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Explicit Limitations on the Implicit Right to Self-Representation in Child Sexual Abuse Trials: Fields v. Murray

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Explicit Limitations on the Implicit Right to Self-Representation in Child Sexual Abuse Trials: *Fields v. Murray*

The Sixth Amendment guarantees fundamental rights to criminal defendants during a trial,[1] and the United States Supreme Court has frequently delineated the scope of the enumerated protections.[2] The Court has held, for example, that the Sixth Amendment provides for an implicit right to self-representation.[3] On the other hand, the Court has upheld restrictions on rights of defendants that are explicitly granted by the Confrontation Clause.[4] In the case of child sexual abuse victims, the Supreme Court has indulged the application of state statutes that permit testimony of child witnesses outside the presence of the defendant.[5] But the Court has provided little guidance on how a trial judge should address the concerns raised

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1. The Sixth Amendment provides that:

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

U.S. CONST. amend. VI (emphasis added).

2. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963) (stating that the Sixth and Fourteenth Amendments require state courts to provide counsel for indigent criminal defendants); *see also infra* note 59 and accompanying text.

3. In Faretta v. California, 422 U.S. 806 (1975), the Court held that the constitutional right to a pro se defense is implicitly rooted in the Sixth Amendment's framework, rather than in its plain text: "Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment." *Id.* at 819.

4. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 181-84 (1987) (holding that a co-conspirator's out-of-court statement against the defendant was admissible because it fell within a "firmly rooted" hearsay exception); Ohio v. Roberts, 448 U.S. 56, 75 (1980) (holding that a trial court properly admitted the pretrial testimony of a witness who was unavailable for confrontation at trial). *See generally* FED. R. EVID. 801 to 806 (defining hearsay rules for proceedings in federal courts).

5. In the landmark case of Maryland v. Craig, 497 U.S. 836 (1990), the Supreme Court concluded that the trial court properly applied a state statute that permitted the cross-examination of a child witness outside the presence of the defendant and transmission of the testimony via one-way closed-circuit television. *Id.* at 856-57. The statute allowed the use of this alternative method of admitting testimony only upon a particularized showing of trauma to a child witness in a sexual abuse trial. MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (1989).

when a defendant invokes the right to self-representation within the context of a child sexual abuse proceeding.[6]

In *Fields v. Murray*,[7] the United States Court of Appeals for the Fourth Circuit upheld a Virginia state court decision to prevent a defendant accused of sexually abusing children from exercising his right to self-representation.[8] In *Fields*, the Fourth Circuit stood at the crossroads of two divergent Sixth Amendment trends. From one direction, the court confronted the emerging practice of trial courts granting a defendant's waiver of counsel and authorizing self-representation.[9] From the other direction, the court faced the increasingly common use of alternative methods of cross-examining alleged child sexual abuse victims,[10] which have developed in response to a groundswell of public concern over the protection of child witnesses in sexual abuse trials.[11] The *Fields* case demonstrates

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6. For example, in *In re* Adoption of J.S.P.L., 532 N.W.2d 653 (N.D. 1995), the Supreme Court of North Dakota stated that "[t]here is sparse authority addressing the propriety of limiting a criminal defendant's sixth amendment rights to both self-representation and to personally confront and cross-examine witnesses." *Id.* at 661.

7. 49 F.3d 1024 (4th Cir.) (en banc), *cert. denied*, 116 S. Ct. 224 (1995).

8. *Id.* at 1034. The *Fields* Court agreed with the state trial court that the defendant did not clearly and unequivocally invoke his right to self-representation. *Id.* Moreover, the Fourth Circuit found that the trial court properly denied the defendant's request to present his own defense because his sole objective was to cross-examine his accusers personally. *Id.* at 1037; *see infra* note 39 and accompanying text (discussing Fields's defense strategy).

9. The Sixth Amendment implicitly grants a criminal defendant the right to defend himself pro se. Faretta v. California, 422 U.S. 806, 821 (1975); *see infra* notes 77-78 and accompanying text. In United States v. Lorick, 753 F.2d 1295 (4th Cir. 1985), the Fourth Circuit reversed the conviction of a defendant whose request to proceed pro se was denied by the trial court. *Id.* at 1299.

10. In Maryland v. Craig, 497 U.S. 836 (1990), the Supreme Court upheld the application of a state statute that permitted the use of closed-circuit television to transmit the cross-examination of a child sexual abuse witness outside the presence of the defendant. *Id.* at 857; *see also* Theresa Cusick, *Televised Justice: Toward a New Definition of Confrontation Under* Maryland v. Craig, 40 CATH. U. L. REV. 967, 967-69 (1991) (arguing that adoption of alternative methods for questioning a child witness is designed to promote accuracy and truthfulness in the child's testimony).

11. *See generally* NANCY W. PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS: LEGAL ISSUES AND DILEMMAS 135-38 (1991) (advocating changes in trial procedures to alleviate trauma to child sexual abuse witnesses); Glenn Collins, *Studies Find Sexual Abuse of Children Is Widespread*, N.Y. TIMES, May 13, 1982, at C1 (asserting that the incarceration rate of sexual offenders is low because children rarely report the crime or because their allegations are not believed); Sandra Evans & Robert O'Harrow, Jr., *Young Victims of Sex Abuse Go Unheard; Civil Suits Become Increasingly Common*, WASH. POST, Mar. 15, 1992, at B1 (describing the prosecution's difficulty in meeting the burden of proof in a criminal trial with a single reluctant child witness).

the difficulty in balancing such an important public concern with a defendant's fundamental Sixth Amendment rights.[12]

This Note examines the Fourth Circuit's decision in *Fields*, including its two-tiered analysis of Sixth Amendment protections. After summarizing the pertinent facts and the Court's holding,[13] the Note recounts the historical development of the implicit Sixth Amendment right to self-representation,[14] which culminated in the case of *Faretta v. California*.[15] Next, the Note describes the emerging trend toward restriction of Confrontation Clause rights, particularly in sexual abuse cases.[16] Finally, the Note analyzes the reasoning in *Fields* and concludes that the Fourth Circuit improperly upheld restrictions on the Sixth Amendment right to self-representation.[17] As a result, the Note concludes, the Fourth Circuit has established precedent for further infringement of a defendant's basic entitlements under the Sixth Amendment.[18]

The protracted procedural history of *Fields* reflects the difficulty of the legal issues raised by the case. In May 1988 Gary Fields was charged with multiple counts of sexual abuse against his twelve-year-old daughter and several of her friends.[19] During the initial criminal proceedings in the Circuit Court of Newport News, Virginia, the trial judge appointed two attorneys to represent Fields.[20] Following the appointment of counsel, but before the trial began, Fields made three separate requests either to act as co-counsel or to dispense with his court-appointed counsel.[21] In his correspondence with the trial court, Fields expressed his desire to cross-examine the children who

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12. The dissent in *Fields* recognized the inherent difficulty in conducting a sexual abuse trial: "[E]ven individuals engaging in horrible acts are afforded protection under our Constitution." *Fields*, 49 F.3d at 1037 (Ervin, C.J., dissenting).

13. *See infra* notes 19-47 and accompanying text.

14. *See infra* notes 59-99 and accompanying text.

15. 422 U.S. 806, 819-21 (1975); *see also infra* notes 73-85 and accompanying text (describing *Faretta*).

16. *See infra* notes 100-65 and accompanying text.

17. *See infra* notes 166-230 and accompanying text.

18. *See infra* note 222 and accompanying text.

19. *Fields*, 49 F.3d at 1025-26. The prosecution alleged that Fields gave sleeping pills to his daughter and her friends during several sleepovers at the Fields residence. *Id.* After the girls had been drugged, the prosecution alleged, Fields sexually abused or raped them. *Id.* A grand jury charged Fields "with six counts of aggravated sexual battery, one count of forcible sodomy, and one count of rape." *Id.* at 1026.

20. *Id.* at 1026.

