERALD (Aug. 24, 2003), [www.smh.com.au/articles/2003/08/23/1061529376490.html?from=storyrhs](http://www.smh.com.au/articles/2003/08/23/1061529376490.html?from=storyrhs) (describing Australian reforms driven by the potential for trauma in child sexual abuse cases); *New Rape Law ‘Will Protect Victims,’* BBC NEWS (Nov. 1, 2002), [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/2384143.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/2384143.stm) (discussing laws in the United Kingdom that restrict personal cross-examination in rape cases passed in response to a child sexual abuse victim’s suicide).

162. See Anderson, *supra* note 158, at 779.

### III. ANALYSIS

The VBR demands a proper balance between defendants' rights and victims' rights.<sup>163</sup> This Part discusses how the relevant law, policy, and science indicate that the *Simcox II* court set the standard for limiting personal cross-examination too high by equating the interests implicated by limitations on personal cross-examination and face-to-face confrontation. Then, it evaluates counter-arguments against limitations on the defendant's right to personal cross-examination.

#### A. An Improper Balance

Because the *Simcox II* court did not analyze the interests at stake as required by the VBR, it failed to recognize that limitations on face-to-face confrontation and personal cross-examination do not implicate the same concerns. Limiting face-to-face confrontation removes the child victim completely from the courtroom outside the presence of the defendant, which eliminates face-to-face confrontation—the core of the confrontation right and the driving force behind the adversarial proceeding and fundamental fairness.<sup>164</sup> In contrast, a limitation on personal cross-examination only prevents the defendant from personally asking the child victim questions.<sup>165</sup> In fact, the defendant is still allowed to create all of the questions asked during cross-examination, it only limits the defendant from vocalizing them and requires the defendant's standby counsel to ask the questions instead.<sup>166</sup> In sum, compared to face-to-face confrontation, personal cross-examination presents greater risks to the victim and a limitation on personal cross-examination is less constitutionally significant to the defendant's rights. Thus, limitations on personal cross-examination should not be set at the same standard as ones for face-to-face confrontation.

The strong public policy of protecting children from secondary traumatization carries over to the realm of personal cross-examination.<sup>167</sup> The State's interest in preventing traumatization of children from personal cross-examination is just as great as—if not even greater than—the risk presented by face-to-face confrontation.<sup>168</sup> Indeed, face-to-face confrontation is much

---

163. See discussion *supra* Section II.B.2.

164. See discussion *supra* Section II.A.1.

165. See discussion *supra* Section II.A.3.

166. See discussion *supra* Section II.A.3.

167. See discussion *supra* Section II.A.3.a.

168. See *Fields v. Murray*, 49 F.3d 1024, 1036 (4th Cir. 1995) (en banc); discussion *supra* Sections II.A.3.a, II.D.2.

less likely to traumatize a child compared to the defendant personally questioning the child victim.<sup>169</sup> Victims have the right to be “free from intimidation, harassment, or abuse, throughout the criminal justice process.”<sup>170</sup> The VBR is implicated because personal cross-examination can cause secondary traumatization, which may lead to intimidation and abuse.<sup>171</sup> Thus, the VBR demands that the right to personal cross-examination be balanced against the victims’ rights.<sup>172</sup> This type of analysis is also supported by *Maryland v. Craig*.<sup>173</sup> As discussed, the U.S. Supreme Court upheld a limitation on face-to-face confrontation in *Craig* because the Confrontation Clause’s truth-seeking goal was “adequately ensure[d]” and protecting children from trauma was a compelling state interest.<sup>174</sup> The *Simcox II* court should have done a similar balancing.