21. *Id.* at 1026-27.

had accused him of sexual abuse.[22] After a pretrial hearing,[23] the court denied all of his requests, and Fields was subsequently convicted in a bench trial on five counts of aggravated sexual battery.[24] Claiming that the trial court denied him the right to self-representation, Fields unsuccessfully appealed his conviction to the

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7 22. *Id.* In June 1988 Fields wrote to the trial judge, requesting permission to act as co-counsel. *Id.* Although Fields expressed some reluctance to pursue this course because of his learning disability and "limited" legal knowledge, he based his request on his intent to question the children because " *'these kids cannot look me in the eye and lie to me.'* " *Id.* (emphasis added). Fields requested permission, however, to retain his court-appointed counsel for technical legal advice. *Id.* at 1038 (Ervin, C.J., dissenting). In a second letter dated August 16, 1988, Fields repeated his request to act as co-counsel and requested replacement of his court-appointed attorneys because they resisted Fields's defense strategy, which had " 'always been to simply get the remainder of the stories from the witness[es] by questioning them [him]self on the stand.' " *Id.* at 1027. On August 29, 1988, when his request for new counsel had not been approved, Fields wrote a third letter in which he dismissed his counsel and stated that he intended to represent himself:

> "[T]he Supreme Court affirmed my right to face my accusers and I feel that that approach is the only one that guarantees me justice. I heard perjury committed at the hearing and I believe the witnesses would not hesitate to lie again to a stranger. The stranger I am referring to would be any council [sic] asking them questions . . . . I regret putting you in this position your Honor but my future is my responsibility and no one else[']s. My honor and reputation is my responsibility and no one else[']s. Without the opportunity to personally defend myself justice will not be served."

Id. at 1039 (Ervin, C.J., dissenting).

23. At the hearing, the trial judge questioned Fields about his reasons for dismissing his counsel and his competence to conduct his own defense:

> THE COURT: You haven't got a legal degree have you?
> THE DEFENDANT: No, sir.
> THE COURT: Don't you think these two attorneys are better suited for what ought to be brought up on your case and what ought not to be brought up?
> THE DEFENDANT: In some respects.
> THE COURT: *You can forget about my allowing you to cross-examine these complaining witnesses—these young children. I'm not going to allow that under any circumstance.*
> THE DEFENDANT: Well then, there won't be any justice in this courtroom.

Id. at 1039-40 (Ervin, C.J., dissenting). Later in the dialogue, Fields claimed that the United States Supreme Court had recognized a defendant's right to cross-examine his accusers. *Id.* at 1040 (Ervin, C.J., dissenting). The judge responded, " *'Well, I'm the Supreme Court in your trial, and you're not going to cross-examine those children.* You can write out your questions and give it to your lawyers if you want to do that . . . but *you're not going to stand up here and cross-examine your accusers.'* " *Id.* (Ervin, C.J., dissenting). The trial judge hinted at his reasoning when he stated, " 'I can't think of putting a child any more ill at ease than to have her own defendant father who she's accused of sexually abusing her standing up here and questioning her.' " *Id.* (Ervin, C.J., dissenting).

24. *Id.* at 1028. The Fourth Circuit panel opinion reported that "Fields was . . . sentenced to eleven years' imprisonment on condition of five years' probation and ten years' good behavior." Fields v. Murray, No. 91-7169, 1994 WL 63013, at *3 (4th Cir. Mar. 3, 1994) (panel decision), *vacated*, 1994 U.S. App. LEXIS 9711, at *1 (4th Cir. May 3, 1994).

Virginia Court of Appeals[25] and to the Supreme Court of Virginia.[26]

In February 1991 Fields petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia.[27] A magistrate judge denied the writ, holding that the trial court had not abused its discretion.[28] Subsequently, a district court judge accepted the decision of the Virginia Court of Appeals and denied the petition.[29] Fields appealed to the United States Court of Appeals for the Fourth Circuit, which initially reversed the district court and ordered that the writ be granted.[30] However, upon rehearing en banc,[31] the Fourth Circuit vacated the panel decision[32] and affirmed the district court's denial of the writ.[33]

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25. In an unpublished opinion, the Virginia Court of Appeals held that the trial court properly denied Fields's request to dismiss counsel and proceed pro se because " 'the record . . . contains no clear and unequivocal waiver of counsel. To the contrary, the record shows that [Fields] wanted and repeatedly requested permission only to conduct cross-examination.' " *Fields*, 49 F.3d at 1028 (quoting Fields v. Commonwealth, No. 1697-88-1, slip op. at 3 (Va. Ct. App. Aug. 21, 1990)).

26. The Supreme Court of Virginia denied Fields's petition for review. Fields v. Commonwealth, No. 901282 (Va. Nov. 26, 1990). Under Virginia law, a Supreme Court denial of petition for appeal operates as a ruling on the merits. *See* Saunders v. Reynolds, 204 S.E.2d 421, 424-25 (Va. 1974).

27. *Fields*, 49 F.3d at 1028.

28. Fields v. Murray, No. 91-100-N, 1991 U.S. Dist. LEXIS 21142, at *8-9 (E.D. Va. June 10, 1991) ("Fields' letters and verbal communications taken as a whole do not manifest an 'unequivocal demand for self-representation.' " (quoting Walker v. Loggins, 608 F.2d 731, 734 (9th Cir. 1979)).

29. Fields v. Murray, No. 91-100-N, 1991 U.S. Dist. LEXIS 21140, at *2 (E.D. Va. July 10, 1991) ("[T]he Magistrate Judge's analyses of the facts and law [were] correct.").

30. Fields v. Murray, No. 91-7169, 1994 WL 63013, at *8 (4th Cir. Mar. 3, 1994), *vacated*, 1994 U.S. App. LEXIS 9711, at *1 (4th Cir. May 3, 1994). The panel decision, authored by Chief Judge Ervin (author of the dissent in the en banc decision), considered de novo the issue of Fields's invocation of the right to self-representation:

> In our view, [the third letter written by Fields] reflects Fields' clear and unequivocal invocation of his right to self-representation and his simultaneous waiver of the right to counsel . . . . That . . . cross-examination was Fields' sole motivation for seeking to represent himself does not eviscerate his unequivocal invocation of his Faretta right.

Id. at *4-5.

31. According to the dissent in *Fields*, the Fourth Circuit reviewed the case en banc in order to produce Part III of the majority's opinion, in which the court held that restriction of the right to face-to-face confrontation with witnesses justified limitations on a defendant's right to self-representation. *Fields*, 49 F.3d at 1044 (Ervin, C.J., dissenting); *see infra* notes 42-47 and accompanying text.

32. *See* Fields v. Murray, 1994 U.S. App. LEXIS 9711, at *1 (4th Cir. May 3, 1994) (panel decision), *vacated*, 1994 U.S. App. LEXIS 9711, at *1 (4th Cir. May 3, 1994).

33. *Fields*, 49 F.3d at 1025 (7-5 vote). Appointed counsel represented Fields throughout the appellate proceedings. *See* Fields v. Murray, No. 91-7169, 1994 WL 63013,

The majority opinion in *Fields* presented two independent inquiries into the trial court proceedings. First, in adopting the conclusions of the district court,[34] the Fourth Circuit held that Fields did not unequivocally invoke his right to self-representation.[35] Under the majority's analysis, Fields's sole request to defend himself pro se was based on his desire for a face-to-face confrontation with his accusers.[36] The majority further observed that Fields may have wavered in his desire for self-representation because he expressed "regret" over his decision to dismiss his counsel.[37] Overall, the majority concluded that "[t]he record taken as a whole, therefore, discloses only a single statement in one letter from Fields that perhaps indicated a desire to proceed *pro se*, although it is not entirely clear that Fields intended it as such."[38]

In its second inquiry, the majority determined that even if Fields effectively invoked his right to proceed pro se, the trial court's denial of his request was proper because the court could reject his stated purpose of self-representation: to cross-examine the girls personally.[39] By analogy to the 1990 case of *Maryland v. Craig*,[40] in which

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at *4 (4th Cir. Mar. 3, 1994) (panel decision), *vacated*, 1994 U.S. App. LEXIS 9711, at *1 (4th Cir. May 3, 1994).

34. The majority opinion, written by Judge Russell, concluded that the issue of whether a defendant effectively invoked his right to self-representation is a question of fact and, therefore, the state court's ruling was reviewable under the "presumption of correctness" contained in 28 U.S.C. § 2254(d). *Fields*, 49 F.3d at 1032. The majority concluded that "[b]ecause we cannot conclude that [the trial court decision] lacked even fair support in the record, the state court's finding that Fields failed to invoke his right to self-representation clearly and unequivocally must be upheld." *Id.* at 1034. Conversely, the dissent argued that "[w]hether [the facts in the trial record] disclose a clear and unequivocal intention by Fields sufficient to exercise his Sixth Amendment right to waive the right to counsel and proceed *pro se* is a question of law, not a question of fact." *Id.* at 1042 (Ervin, C.J., dissenting).

35. Unlike the right to counsel, which need not be asserted to be effective, the Sixth Amendment right to self-representation is effective only when a defendant "knowingly and intelligently" declares to the court that he intends to represent himself. Faretta v. California, 422 U.S. 806, 835 (1975); *see infra* note 80 and accompanying text.

36. *Fields*, 49 F.3d at 1033. The majority observed that Fields did not discuss proceeding as a pro se defendant until his third letter to the trial judge, but the text of the letter "suggest[ed] that he may have been thinking about simply cross-examining personally the witnesses against him, rather than proceeding pro se." *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1034. The majority argued that in his brief presented to the Fourth Circuit, Fields conceded that his sole purpose for proceeding pro se was to cross-examine his accusers personally. *Id.* Fields argued that "[h]e demanded to represent himself so that he could personally cross-examine the witnesses and thus control the presentation of his defense." Brief for Appellant at 14, Fields v. Murray, 49 F.3d 1024 (4th Cir. 1995) (No. 91-7169).

the United States Supreme Court upheld modified procedures for receiving the testimony of child sexual abuse victims against the accused,[41] the Fourth Circuit reasoned that the Sixth Amendment did not guarantee Fields a constitutional right to cross-examine the girls personally.[42] The Fourth Circuit adopted *Craig's* two-pronged test to determine whether courts can prohibit a pro se defendant from confronting adverse witnesses face-to-face.[43] First, the court reasoned that the purpose of the self-representation right—to affirm the dignity and autonomy of the defendant—could be "otherwise assured" even when one element of the right—personal cross-examination of witnesses—is restricted.[44] Second, relying on the *Craig* decision,[45] the Fourth Circuit concluded that the important state interest of preventing emotional trauma to the child witnesses outweighed Fields's right to personal cross-examination.[46] Conse-

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40. 497 U.S. 836 (1990).

41. In *Craig*, the testimony of a child sexual abuse victim was taken outside the courtroom and transmitted live via closed-circuit television to the judge, jury, and defendant. *Id.* at 840-43.

42. *Fields*, 49 F.3d at 1034-37. The *Craig* Court found that the reliability of the testimony of child sexual abuse witnesses admitted via closed-circuit television is "functionally equivalent" to physical confrontation as long as the trial court enforces other "safeguards of reliability and adversariness," including the oath, cross-examination, and observation of the witness by the trier of fact. *Craig*, 497 U.S. at 851.

43. *Fields*, 49 F.3d at 1035. Under *Craig*, a defendant's right to face-to-face meeting with his accusers under the Confrontation Clause can be restricted "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 U.S. at 850.

44. *Fields*, 49 F.3d at 1035-37. The majority stated that "it is universally recognized that the self-representation right is not absolute." *Id.* at 1035. The court then applied the *Craig* analysis to Fields's right to self-representation: The purposes of the right to self-representation, "to affirm [a defendant's] 'dignity and autonomy' " and to present his " 'best possible defense,' " could be assured even if Fields could not personally cross-examine the witnesses. *Id.* at 1035 (quoting McKaskle v. Wiggins, 465 U.S. 168, 176-78 (1984)). Hence, the *Fields* court concluded that denial of the request to cross-examine the witnesses did not violate the Sixth Amendment right to self-representation established in *Faretta*. *Id.* at 1035-37.

45. *Craig*, 497 U.S. at 853-55. Justice O'Connor, writing for the *Craig* Court, stated that the enactment of "child shield" statutes in over 30 states demonstrated the importance of protecting child witnesses. *Id.* at 853.

46. *Fields*, 49 F.3d at 1036. Although *Craig* required a particularized showing of trauma to the child witnesses, 497 U.S. at 855-58, the majority in *Fields* found it "reasonable for the trial court to have concluded on the basis of the facts before it that [the child victims] would be emotionally harmed if they were personally cross-examined in open court by Fields, their alleged abuser," *Fields*, 49 F.3d at 1036. Unlike *Craig*, the record in *Fields* contained no expert testimony or other evidence demonstrating the likelihood of trauma to the children. *Id.* Nonetheless, the *Fields* court reasoned: "[W]e do not believe it was essential in this case that psychological evidence of the probable emotional harm to each of the girls be presented in order for the trial court to find that

quently, the majority concluded that "[b]ecause the trial court was not required to allow such personal cross-examination, Fields was denied nothing to which he was entitled."[47]

The *Fields* dissent, written by Chief Judge Ervin, rejected both parts of the majority opinion.[48] First, the dissent argued that in his third letter to the court and at the pretrial hearing, Fields waived his right to counsel and effectively invoked his right to self-representation.[49] Rejecting the majority's interpretation of the Sixth Amendment provisions, the dissent asserted that "[t]he right to represent oneself before a jury of one's peers is the bedrock of the Sixth Amendment."[50] Subordination of the self-representation right to the public policy of protecting child witnesses thus violated the holding in *Faretta*.[51]

Second, the dissent rejected the majority's analogy to *Maryland v. Craig*.[52] According to the dissent, *Craig* addressed "the 'accuracy' and 'reliability' concerns that form the core of Confrontation Clause analysis";[53] the holding in *Craig*, however, did not encompass the pro se defendant's "dignity and autonomy," which are protected by the *Faretta* right to self-representation.[54] Instead of deciding *Fields* solely by analogizing it to *Craig*, Chief Judge Ervin's dissent argued that both *Craig* and *Faretta* could be satisfied by allowing the use of modified courtroom procedures during the defendant's cross-examination of the child witnesses.[55]

Overall, the court's decision in *Fields* suggests that the Fourth Circuit remains deeply divided[56] over the protection of two impor-

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denying Fields personal cross-examination was necessary to protect them." *Id.* at 1037.

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

48. *Id.* at 1037 (Ervin, C.J., dissenting).

49. *Id.* at 1044 (Ervin, C.J., dissenting).

50. *Id.* (Ervin, C.J., dissenting).

51. *See id.* (Ervin, C.J., dissenting). Chief Judge Ervin attacked the protective stance adopted by the majority, claiming that it disregarded the defendant's constitutional right: "I am afraid that in trying to protect these children, a majority of this court also closed its eyes to Fields' invocation of his right to represent himself." *Id.* (Ervin, C.J., dissenting).

52. *Id.* at 1044-47 (Ervin, C.J., dissenting); *see supra* notes 40-46 and accompanying text.

53. *Fields*, 49 F.3d at 1047 (Ervin, C.J., dissenting).

54. *Id.* (Ervin, C.J., dissenting).

55. *Id.* (Ervin, C.J., dissenting). The dissent proposed several alternatives to face-to-face cross-examination, such as "installing a screen or other barrier between the defendant and the witnesses; conducting closed sessions out of the courtroom; placing the defendant and the witnesses in separate rooms . . . and requiring the defendant to remain seated at counsel table while questioning the witnesses." *Id.* at 1047 n.4 (Ervin, C.J., dissenting).

56. The vote in the en banc decision was 7-5. *Id.* at 1025.

tant legal interests: a defendant's right to self-representation and the protection of child witnesses in sexual abuse trials. In the Fourth Circuit's view, the implicit Sixth Amendment right to a pro se defense may be subjected to the same judicial scrutiny that the Supreme Court has imposed on the explicit rights of the Confrontation Clause.[57] Despite the contentious debate between the majority and dissent in *Fields*, the opinion sets a precedent for the limitation of self-representation rights when the restriction is necessary to advance an important public policy.[58]

During the past seventy-five years, the Supreme Court has examined the breadth of the constitutional right of representation under the Sixth Amendment. The Court has held that a trial court must grant a defendant the right to counsel before it can impose a valid conviction or imprisonment.[59] The Sixth Amendment does not, however, explicitly confer on a criminal defendant the right to self-representation.[60] The Judiciary Act of 1789 granted defendants in federal courts the right to proceed pro se.[61] Similarly, several state constitutions explicitly grant to the criminal defendant the right of defending himself personally.[62] However, the Supreme Court has examined the right to self-representation in only a limited number of cases.[63]

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57. *See supra* notes 40-46 and accompanying text (summarizing the *Fields* majority's application of the *Craig* analysis).