Moreover, the *Simcox II* court did not properly analyze the relevant law. The *Simcox II* court recognized that there is no federal constitutional standard of proof beyond the requirement for a case-specific showing of necessity.<sup>175</sup> Therefore, unlike *Simcox I*, the VBR is applicable because the rights cannot be in direct conflict if there is no federally mandated standard of proof.<sup>176</sup> The Arizona Supreme Court in *Riggs* and the Arizona Court of Appeals in *Roper*, both concluded that the VBR requires careful balancing of the interests at stake even where the defendant’s rights to fundamental fairness and cross-examination are invoked.<sup>177</sup> The Arizona Supreme Court explicitly cautioned lower courts from making ad hoc exceptions that would defeat the VBR’s purpose of giving victims a participatory voice in the criminal justice system.<sup>178</sup> By failing to account for the victims’ interests and rights under the VBR, the *Simcox II* court did just that.

Thus, the proper analysis is to balance the interests at stake. The defendant’s right to personal cross-examination is not as central to fundamental fairness as face-to-face confrontation. The U.S. Supreme Court has indicated that face-to-face confrontation is at the core of the

---

169. See *Fields*, 49 F.3d at 1036; discussion *supra* Sections II.A.3.a, II.D.2.

170. ARIZ. CONST. art. 2, § 2.1(A)(1).

171. See discussion *supra* Section II.D.2.

172. See discussion *supra* Section II.D.2.

173. *Maryland v. Craig*, 497 U.S. 836, 851 (1990); see *supra* notes 37–44 and accompanying text.

174. *Craig*, 497 U.S. at 851; see *supra* notes 49–50 and accompanying text.

175. *Simcox II*, 371 P.3d 642, 645 (Ariz. Ct. App. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); see *supra* note 135 and accompanying text.

176. *Simcox II*, 371 P.3d at 645; see discussion *supra* Section II.C.

177. See *supra* notes 112–23 and accompanying text.

178. See *supra* note 110 and accompanying text.

Confrontation Clause and is an essential part of fundamental fairness, while it has said nothing about personal cross-examination.<sup>179</sup> The majority approach recognizes this fact, and it treats limits on personal cross-examination and face-to-face confrontation differently as a result.<sup>180</sup> However, the *Simcox II* court treated the rights to personal cross-examination and face-to-face confrontation equally, without addressing the majority approach. In fact, the *Simcox II* court cited to ten other states which limit face-to-face confrontation—not personal cross-examination—upon a case-specific showing by clear and convincing evidence when it set the standard of proof for limitations on personal cross-examination.<sup>181</sup>

But, equating the interests behind the two rights is inappropriate because they implicate different concerns; thus, the standards allowing limitation should also be different. The minority approach reasons that the test for limitations on both personal cross-examination and face-to-face confrontation should be the same because they are equally constitutionally intrusive on the defendant's rights.<sup>182</sup> The *Simcox I* court suggested that personal cross-examination implicates both the right to confrontation and the right of self-representation.<sup>183</sup> While limitations on face-to-face confrontation remove the driving force behind the Confrontation Clause's truth-seeking goal, both the confrontation right and the self-representation right are minimally affected by a limitation on personal cross-examination.

First, the confrontation right is completely secure when personal cross-examination is limited. Each of the features of confrontation are met: (1) physical presence, (2) oath, (3) cross-examination, and (4) observation of the witness's demeanor by the trier of fact, unlike a limitation on face-to-face confrontation.<sup>184</sup> In contrast, limitations on face-to-face confrontation eliminate physical presence, the feature that the U.S. Supreme Court

---

179. See discussion *supra* Section II.A.1.

180. See discussion *supra* Section II.A.3.c.

181. ARK. CODE ANN. § 16-43-1001(a)(1) (2017) (allowing for a restriction on face-to-face confrontation upon a showing by “clear and convincing evidence that testifying in open court would be harmful or detrimental to the child”); accord CAL. PENAL CODE § 1347(b)(2) (Deering 2017); CONN. GEN. STAT. ANN. § 54-86g(a) (2017); IDAHO CODE ANN. § 9-1805(1)(a) to (b) (2017); KAN. STAT. ANN. § 22-3434(b) (2017); MONT. CODE ANN. § 46-16-229(1) (2017); NEV. REV. STAT. ANN. § 50.580(1) (2017); N.Y. CRIM. PROC. LAW § 65.10(1) (McKinney 2017); OKLA. STAT. tit. 12, § 2611.7(A) (2017); W. VA. CODE ANN. § 62-6B-3 (2017); see *supra* note 158 and accompanying text.

182. See, e.g., *Simcox II*, 371 P.3d 642, 645–46 (Ariz. Ct. App. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); discussion *supra* Sections II.A.3.b, II.A.3.c.

183. *Simcox I*, 349 P.3d 1100, 1107 (Ariz. Ct. App. 2015), *cert. denied*, 136 S. Ct. 2486 (2016).

184. *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

characterizes as the core of the confrontation right's truth-seeking function, which drives fundamental fairness.<sup>185</sup> Thus, limiting face-to-face confrontation is more constitutionally significant than limiting the defendant's personal cross-examination right. Moreover, the U.S. Supreme Court has held that the confrontation right is met where the defendant has the opportunity to conduct cross-examination to probe testimonial infirmities.<sup>186</sup> Indeed, the Arizona Supreme Court has noted that the defendant does not have a right to have cross-examination proceed exactly how the defendant desires.<sup>187</sup> A limit on personal cross-examination that merely requires standby counsel to be the defendant's mouthpiece will still put the child victim's testimony through the crucible of cross-examination and meet all the features of confrontation.<sup>188</sup> Thus, the confrontation right is barely affected—if at all—by a limitation on personal cross-examination.

Moreover, personal cross-examination could interfere with the Confrontation Clause's truth-seeking function more significantly than face-to-face confrontation. CSAAS explains that personal cross-examination can lead to false testimony as a result of the grooming process, which the abuser used to keep the sexual abuse secret in the first place.<sup>189</sup> Further, secondary traumatization can lead some victims to refuse to testify or fail to be able to reasonably communicate, which will likely lead to dismissal of the case given that the child victim's testimony is central to prosecution.<sup>190</sup> As discussed, other common law countries and studies have recognized that personal cross-examination can be extremely traumatic for child sexual abuse victims—much more than from face-to-face confrontation.<sup>191</sup> Consequently, it is much more likely that a child sexual abuse victim would refuse to testify or be unable to reasonably communicate as a result of personal cross-examination versus from mere face-to-face confrontation. Therefore, the Confrontation Clause's truth-seeking goal is more at risk when the defendant personally cross-examines the victim as compared to simply sitting in the courtroom with the victim.

Under self-representation analysis, defendants retain actual control over the case they choose to present and the jury's perception that the defendant is

---

185. *See supra* notes 27–32 and accompanying text.

186. *See supra* note 32 and accompanying text.

187. *State v. Riggs*, 942 P.2d 1159, 1163–64 (Ariz. 1997); *see supra* note 121 and accompanying text.

188. *See supra* notes 29–32 and accompanying text.

189. *See supra* notes 144–52 and accompanying text. *See generally* discussion *supra* Section II.D.1.

190. *See supra* notes 155–61 and accompanying text.

191. *See supra* notes 155–62 and accompanying text.



in control is not destroyed. First, the defendant still controls all other aspects of the trial. The defendant also maintains control over cross-examination of the child victim by creating the questions that standby counsel asks.<sup>192</sup> Moreover, the defendant's right to self-representation is secured so long as the appearance of self-representation before the jury is not seriously undermined.<sup>193</sup> The appearance of self-representation would not be undermined where the jury is instructed that the defendant prepared the questions but the court is obligated to substitute standby counsel to satisfy a general public policy of protecting children during testimony.<sup>194</sup> Further, the State's interest in preserving the integrity of the trial can overcome the defendant's right to self-representation,<sup>195</sup> which could be affected where the child either cannot reasonably communicate as a result of secondary trauma or where the child recants or lies due to CSAAS.<sup>196</sup> Thus, the defendant's self-representation right is minimally affected and may, in fact, be outweighed by the interest in limiting it.