58. *See infra* notes 222-29 and accompanying text.

59. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963) (concluding that the Sixth and Fourteenth Amendments require appointment of counsel for indigent criminal defendants in state court trials); Johnson v. Zerbst, 304 U.S. 458, 467-68 (1938) (stating that the Sixth Amendment is a "jurisdictional bar" to a criminal conviction in federal court when counsel is not retained or provided); Powell v. Alabama, 287 U.S. 45, 71-73 (1932) (holding that the Sixth and Fourteenth Amendments required appointment of counsel for a criminal defendant in a capital case who was unable to retain an attorney and was incapable of representing himself).

60. *See supra* note 1.

61. This portion of the Judiciary Act is codified at 28 U.S.C. § 1654 (1988).

62. *See, e.g.*, DEL. CONST. of 1897 art. I, § 7 (declaring that a criminal defendant has the right "to be heard by himself and his counsel"); MASS. CONST. art. XII (providing that a criminal defendant has the right "to be fully heard in his defence by himself, or by counsel, at his election"); S.C. CONST. art. I, § 14 (guaranteeing a defendant's right "to be fully heard in his defense by himself or by his counsel or by both"). The Constitution of Virginia does not explicitly grant the right to self-representation or assistance of counsel, but the Supreme Court of Virginia has held that the Bill of Rights in the United States Constitution guarantees a criminal defendant's right to counsel. Watkins v. Commonwealth, 6 S.E.2d 670, 671 (Va. 1940).

63. *See* Faretta v. California, 422 U.S. 806, 832 (1975) (holding that the Sixth Amendment implicitly guarantees the freedom to represent oneself); Price v. Johnston, 334 U.S. 266, 285 (1948) (holding that a defendant has the "privilege of conducting his own

In 1943, the Supreme Court decided *Adams v. United States* ex rel. *McCann*,[64] in which it considered whether a defendant could waive his right to a jury trial without the advice of counsel.[65] In *Adams*, the Court examined the benefits of the Sixth Amendment right to counsel and a defendant's freedom to present his own defense.[66] While concluding that the defendant may freely choose to waive the right to a hearing in front of a jury,[67] the Court's opinion examined in dicta "[t]he right to assistance of counsel and the correlative right to dispense with a lawyer's help."[68] According to the *Adams* Court, "[a]n accused must have the means of presenting his best defense,"[69] and "the public conscience must be satisfied that fairness dominates the administration of justice."[70] Most importantly, *Adams* concluded that "the Constitution does not force a lawyer upon a defendant."[71]

After *Adams*, the issue of whether a state, in the interest of protecting the right to counsel, could constitutionally compel a defendant to accept counsel remained unanswered.[72] In 1975, however, the United States Supreme Court resolved the debate over pro se litigation in the definitive case of *Faretta v. California*.[73] In *Faretta*, a criminal defendant requested permission to represent himself in a California state court, and the trial judge granted the request.[74] Just before trial, however, the trial judge, concerned

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defense at the trial"); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942) (holding that the Constitution cannot force a lawyer upon a defendant); Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934) (concluding that the Sixth Amendment's Confrontation Clause guarantees a defendant's right to be present at all portions of his trial as required by fundamental fairness because the defendant ultimately has the right to conduct his own defense).

64. 317 U.S. 269 (1943).

65. *Id.* at 270-72.

66. *Id.* at 275-81.

67. *Id.* at 280-81. The *Adams* Court stated that the denial of a defendant's reasonable request for waiver of a jury trial "imprison[s] a man in his privileges." *Id.* at 280.

68. *Id.* at 279-80.

69. *Id.* at 279. The Court rejected a formalistic approach to the Sixth Amendment right to counsel: "[T]he procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters." *Id.*

70. *Id.*

71. *Id.*

72. Recognition of a right to self-representation under the Sixth Amendment is dispositive of the rights of defendants in state courts due to the protections granted under the Fourteenth Amendment. *See* Faretta v. California, 422 U.S. 806, 818 (1975).

73. 422 U.S. 806 (1975).

74. *Id.* at 807-08.

about the defendant's ignorance of the rules of evidence and jury selection, reversed his ruling and appointed the public defender to serve as counsel.[75] The defendant was convicted, and the California Court of Appeal affirmed.[76]

In *Faretta*, the United States Supreme Court held that a state court cannot force appointed counsel on an unwilling criminal defendant: "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[77] The *Faretta* opinion, written by Justice Stewart, stated that the explicit Sixth Amendment rights of notice, confrontation, and compulsory process are rooted in an implicit right to self-representation;[78] hence, the Court concluded that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."[79] Because the defendant in *Faretta* "clearly and unequivocally" declared his intention to discharge his counsel and represent himself,[80] the Supreme Court held that the trial court violated his Sixth Amendment right.[81] The *Faretta* majority, which acknowledged that the loss of any "benefits" associated with the right to counsel could lead to unfavorable consequences for the defen-

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75. *Id.* at 808-10.

76. *Id.* at 811-12. The California Supreme Court denied the defendant's petition for review. *Id.* at 812.

77. *Id.* at 819-20. The Court stated that the explicit Sixth Amendment guarantee of counsel must be provided in the form of assistance. *Id.* at 820. In cases in which counsel is "thrust" upon an unwilling defendant, the counsel becomes "not an assistant, but a master." *Id.*

78. *Id.* at 818-19. The Court concluded that "the Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Id.* at 819. The Court acknowledged a "consensus" recognition of the right to self-representation among the state constitutions, federal court decisions, and Supreme Court precedent. *Id.* at 817. According to *Faretta*, the consensus is rooted in "the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged." *Id.* at 818. The *Faretta* opinion traced the history of the right of self-representation from early common law, during which a criminal defendant usually presented his own defense, through the Revolutionary period, when self-representation was protected through colonial charters and state laws. *Id.* at 821-32.

79. *Id.* at 817.

80. *Id.* at 835. The defendant's declaration indicated that he "knowingly and intelligently" relinquished the right to be represented by counsel. *Id.* The "knowingly and intelligently" standard, announced by the Court in Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938), has commonly been adopted by modern courts in their review of defendants' requests for self-representation. *See infra* note 87.

81. *Faretta*, 422 U.S. at 836.

dant,[82] ruled that a defendant seeking to proceed pro se must "knowingly and intelligently" waive his right to counsel.[83]

In his dissent in *Faretta*, Chief Justice Burger argued that enforcement of the *implicit* right to self-representation would inevitably compromise the *explicit* rights granted under the Sixth Amendment.[84] Chief Justice Burger asserted that the "spirit and the logic" of the Sixth Amendment guarantees a defendant "the fullest possible defense," which is ultimately best effected by granting broad discretionary powers to the trial judge "to determine whether the accused is capable of conducting his defense."[85]

In the aftermath of *Faretta*, lower courts have attempted to properly scrutinize defendants' decisions to travel the road of self-representation.[86] Like many of the other federal appellate courts,[87]

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82. *Id.* at 834.

83. *Id.* at 835 (citing *Johnson*, 304 U.S. at 464-65). The *Faretta* Court attempted to reconcile its decision with previous Supreme Court cases that prohibited conviction or imprisonment of defendants without provision of the right to assistance of counsel. *Id.* at 832-34; *see supra* note 59. The Court concluded that the Bill of Rights does not extinguish a defendant's free choice, including his decision whether the assistance of counsel is advantageous to his defense. *Faretta*, 422 U.S. at 833-34.

84. *Faretta*, 422 U.S. at 837 (Burger, C.J., dissenting). The dissent argued that "in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." *Id.* at 838 (Burger, C.J., dissenting). Chief Justice Burger rejected the majority's argument that the defendant bears primary responsibility for his defense. *Id.* at 839 (Burger, C.J., dissenting). Instead, he argued that the prosecution and the trial judge have a duty to ensure that justice is served: "[T]he system of criminal justice should not be available as an instrument of self-destruction." *Id.* at 838, 840 (Burger, C.J., dissenting). Chief Justice Burger's paradigm of a helpless defendant representing himself came to life in the case of Colin Ferguson, who was convicted in February 1995 of six counts of second-degree murder and nineteen counts of attempted murder after a shooting rampage on a New York commuter train. *See* John T. McQuiston, *Jury Finds Ferguson Guilty of Slayings on the L.I.R.R.*, N.Y. TIMES, Feb. 18, 1995, at A1. After discharging two attorneys who had encouraged him to pursue insanity and "black rage" defenses, Ferguson conducted his own defense, which included cross-examination of witnesses and opening and closing statements. *Id.* at A26. Ferguson had been diagnosed as paranoid and delusional. *See* John T. McQuiston, *Murder Trial in L.I.R.R. Case Goes to the Jury for Deliberation*, N.Y. TIMES, Feb. 17, 1995, at B1.