The VBR requires Arizona courts to look for the purpose behind each right and the interests at stake.<sup>197</sup> In sum, a limitation on personal cross-examination is significantly less constitutionally intrusive than one on face-to-face confrontation, and personal cross-examination is more likely to cause trauma to the victim. The *Simcox II* court did not recognize these two key facts. Consequently, legislation must be passed to rectify this error by lowering the standard of proof required to allow for a limitation on personal cross-examination in order to provide the proper balance.

### *B. Arguments Against Testimonial Accommodations*

Two key arguments against limiting the defendant's ability to personally cross-examine the witnesses against him are that this limitation may: (1) lead to a weakening of the presumption of innocence and (2) prevent the defendant

---

192. See discussion *supra* Section II.A.3.a.

193. *McKaskle v. Wiggins*, 465 U.S. 168, 187 (1984); see *supra* note 57 and accompanying text.

194. See *supra* notes 69–72 and accompanying text. For a discussion of how jury instructions can protect the defendant's right to a fair trial, see discussion *supra* Section III.B.1. Possible jury instructions could explain that lawyers are trained in cross-examination and courtroom procedure, making the process less traumatic for the child witness. See *supra* note 54; see also *State v. Estabrook*, 842 P.2d 1001, 1006 (Wash. 1993).

195. See *supra* note 59 and accompanying text.

196. See discussion *supra* Section II.D.

197. See discussion *supra* Section II.B.2.

from presenting the “best possible defense” given the difficult nature of child sexual abuse cases.

### 1. Presumption of Innocence

One argument proponents of the right to personal cross-examination proffer is that the presumption of innocence is diminished. The *Simcox I* court specifically mentioned that limiting the defendant from personally cross-examining the child victim could affect the jury’s perception of the defendant’s innocence.<sup>198</sup> The concern is jurors might wonder why the court is limiting personal cross-examination of the child victim if the defendant is innocent.<sup>199</sup>

While it is possible a jury might draw an improper inference from a limitation on personal cross-examination that requires standby counsel to ask the defendant’s prepared question, it runs no more risk than removing the child from the courtroom altogether. Moreover, courts assume that jurors follow jury instructions because many things during trial can affect the jury’s perception of whether the defendant is guilty.<sup>200</sup> In *Holbrook v. Flynn*, state troopers were stationed behind the defendant during the trial, and thus, a similar question could be asked: Why would state troopers be necessary if the defendant was not guilty?<sup>201</sup> The U.S. Supreme Court rejected this argument and reasoned that the state troopers’ presence was not “so inherently prejudicial” that it would threaten the defendant’s right to a fair trial because the jury likely assumed it was a normal procedure.<sup>202</sup> Similarly, jurors would likely assume having trained lawyers question children in court is the normal procedure. Thus, properly crafted jury instructions, like an explanation that limiting personal cross-examination is the standard practice for protecting child victims would adequately protect the presumption of innocence.<sup>203</sup>

---

198. *Simcox I*, 349 P.3d 1100, 1106 (Ariz. Ct. App. 2015), *cert. denied*, 136 S. Ct. 2486 (2016).

199. See Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak After Maryland v. Craig*, 27 ST. MARY’S L.J. 389, 405–406 (1996); Mohammadian, *supra* note 25, at 507.

200. See *Richardson v. Marsh*, 481 U.S. 200, 206 (1987); *State v. Dalton*, 385 P.3d 412, 417 (Ariz. 2016); see also *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (“This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down.”).

201. See *Holbrook*, 475 U.S. at 570.

202. *Id.* at 571–72.

203. *But cf.* Mohammadian, *supra* note 25, at 507 (discussing that more research must be done on how jury instructions on testimonial accommodations affect jurors).