85. *Faretta*, 422 U.S. at 840 (Burger, C.J., dissenting). According to the dissent, the powers of discretion retained by the trial court are essential to protect "[t]rue freedom of choice and society's interest in seeing that justice is achieved." *Id.* (Burger, C.J., dissenting). The majority conceded that a pro se defendant may ultimately injure himself, but stated that "[a defendant's] choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " *Id.* at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)). In *Fields*, the Fourth Circuit rejected the defendant's claim for self-representation in order to protect child witnesses, rather than to protect the defendant from adverse consequences at trial. 49 F.3d at 1037.

86. Justice Blackmun's dissent in *Faretta* perceptively identified the predominant concerns:

the Fourth Circuit has established criteria for determining if a defendant has effectively waived her right to counsel and invoked her right to self-representation. In *McNamara v. Riddle*,[88] the court adopted the Tenth Circuit standard that the right to a pro se defense is in force only when a defendant asserts it "clearly and unequivocally."[89] In the 1985 case of *United States v. Lorick*,[90] the Fourth Circuit reversed the conviction of a defendant who was forced to accept court-appointed counsel even though he had "expressly and unambiguously" requested to proceed pro se.[91] The *Lorick* court urged that a trial judge faced with an ambivalent defendant should "elicit for the record a clear statement indicating a defendant's

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> Must every defendant be advised of his right to proceed *pro se*? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed *pro se*, does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*? Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the *pro se* defendant differently than it would professional counsel?

Faretta, 422 U.S. at 852 (Blackmun, J., dissenting). In *Fields*, the Fourth Circuit examined the difficulties encountered by a trial court when a defendant intends to invoke the right of self-representation, concluding that the trial court must navigate a "thin line" along which it protects both the right to counsel and the right to self-representation. *Fields*, 49 F.3d at 1029. For example, improperly allowing the defendant to represent himself may violate the right to counsel, while improperly requiring retention of counsel may violate the right to self-representation. *Id.* For a survey of contemporary Sixth Amendment law, see Rick Madden & Cheryl M. Miller, Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993*, 82 GEO. L.J. 1007, 1014-18 (1994).

87. *See, e.g.*, United States v. Reddeck, 22 F.3d 1504, 1510 (10th Cir. 1994) (concluding that "[w]aiver of the right to counsel must be made 'knowingly and intelligently' and 'made with eyes open' as to the dangers and disadvantages of self-representation"); Adams v. Carroll, 875 F.2d 1441, 1444 n.3 (9th Cir. 1989) (holding that request for self-representation must be unequivocal, knowing and intelligent, timely, and not for purposes of delay).

88. 563 F.2d 125, 127 (4th Cir. 1977) (holding that the defendant's "implied" request for self-representation did not satisfy the *Faretta* standard for invoking the right to proceed pro se).

89. *Id.* at 127 (citing United States v. Bennett, 539 U.S. 45, 50 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976)).

90. 753 F.2d 1295 (4th Cir.), *cert. denied*, 471 U.S. 1107 (1985).

91. *Id.* at 1299. In *Lorick*, the defendant effectively invoked his right to self-representation, but subsequently invited standby counsel to participate in pretrial proceedings. *Id.* at 1298. At trial, the standby counsel became more involved in the defense, and the court required the defendant to address the court through his attorney. *Id.* at 1299. The Fourth Circuit concluded that the defendant never waived his right to self-representation once he invoked it. *Id.*

knowledgeable initial assertion of the right [of self-representation] and thereafter to observe the right scrupulously."[92] Finally, in *United States v. Gillis*,[93] the Fourth Circuit stated that the right to self-representation "can only be invoked by waiving counsel expressly, knowingly, and intelligently."[94]

In the 1984 case of *McKaskle v. Wiggins*,[95] the Supreme Court enumerated the specific rights of a defendant who successfully invokes his right to self-representation: "The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, *to question witnesses*, and to address the court and the jury at appropriate points in the trial."[96] The *Wiggins* Court resolved a case in which a defendant had asserted his right as a pro se litigant, but the trial court assigned standby counsel whose behavior at trial interfered with the defendant's actions.[97] The Supreme Court ultimately upheld the defendant's conviction because the standby counsel's behavior did not violate the right to self-representation.[98] The Court further stated that the *Faretta* doctrine does not provide a constitutional guarantee for "hybrid" representation, such as appointment of standby counsel or the defendant's involvement as co-counsel.[99]

Along with its recognition of an implicit right to self-representation, the Supreme Court has examined the explicit provisions of the Sixth Amendment that provide guarantees to the defendant simply by virtue of his presence at trial. In the case of the Confrontation Clause,[100] the Court's decisions reveal a discernible trend toward restricting face-to-face meetings between a defendant and the

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92. *Id.* at 1299.

93. 773 F.2d 549 (4th Cir. 1985).

94. *Id.* at 559.

95. 465 U.S. 168 (1984).

96. *Id.* at 174 (emphasis added). The *Wiggins* Court also stated that "[t]he right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." *Id.* at 176-77.

97. *Id.* at 172-73.

98. *Id.* at 188.

99. *Id.* at 183; *see also* Cross v. United States, 893 F.2d 1287, 1291-92 (11th Cir.) (holding that a defendant has no constitutional right to "hybrid" representation and that "the decision to permit a defendant to proceed as co-counsel rests in the sound discretion of the trial court"), *cert. denied*, 498 U.S. 849 (1990).

100. The Constitution provides that "the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI.

witnesses testifying against him.[101] The Fourth Circuit's decision in *Fields* relied extensively on the Supreme Court's recent Confrontation Clause opinions.[102]

Historically, the absence of early Supreme Court decisions on the Confrontation Clause was an "understandable consequence of the scant attention originally paid to the Bill of Rights and the limited criminal jurisdiction of the federal courts early in the nation's history."[103] The Court's first major analysis of the Confrontation Clause occurred in the 1895 case of *Mattox v. United States*.[104] In *Mattox*, the Court addressed the admissibility of transcribed testimony of witnesses taken at the defendant's previous trial.[105] The trial court had admitted the testimony taken from the prior case, and the defendant appealed his conviction on the ground that the admission of the testimony violated his rights under the Confrontation Clause.[106] In rejecting the defendant's argument, the Court declared that "the primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness."[107] *Mattox* held that the Confrontation Clause was satisfied when the defendant had been granted a face-to-face confrontation and cross-examination of the witnesses in the first trial.[108] The Court thus rejected a literal interpretation of the Sixth Amendment,[109] instead holding that the "general rule" requiring the

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101. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 849-52 (1990) (holding that testimony of a child sexual abuse witness may be taken outside the presence of the defendant and transmitted to the trial court through closed-circuit television); Ohio v. Roberts, 448 U.S. 56, 74-75 (1980) (admitting pretrial statements of witnesses who were unavailable at trial).

102. *See supra* notes 40-46 and accompanying text (analyzing the impact of *Maryland v. Craig* on the *Fields* holding).

103. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 589 (1992).

104. 156 U.S. 237 (1895).

105. *Id.* at 240. Because the witnesses had died after the first trial, they were no longer available for cross-examination or impeachment. *Id.* at 245. The trial court also refused to allow the defendant to introduce a witness to impeach the testimony of one of the deceased witnesses. *Id.* at 244-45. The *Mattox* Court held that "before a witness can be impeached [by evidence of contradictory statements], a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements." *Id.* Hence, a witness could not be impeached after his death. *Id.* at 245-50.

106. *Id.* at 238-39.

107. *Id.* at 242-43.

108. *Id.* at 244.