## 2. The Right to a Best Possible Defense

Another argument that opponents of limitations on personal cross-examination pose is that the right of self-representation includes the right to present the “best possible defense.”<sup>204</sup> Those who support this argument assert that the self-representation right includes the right to present “the accused’s best possible defense.”<sup>205</sup> Therefore, this argument suggests that the defendant must be allowed to conduct personal cross-examination because limiting it violates the right to a best possible defense.<sup>206</sup> The dissent in *Fields* made a similar argument by suggesting that a limitation on personal cross-examination infringes the self-representation right by preventing the defendant from having his “voice heard.”<sup>207</sup>

This argument is incorrect because, as discussed above, the right to self-representation is minimally affected by a limitation on personal cross-examination.<sup>208</sup> The self-representation right is not infringed because the defendant maintains actual control over the case where the defendant is allowed to prepare the questions standby counsel asks and where the jury is instructed that the defendant is exercising the right to self-representation.<sup>209</sup> In practice, the defendant’s voice is heard because standby counsel reads questions created by the defendant and jury instructions can emphasize the fact that the defendant retained control by creating the questions asked by standby counsel.<sup>210</sup> A restriction on personal cross-examination would not prevent the defendant from asking any question that the defendant could ask if the defendant were allowed to personally question the child victim.

Supporters of the best-possible-defense argument also point to the suggestibility of children.<sup>211</sup> In *Coy v. Iowa*, the U.S. Supreme Court hypothesized that a “malevolent adult” could coach a child to make a false accusation.<sup>212</sup> Research indicates that suggestive questions can lead children

---

204. See, e.g., *Fields v. Murray*, 49 F.3d 1024, 1047 (4th Cir. 1995) (en banc) (Ervin, C.J., dissenting).

205. See, e.g., *id.* at 1047 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984)).

206. See, e.g., *id.* at 1045–46; see William F. Lane, *Explicit Limitations on the Implicit Right to Self-Representation in Child Sexual Abuse Trials: Fields v. Murray*, 74 N.C. L. REV. 863, 894–96 (1996).

207. *Fields*, 49 F.3d at 1046 (Ervin, C.J., dissenting) (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984)); see *supra* note 81 and accompanying text.

208. See *supra* notes 190–94 and accompanying text.

209. See discussion *supra* Section II.A.2.

210. See *supra* notes 190–94 and accompanying text.

211. See, e.g., Steven Grossman, *Hot Crimes: A Study in Excess*, 45 CREIGHTON L. REV. 33, 66–70 (2011).

212. 487 U.S. 1012, 1020 (1988).

to make false accusations.<sup>213</sup> Thus, obtaining the truth from a child requires a skilled interviewer, as skill directly affects the “quality of the report obtained.”<sup>214</sup> In fact, “children are very unlikely to make a false allegation without suggestive questioning.”<sup>215</sup> However, suggestive questioning can cause a child to truly believe the abuse happened due to “repeated reinforcement” by interviewers.<sup>216</sup>

It seems that those who argue against limits on personal cross-examination due to the suggestibility of children have an issue with forensic interviews—not limitations on personal cross-examination. In any event, as the research indicates, it is unlikely that a child would make a false accusation without suggestive questioning.<sup>217</sup> Moreover, the U.S. Supreme Court’s “malevolent adult” scenario dealt with limitations on face-to-face confrontation not personal cross-examination,<sup>218</sup> a right much more central to the truth-seeking goal of the adversarial process.<sup>219</sup>

But, in fact, the suggestibility argument works both ways. The U.S. Supreme Court has recognized that the right to self-representation may be limited where the integrity of the trial is at stake.<sup>220</sup> The integrity of the trial could be affected where exercising the right to self-representation through personal cross-examination of the child victim leads to the child lying due to CSAAS or failing to testify because of secondary traumatization.<sup>221</sup> Thus, the suggestibility of children works against the best possible defense argument.

\* \* \*

While there are some legitimate arguments against limiting personal cross-examination, there are ways to mitigate these concerns. However, what

---

213. Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 56–57 (2000). For an example of suggestive questioning, see *Idaho v. Wright*, 497 U.S. 805, 808, 810–11 (1990) (discussing an interview in which a pediatrician asked a two-and-a-half-year-old child: “Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?”).

214. Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, 65 LAW & CONTEMP. PROBS. 149, 150 (2002).

215. Ceci & Friedman, *supra* note 213, at 85.

216. See Thomas L. Feher, *The Alleged Molestation Victim, the Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 233 (1987).

217. See *supra* note 238 and accompanying text.

218. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

219. See *supra* notes 27–32, 184–80 and accompanying text.

220. See discussion *supra* Section II.A.2.

221. See discussion *supra* Section II.D.

these arguments do show is that there does need to be safeguards to protect the defendant's rights to achieve the proper balance the VBR demands. So, the question becomes: When should a court step in to protect vulnerable child witnesses at the expense of the defendant's right to personal cross-examination?

#### IV. RESTORING THE BALANCE: PROPOSED LEGISLATION

The Arizona Legislature should pass legislation to provide the proper balance between the defendant's right to personal cross-examination and the rights of the child sexual abuse victim. This approach makes sense given that there is already a statute that allows for limitations on face-to-face confrontation in Arizona.<sup>222</sup> This Part proposes legislation that would require a limitation on personal cross-examination where the prosecution shows a case-specific necessity by a preponderance of the evidence. It then applies this new test to illustrate how it will work.

##### A. *The Proposed Legislation*

The proposed legislation should direct trial courts to limit the defendant's right to personal cross-examination where it is shown by a preponderance of the evidence that the child will face more than de minimis harm from personal cross-examination. The U.S. Supreme Court has not mandated a particular standard of proof to show a case-specific necessity.<sup>223</sup> However, due to the holding in *Simcox I*, the proposed legislation must at least require the prosecution to show a case-specific necessity, meaning that trauma will result from personal cross-examination before a limitation on personal cross-examination may be imposed.<sup>224</sup>

---

222. ARIZ. REV. STAT. ANN. § 13-4253 (2017). For a discussion on how the *Simcox I* and *Simcox II* courts applied this statute to the right of personal cross-examination, see Section II.C. Recently the Washington State Legislature recommended that the State's Supreme Court "adopt rules" that would allow trial courts to limit the defendant's right to personally cross-examine alleged victims of sexual offenses upon substantial evidence of a case-specific necessity. H.B. 1001, 62d Leg., Reg. Sess. (Wash. 2011), <http://lawfilesexst.leg.wa.gov/biennium/2011-12/Pdf/Bills/House%20Bills/1001.pdf>. For a discussion of how this statute balances defendants' rights and victims' rights, see generally Mohammadian, *supra* note 25. Note that it seems this legislation failed. *HB 1001-2011-12*, WASH. ST. LEGISLATURE, <http://app.leg.wa.gov/billsummary?BillNumber=1001&Year=2011> (last visited Oct. 16, 2017).

223. See *Simcox II*, 371 P.3d 642, 645 (Ariz. Ct. App. 2016), *cert. denied*, 137 S. Ct. 1204 (2017).

224. See *Simcox I*, 349 P.3d 1100, 1103-04, 1106 (Ariz. Ct. App. 2015), *cert. denied*, 136 S. Ct. 2486 (2016).

This new test seeks to meet the concerns of both the *Fields* and *Folks* test. The *Fields* test requires less evidence of trauma to impose a limitation on personal cross-examination because it recognizes limitations on personal cross-examination and face-to-face confrontation implicate different concerns.<sup>225</sup> The *Folk* test requires the same case-specific showing of necessity for limitations on both personal cross-examination and face-to-face confrontation because it reasons both rights are equally constitutionally significant.<sup>226</sup> This proposal reconciles these two views by requiring a case-specific showing of necessity and setting the standard of proof for making that case-specific showing at the lower standard of a preponderance of the evidence. While the *Fields* test identifies that each right implicates different concerns, the *Folk* test recognizes that the defendant's right to personal cross-examination should require a case-specific showing of necessity because there are significant interests at stake for the defendant.