109. *Id.* at 243. The *Mattox* Court warned of the extreme consequences of a literal interpretation: "A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and

presence of witnesses before the jury "must occasionally give way to the considerations of public policy and the necessities of the case."[110]

For nearly a century after *Mattox*, the Supreme Court's principal Confrontation Clause decisions centered on the evidentiary question of hearsay exceptions.[111] In several of its opinions, the Court ostensibly balanced the "integrity of the fact-finding process"[112] with the utility of allowing exceptions to in-court, physical confrontation.[113] The Court's treatment of the Confrontation Clause culminated in the 1980 case of *Ohio v. Roberts*,[114] in which the Court enunciated a standard for allowing exceptions to the confrontation right.[115] In *Roberts*, a witness testified during a preliminary hearing against a defendant charged with forgery.[116] In preparation for trial, the prosecution subpoenaed the witness five times, but she could not be located.[117] Over the defendant's objection, the prosecution successfully introduced a transcript of the testimony from the hearing, and the defendant was convicted on all counts.[118] After

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farther than the safety of the public will warrant." *Id.*

110. *Id.*

111. *Compare, e.g.*, California v. Green, 399 U.S. 149, 164 (1970) (allowing a trial court to admit a prior inconsistent statement by a witness for substantive purposes because the prior testimony was subject to cross-examination by the defendant) *and* Motes v. United States, 178 U.S. 458, 474 (1900) (holding that the admission of testimony taken at a preliminary hearing from a witness who was unavailable at trial due to negligence of the prosecution violated the Confrontation Clause, even though the defendant had the opportunity to cross-examine the witness) *with* Dutton v. Evans, 400 U.S. 74, 89 (1970) (concluding that physical confrontation of an available witness who made a prior implicating statement was unnecessary because cross-examination of a second witness who heard the statement would satisfy the "truth-determining process" guaranteed by the Confrontation Clause). *See generally* Jacqueline M. Beckett, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials*, 82 GEO. L.J. 1605, 1614-29 (1994) (criticizing Supreme Court precedent that equates the Sixth Amendment right to confrontation with cross-examination); Berger, *supra* note 103, at 592 (arguing that the widespread acceptance of Professor Wigmore's theory of pre-constitutional hearsay exceptions "laid the groundwork for the Supreme Court's present view of confrontation as an evidentiary doctrine").

112. Berger v. California, 393 U.S. 314, 315 (1969).

113. *See, e.g.*, *Green*, 399 U.S. at 165 (holding that a witness's forgetfulness at trial permitted the prosecution to introduce statements by the witness taken during a preliminary hearing in which the defendant's counsel was present and had the opportunity to cross-examine the witness).

114. 448 U.S. 56 (1980).

115. *Id.* at 65, 73-77.

116. *Id.* at 58.

117. *Id.* at 59.

118. *Id.* at 59-60. The Court of Appeals of Ohio reversed, and the Supreme Court of Ohio affirmed. *Id.*

his conviction, the defendant appealed, claiming violation of his right to confrontation.[119]

The *Roberts* Court employed a two-part analysis for evaluating hearsay in light of "the Framers' preference for face-to-face accusation."[120] First, introduction of the hearsay must satisfy the rule of necessity, under which the proponent of the evidence must demonstrate the unavailability of the witness.[121] Second, the statement "is admissible only if it bears adequate 'indicia of reliability.' "[122] According to *Roberts*, the reliability of the statement can be readily inferred if it "falls within a firmly rooted hearsay exception";[123] otherwise, the proponent must present "a showing of particularized guarantees of trustworthiness."[124] Overall, the *Roberts* Court rejected a strict interpretation of the Confrontation Clause; instead, the Court reasoned that the Sixth Amendment requires " 'substantial compliance with the purposes behind the confrontation requirement.' "[125]

The *Roberts* decision provided a framework for courts to use in determining whether to dispense with physical confrontation of witnesses in particular cases. During the 1980s, however, new challenges to the confrontation right emerged.[126] In particular, the

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119. *Id.* at 59, 62.

120. *Id.* at 65.

121. *Id.* The Court declared that absolute unavailability of a witness is not necessary in order to dispense with physical confrontation: "The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Id.* at 74.

122. *Id.* at 66 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).

123. *Id.* In *Roberts*, the Court held that the defense attorney's opportunity to question the witness and his use of leading questions at the preliminary hearing took the form of cross-examination; hence, the testimony satisfied the right to confrontation and its reliability requirement. *Id.* at 70-73; *see also* California v. Green, 399 U.S. 149, 165 (1970) (holding that testimony under oath, assistance of counsel, the opportunity to cross-examine, and proceeding in a court sufficiently simulate trial conditions and satisfy the confrontation right).

124. *Roberts*, 448 U.S. at 66.

125. *Id.* at 69 (quoting *Green*, 399 U.S. at 166).

126. After the *Roberts* decision was handed down in 1980, the Supreme Court further examined the constitutional issues surrounding the hearsay rules. *See, e.g.*, White v. Illinois, 502 U.S. 346, 353-58 (1992) (holding that the Confrontation Clause did not require a showing of unavailability of a declarant whose statements fell within the state's hearsay exceptions for spontaneous declarations and statements made in the course of receiving medical care); Idaho v. Wright, 497 U.S. 805, 817-19 (1990) (declaring that the state's residual hearsay exception was not a "firmly rooted" exception, and therefore statements falling within it were admissible only upon a finding of "particularized guarantees of trustworthiness"); Bourjaily v. United States, 483 U.S. 171, 181-84 (1987) (concluding that out-of-court declarations made by a co-conspirator fell within a "firmly rooted" hearsay

growing public awareness of child sexual abuse and the difficulties of gathering sufficient evidence for criminal convictions[127] prompted the development of nontraditional methods of gathering evidence and admitting testimony.[128] In response to the public outcry for prosecution of child abusers, many states enacted child shield statutes which explicitly permit courts to adopt alternative methods for receiving the testimony of children in sexual abuse cases.[129] Many

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exception and hence the trial court was not required to examine independently the reliability of the statements); United States v. Inadi, 475 U.S. 387, 394-400 (1986) (holding that a showing of the unavailability of the declarant was not required for the trial court to admit a co-conspirator's out-of-court statements). *See* MCCORMICK ON EVIDENCE § 252 (John W. Strong ed., 4th ed. 1992).

127. The number of reported cases of child sexual abuse grew dramatically from 1975 to 1990. GAIL S. GOODMAN ET AL., TESTIFYING IN CRIMINAL COURT: EMOTIONAL EFFECTS ON CHILD SEXUAL ASSAULT VICTIMS 1-2 (1992). One study found that the number of reported cases increased from 1,975 to over 135,000 between 1976 and 1990. *Id.* (citing U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM WORKING PAPER: 1990 SUMMARY COMPONENTS (1992)). Child sexual abuse cases are difficult to prosecute for several reasons, including the scarcity and unreliability of evidence. *See* Meridith F. Sopher, *"The Best of All Possible Worlds": Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case*, 63 FORDHAM L. REV. 633, 643 (1994). In many cases, the lack of physical evidence means that the prosecution hinges on the testimony of the child victim. *Id.* at 644. The problem is compounded by factors that may limit the child's ability to communicate effectively, including intimidation by the courtroom setting and memory loss. *Id.* at 643-44. According to one study sponsored by the Department of Justice, children have difficulty testifying for three principal reasons: immaturity, the nature of the crime of sexual abuse, and the criminal justice system's "limited understanding of children's capabilities as witnesses." DEBRA WHITCOMB, WHEN THE VICTIM IS A CHILD 15 (2d ed. 1992).

128. Courts have adopted several techniques to facilitate child sexual abuse prosecutions, including "admitting psychological expert testimony, ... abolishing corroboration requirements, and extending statutes of limitations." Diana Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691, 694 (1991).

129. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (1995) (permitting use of one-way closed-circuit television to transmit the cross-examination of a child witness conducted outside the presence of the defendant); S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1976 & Supp. 1994) (allowing use of videotaped testimony by child witness); VA. CODE ANN. § 18.2-67.9 (Michie 1988 & Supp. 1994) (permitting the use of two-way closed circuit television for cross-examination outside the defendant's presence). For a complete list of statutes permitting the use of videotaped testimony, one-way closed circuit television, and two-way closed circuit television, see Maryland v. Craig, 497 U.S. 836, 853-54 nn. 2-4 (1990). At the time of the *Fields* trial, Virginia law allowed an alternative method of testimony in sexual assault cases:

> A. In any criminal proceeding, including preliminary hearings, involving an alleged offense against a child the age of twelve or under relating to [several crimes including sexual assault] ..., the Commonwealth's attorney or the defendant may apply for an order from the court that the child's testimony be taken in a room outside the courtroom and be televised by two-way closed-circuit television ....

states enacted statutes that did not require a particular finding of unavailability under the *Roberts* framework but instead presumed that there would be trauma to *all* child witnesses in these cases.[130] Hence, the stage was set for the Supreme Court to renew its scrutiny of challenges to the Confrontation Clause.

In 1988, the Court examined the constitutionality of a child shield statute in *Coy v. Iowa*.[131] The defendant in *Coy* was charged with sexually assaulting two thirteen-year-old girls.[132] Pursuant to a state statute,[133] the trial court allowed the girls to testify behind a screen that prevented the girls from seeing the defendant yet "would enable [the defendant] dimly to perceive the witness."[134] The Supreme Court held that the use of the screen violated the Confrontation

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B. The court may order that the testimony of the child be taken [under Subsection A] if it finds that the child is unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons:
   1. The child's persistent refusal to testify despite judicial requests to do so;
   2. The child's substantial inability to communicate about the offense; or
   3. The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying.

. . . .

C. In any proceeding in which closed-circuit television is used to receive testimony, the Commonwealth's attorney and the defendant's attorney shall be present in the room with the child, and the child shall be subject to direct and cross-examination. The only other persons allowed to be present in the room with the child during his testimony shall be those persons necessary to operate the closed-circuit equipment, and any other person whose presence is determined by the court to be necessary to the welfare and well-being of the child.

D. The child's testimony shall be transmitted by closed-circuit television into the courtroom for the defendant, jury, judge and public to view. The defendant shall be provided with a means of private, contemporaneous communication with his attorney during the testimony.

VA. CODE ANN. § 18.2-67.9 (Michie 1988).

North Carolina has not enacted a child shield statute, yet trial courts have authorized the use of closed-circuit television to transmit the testimony of child witnesses taken outside the presence of a criminal defendant. *See, e.g., In re* Stradford, 119 N.C. App. 654, 657-59, 460 S.E.2d 173, 175-76 (holding that the trial court's discretionary use of remote testimony did not violate the defendant's right to confrontation under the North Carolina or federal constitutions), *disc. rev. denied*, 341 N.C. 650, 462 S.E.2d 525 (1995).

130. *See* Cusick, *supra* note 10, at 975 (listing the states with such statues).

131. 487 U.S. 1012 (1988).

132. *Id.* at 1014.

133. IOWA CODE § 910A.14 (1987) (repealed 1989). The statute allowed the child witness to testify in "an adjacent room or behind a screen or mirror that permits the [defendant] to see and hear the child" while preventing the child from seeing or hearing the defendant. *Id.*

134. *Coy*, 487 U.S. at 1015.

Clause,[135] which "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[136] Writing for the Court, Justice Scalia asserted that "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."[137]

The *Coy* opinion observed that previous Supreme Court decisions permitting limitations on the right to physical confrontation dealt with rights that are implicit in the Confrontation Clause;[138] hence, the *Coy* Court conceded that these rights "are not absolute, and may give way to other important interests."[139] In contrast, the defendant's right to a face-to-face meeting with witnesses at trial was "narrowly and explicitly set forth in the [Confrontation] Clause."[140] The Court also rejected the state's contention that the statute was necessary to further the important public policy of preventing trauma to witnesses.[141]

Justice O'Connor, concurring, agreed that the statute in *Coy* did not qualify as an exception to the Confrontation Clause; but she argued that the majority did not abolish all child shield statutes.[142] Moreover, Justice O'Connor asserted that precedent clearly permitted limited exceptions to the "core" Confrontation Clause protections.[143] Alluding to the enactment of numerous child shield statutes by state legislatures, Justice O'Connor concluded that "the protection of child witnesses" is an important public policy that could, under certain circumstances, justify limitation of the Confrontation Clause.[144]

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135. *Id.* at 1022.

136. *Id.* at 1016.

137. *Id.* at 1020.

138. *Id.*; *see, e.g.*, Ohio v. Roberts, 448 U.S. 56, 63-65, 77 (1980) (holding that the defendant could not exclude out-of-court statements by an unavailable witness).

139. *Coy*, 487 U.S. at 1020.

140. *Id.*

141. *Id.* at 1021. Noting that the Iowa statute "create[d] a legislatively imposed presumption of trauma," the Court held that the denial of face-to-face confrontation could not withstand the explicit guarantees of the Confrontation Clause, absent "individualized findings" of trauma. *Id.* Hence, the use of the screen could not qualify as a permissible exception to the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.' " *Id.* (quoting California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)).

142. *Id.* at 1023 (O'Connor, J., concurring).

143. *Id.* at 1024-25 (O'Connor, J., concurring). The concurrence argued that certain exceptions to a literal interpretation of the Confrontation Clause may be permissible: "[O]ur precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute." *Id.* at 1025 (O'Connor, J., concurring).

144. *Id.* (O'Connor, J., concurring). Alluding to the Supreme Court precedent that permitted limitations on face-to-face confrontation, Justice O'Connor wrote: "[I]f a court

In 1990, just two years after *Coy*, the Supreme Court reexamined whether there could be a permissible exception to the requirement of face-to-face confrontation. In *Maryland v. Craig*,[145] the Court evaluated a state statute that allowed the use of one-way closed-circuit television to transmit the testimony of a child abuse victim from outside the courtroom[146] when "[t]he judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."[147] In *Craig*, the prosecution charged the defendant, the owner of a preschool, with several sexual offenses against a six-year-old child.[148] Before trial, the prosecution presented expert testimony that the alleged victim and several other child witnesses would be unable to "reasonably communicate" in the courtroom, and the trial proceeded with the use of closed-circuit television.[149] The defendant was convicted, but the Court of Appeals of Maryland reversed.[150]

In *Craig*, the majority opinion was written by Justice O'Connor,[151] whose concurrence in *Coy* raised the possibility of exceptions to an absolute requirement of face-to-face confrontation.[152] According to the *Craig* Court, "[t]he 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."[153] This "primary purpose" is served by the "elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact."[154] The inclusion of these elements

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makes a case-specific finding of necessity, as is required by a number of state statutes, . . . our cases suggest that the strictures of the Confrontation Clause may give way." *Id.* (O'Connor, J., concurring).

145. 497 U.S. 836 (1990).

146. *Id.* at 840.

147. MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989).

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

149. *Id.* at 842-43.

150. *Id.* at 843. The court of appeals held that the prosecution failed to meet the "high threshold"—established in *Coy*—of showing that the children's inability to communicate was primarily the result of face-to-face confrontation. *Id.* (quoting Craig v. State, 560 A.2d 1120, 1121 (Md. 1989)). The *Craig* Court reversed the court of appeals to the extent that it had overestimated the evidentiary requirements established by *Coy*. *Id.* at 857-60.

151. *Id.* at 840.

152. *See supra* notes 143-44 and accompanying text (discussing Justice O'Connor's rejection of a literal interpretation of the Confrontation Clause in *Coy*).

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

154. *Id.* at 846.

of confrontation, moreover, satisfies the reliability prong of the *Roberts* analysis.[155] The Court rejected the argument that face-to-face confrontation is "the *sine qua non* of the confrontation right"[156] by pointing to cases in which it had upheld the admissibility of hearsay statements.[157]

The *Craig* opinion also dispensed with the "unavailability" prong of the *Roberts* analysis; instead, Justice O'Connor wrote that the absence of face-to-face confrontation could be justified if "the procedure is necessary to further an important state interest."[158] According to *Craig*, the concurrence in *Coy* and the widespread enactment of child shield statutes demonstrated that the state interest in protecting child witnesses is sufficiently important to permit testimony without face-to-face confrontation given an "adequate showing of necessity."[159] Relying on documented evidence of trauma to child witnesses in sexual abuse cases, the Court concluded that case-specific findings of trauma in the presence of the defendant satisfy the necessity requirement.[160]

Justice Scalia, the author of *Coy*, vehemently dissented in *Craig*, arguing that the Confrontation Clause can be interpreted only by its literal meaning: "[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face to face' confrontation."[161] The dissent also rejected the majority's implication that hearsay exceptions, based on unavailability of witnesses, justify limitations on face-to-face confrontation: "[The]

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155. *Id.* at 851-52; *see supra* notes 123-25 and accompanying text (describing the analysis of the Confrontation Clause in Ohio v. Roberts).