A lower standard of proof is appropriate, but a specific case-by-case evaluation is also vital. Every child responds differently to the courtroom experience, and some children may even benefit from confronting their abuser during personal cross-examination.<sup>227</sup> Thus, limiting personal cross-examination could be working against the policy behind helping children if allowing it would benefit the child. And, consequently, it would be unconstitutional under *Simcox I* because there would not be a potential for trauma.<sup>228</sup> Maintaining the *Simcox I* court's requirement of a case-specific showing of necessity is supported by research that indicates each case is different.<sup>229</sup>

---

225. See *Fields v. Murray*, 49 F.3d 1024, 1036–37 (1995) (en banc); discussion *supra* Sections II.A.3.c, III.A.

226. See discussion *supra* Section II.A.3.c.

227. See discussion *supra* Section II.D.2.

228. See *supra* notes 129–33 and accompanying text.

229. See *supra* note 155 and accompanying text.

The case-specific requirement also mitigates against the potential that the defendant will not be able to combat a false allegation under the malevolent adult scenario.<sup>230</sup> Further, because the Arizona Supreme Court has warned against the potential that ad hoc rulings would have in undermining the purpose behind the VBR, particular guidance in the statute is necessary to ensure the child victim's rights are respected.<sup>231</sup> Thus, the statute should include specific factors such as:

- (1) The age and maturity of the child witness; (2) The facts and circumstances of the alleged offense; (3) The necessity of [limiting the defendant from conducting cross-examination] to the prosecution's ability to proceed as well as any prejudice to the defendant by [limiting personal cross-examination]; (4) Whether or not the facts of the case involve the alleged infliction of bodily injury to the child witness . . . ; and (5) Any mental or physical handicap of the child witness.<sup>232</sup>

Because each case and each child is different, these factors will help ensure that there is a case-specific necessity. Factor three is especially noteworthy given that the VBR's goal is to properly balance the interests at stake. Evaluating prejudice to the defendant gives the court the tools to deny a limitation where it might seem that an adult is using the child to falsely accuse the defendant and personal cross-examination would help to combat the malevolent scheme.<sup>233</sup>

Where the court makes a case-specific finding of trauma by a preponderance of the evidence, the statute would instruct the court to require standby counsel to read the defendant's prepared questions to the child victim and allow time for the defendant to prepare any follow-up questions during cross-examination. The court would also instruct the jury that this is the practice for all alleged child victims and that the defendant prepared all questions asked during cross-examination. Thus, the defendant's confrontation right and self-representation right would be protected and any prejudice to the defendant would be mitigated.<sup>234</sup>

---

230. See discussion *supra* Section III.B.2.

231. See *supra* note 110 and accompanying text.

232. W. VA. CODE ANN. § 62-6B-3(c) (2017). The West Virginia statute providing for limitations on face-to-face confrontation is a good model because, unlike many other statutes, it is particularly specific in what the court should evaluate to come to its finding of a case-specific necessity. Further, these factors are supported by the psychological studies, which indicate that these types of factors are extremely relevant in determining whether a child sexual abuse victim would suffer trauma as a result of personal cross-examination. See discussion *supra* Section II.D.

233. See *supra* notes 211–14 and accompanying text.

234. See discussion *supra* Part III.

Setting the standard to limit personal cross-examination at the preponderance of the evidence standard recognizes that limitations on personal cross-examination and face-to-face confrontation should be different because the interests at stake are different. Thus, where it is more likely than not a child will suffer trauma as a result of personal cross-examination, the defendant should be limited from performing cross-examination. Applying this standard allows both the victim and the defendant to be adequately protected. This type of balancing is what the VBR demands.

The statute should read:

A. In a criminal prosecution for a sex offense allegedly committed by the defendant against a child, the court, on motion or on its own initiative, must limit the defendant from personally cross-examining the child victim where there is a case-specific finding made on the record by a preponderance of the evidence that the child victim will be subject to more than de minimis harm that would impair the child victim's ability to reasonably communicate as a result of personal cross-examination by the defendant.

B. The court must evaluate all the available evidence and make reasonable inferences to determine whether the alleged child victim will be subject to more than de minimis harm as a result of personal cross-examination. The court must evaluate the following factors:

- (1) The age and maturity of the alleged child victim;
- (2) The facts and circumstances of the alleged offense;
- (3) The necessity of limiting the defendant from conducting cross-examination to the prosecution's ability to proceed and any prejudice to the defendant by limiting personal cross-examination;
- (4) Whether or not the facts of the case involve the alleged infliction of bodily injury to the child witness or the threat of bodily injury to the alleged child victim child or another; and
- (5) Any mental or physical handicap of the alleged child victim.

C. This Statute shall have no effect on testimonial accommodations for face-to-face confrontation under A.R.S. § 13-4253.

### *B. Applying the New Standard*

To illustrate how the new standard works, I will apply it to the facts of the *Smith* case from Section II.A.3.c. The *Smith* case fails under this standard. Recall, in *Smith*, the defendant was charged with sexually abusing his daughter, and the trial court limited personal cross-examination because the defendant was her father, the charges were for sexual abuse, and the



defendant exhibited some anger in court proceedings.<sup>235</sup> Under the proposed statute, this evidence would not be sufficient to make a case-specific finding of trauma by the preponderance of the evidence.<sup>236</sup> The *Simcox I* court specifically stated evidence of “the nature of the crimes and the defendant’s relationship with the victims” is insufficient to show a case-specific necessity.<sup>237</sup> This type of generalized evidence is not sufficient to show a case-specific showing because it merely presumes that any child sexually abused by her father would be traumatized by him personally cross-examining her. Thus, because the proposed statute still requires a case-specific showing of necessity to avoid trauma as a result of personal cross-examination, this type of generalized evidence would not be sufficient to show a case-specific necessity.

Other facts would change this analysis. For example, in *Fields*, one victim testified she had “wet the bed repeatedly” and that she had had nightmares along with evidence that the defendant was a father-figure to her and that she suffered repeated sexual abuse.<sup>238</sup> This evidence goes beyond just the defendant’s relationship with the victim and the crime, and it could satisfy a case-specific showing of necessity by a preponderance of the evidence because it is particularized evidence of that necessity rather than a mere presumption from generalized evidence. Therefore, once the court has *specific* evidence that the child will suffer trauma from personal cross-examination, it can then measure whether the evidence shows by a preponderance of the evidence that a limitation on personal cross-examination is necessary to avoid trauma to the child sexual abuse victim.

## V. CONCLUSION

Currently, under Arizona law, there is an improper balance between the defendant’s right to personal cross-examination and the child sexual abuse victim’s rights under the VBR. The *Simcox II* court held that the prosecution must show a case-specific necessity by clear and convincing evidence to obtain a limitation on both personal cross-examination and face-to-face confrontation. Because the *Simcox II* court did not apply the VBR, it failed to properly balance the interests implicated when the defendant seeks to

---

235. *Smith v. Smith*, No. 05-CV-74045-DT, 2007 WL 1585653, at \*2 (E.D. Mich. May 31, 2007); *see supra* notes 85–88 and accompanying text.

236. *Simcox I*, 349 P.3d 1100, 1106–07 (Ariz. Ct. App. 2015), *cert. denied*, 136 S. Ct. 2486 (2016); *see supra* note 129–133 and accompanying text.

237. *Simcox I*, 349 P.3d at 1106; *see supra* note 131 and accompanying text.

238. *Fields v. Murray*, 49 F.3d 1024, 1034–35 (4th Cir. 1995) (en banc); *see supra* note 65 and accompanying text.

personally cross-examine a child sexual abuse victim. A limitation on personal cross-examination presents a much lower risk to defendants' rights than a limitation on face-to-face confrontation and personal cross-examination presents a much higher risk of trauma to child sexual abuse victims than face-to-face confrontation. Thus, the standard of proof to show a case-specific necessity should be lower than the clear and convincing standard used for limitations on face-to-face confrontation.

Legislation should be passed to lower the standard of proof to a preponderance of the evidence in recognition of this reality. However, the legislation should still require a case-specific showing which ensures that the child victim is actually at risk of trauma as a result of personal cross-examination. This requirement will also protect the defendant's right to fundamental fairness. The proposed legislation would strike the proper balance between the defendant's right to personal cross-examination and the child sexual abuse victim's rights that the VBR demands.