156. *Craig*, 497 U.S. at 847.

157. *Id.* at 848-49; *see supra* notes 111, 126 (summarizing Supreme Court decisions that outlined the constitutional requirements for admitting hearsay statements).

158. *Craig*, 497 U.S. at 852; *see infra* notes 212-13 and accompanying text (highlighting the increasing public awareness of child sexual abuse trials).

159. *Craig*, 497 U.S. at 853-55; *see* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-09 (1982) (finding that protection of a minor victim's psychological and physical well-being was a state interest that could justify excluding the press and the public from attending a trial). *But see* Davis v. Alaska, 415 U.S. 308, 319-20 (1974) (holding that a state court's protective order prohibiting cross-examination of a juvenile witness about his criminal record violated the defendant's right to confrontation).

160. *Craig*, 497 U.S. at 856-57. The Court declined to "establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure." *Id.* at 860.

161. *Id.* at 862 (Scalia, J., dissenting). The dissent argued that the original intent of the Confrontation Clause governs a defendant's Sixth Amendment rights: " '[T]o confront' plainly means to encounter face to face, whatever else it may mean in addition." *Id.* at 864 (Scalia, J., dissenting).

unwillingness [to testify in the presence of the defendant] cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant."[162]

The *Craig* decision softened the blow dealt to child shield statutes by *Coy* and restored the protected status of child sexual abuse witnesses. *Craig* approved the use of alternatives to face-to-face confrontation[163] when the prosecution can demonstrate a particularized showing of trauma to the witness in the presence of the defendant.[164] Ultimately, the *Craig* decision signified the Supreme Court's willingness to limit the protections granted to defendants by the Confrontation Clause and the other provisions of the Sixth Amendment.[165]

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162. *Id.* at 866 (Scalia, J., dissenting). Justice Scalia cited numerous studies that questioned the reliability of testimony by child witnesses. *Id.* at 868 (Scalia, J., dissenting). The dissent cited evidence of suggestibility, poor memory, and exaggeration, *id.* at 868-69 (Scalia, J. dissenting), to demonstrate "[t]he value of the confrontation right in guarding against a child's distorted or coerced recollections," *id.* at 869 (Scalia, J., dissenting). For a discussion of the reliability of child witnesses, see *infra* note 215.

163. The method for receiving testimony is typically specified by a state statute that authorizes protection of child witnesses. *See, e.g.*, VA. CODE ANN. § 18.2-67.9 (Michie 1988 & Supp. 1994); *see also supra* note 129 (quoting the pertinent Virginia law in effect at the time of the *Fields* trial). In 1991, Congress adopted the *Craig* criteria when it enacted the Child Victims' and Child Witnesses' Rights (CVCWR) statute as part of the Crime Control Act of 1990. Pub. L. No. 101-647, § 225, 104 Stat. 4789, 4798-4805 (1990) (codified as amended at 18 U.S.C. § 3509 (1994)). The legislation permits the use of closed-circuit television in federal courts for receiving testimony and taking depositions from a child who witnessed a crime against another person or who has been a victim of physical or sexual abuse. *Id.*

164. *Craig*, 497 U.S. at 856-57.

165. The *Craig* decision reflects the Supreme Court's thinking on the scope of the federal Confrontation Clause. However, many state constitutions explicitly require face-to-face confrontation between defendant and witnesses. For example, in Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991), the Supreme Court of Pennsylvania held that the state constitution required a literal "face-to-face" confrontation between the defendant and the witnesses. *Id.* at 284-85. The same result was realized in People v. Fitzpatrick, 633 N.E.2d 685, 688-89 (Ill. 1994), in which the Supreme Court of Illinois struck down a state child shield statute because "the Illinois Constitution confers an express and unqualified right to a face-to-face confrontation with witnesses." *Id.* at 687. However, in November 1994, less than nine months after the *Fitzpatrick* decision was announced, the Illinois Constitution's Confrontation Clause was amended by popular vote. *See* Thomas Conklin, Note, People v. Fitzpatrick*: The Path to Amending the Illinois Constitution to Protect Child Witnesses in Criminal Sexual Abuse Cases*, 26 LOY. U. CHI. L.J. 321, 322-23 (1995). The amendment adopted language that was nearly identical to that of the Confrontation Clause in the United States Constitution, thereby negating the decision in *Fitzpatrick*. *See id.* at 323.

The Fourth Circuit's two-part decision in *Fields* relies on two of the Supreme Court's principal Sixth Amendment decisions[166] in examining a defendant's right to defend himself pro se in a child sexual abuse trial. The first tier of the Fourth Circuit's decision focuses strictly on the standard under which the *Faretta* right must be invoked.[167] Little dispute exists among the federal circuit courts regarding the articulated standard for a defendant to invoke the right to self-representation.[168] Despite the uniform standard for exercising the *Faretta* right, however, the federal circuit courts have adopted varied interpretations on the extent to which a defendant's behavior at trial conforms with the *Faretta* criteria.[169] Nevertheless, the Fourth Circuit's analysis is consistent with the general reluctance of appellate courts to reverse trial court denials of requests for self-representation.[170] Applying the "question of fact" standard of review, the *Fields* court accorded a " 'high measure of deference' "[171] to the trial court's refusal to allow Fields to proceed without counsel.[172]

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166. The *Fields* opinion examined the right to self-representation under Faretta v. California, 422 U.S. 806 (1975), and the effect of the Confrontation Clause in a sexual abuse trial under Maryland v. Craig, 497 U.S. 836 (1990). *Fields*, 49 F.3d at 1028-37.

167. In the first part of *Fields*, the Fourth Circuit upheld the state court's determination that Fields never declared his desire to represent himself "clearly and unequivocally." *Fields*, 49 F.3d at 1034. Hence, his attempt to waive the right to counsel and proceed pro se did not meet the threshold established in the wake of *Faretta*. *See supra* note 35 and accompanying text. The first part of the opinion thus resolved the issue on appeal. According to the dissent, the second part of the majority opinion, addressing the scope of Fields's Sixth Amendment right of self-representation, "borders on dicta." *Fields*, 49 F.3d at 1045 (Ervin, C.J., dissenting).

168. A defendant intending to proceed pro se must "clearly and unequivocally" waive the right to counsel and "knowingly and intelligently" declare his desire to represent himself. *See, e.g.*, Adams v. Carroll, 875 F.2d 1441, 1444-45 (9th Cir. 1989); Tuitt v. Fair, 822 F.2d 166, 174-75 (1st Cir.), *cert. denied*, 484 U.S. 945 (1987).

169. *See Adams*, 875 F.2d at 1444-45 (holding that a "conditional" request for self-representation was not equivocal); *cf.* United States v. Lorick, 753 F.2d 1295, 1298-99 (4th Cir.) (holding that a defendant may invite counsel to participate during certain stages of trial and still effectively invoke the right to self-representation), *cert. denied*, 471 U.S. 1107 (1985).

170. *See, e.g.*, United States v. Reddeck, 22 F.3d 1504, 1510-11 (10th Cir. 1994) (holding that the defendant's request to proceed pro se after trial commenced was properly denied); McNamara v. Riddle, 563 F.2d 125, 127 (4th Cir. 1977) (concluding that the defendant's implied request to dispense with counsel and proceed pro se was properly disregarded by the trial court).

171. *Fields*, 49 F.3d at 1033 (quoting Rushen v. Spain, 464 U.S. 114, 120 (1983)).

172. The majority opinion's analysis, based on 28 U.S.C. § 2254(d) (1988), reviewed the trial court's denial under a "presumption of correctness." *Fields*, 49 F.3d at 1032-33; *see supra* note 34 (discussing the majority's standard of review).

The opinion also highlighted the uniqueness of the right to self-representation. As *Faretta* recognized, the right of a defendant to proceed pro se is implicit in the structure of the Sixth Amendment.[173] Yet, the goal of the *Faretta* decision[174]—to guarantee that a criminal defendant has a personal defense—must co-exist with the constitutional entitlement to proceed with counsel, even though the two rights are mutually exclusive.[175] Because the granting of a request for self-representation is within the trial court's discretion,[176] defendants may perceive it as a privilege rather than a constitutional guarantee.[177] Conversely, protection of the right to counsel is not discretionary; it is in force until the defendant effectively waives it.[178] The difficulty faced by trial judges in protecting both rights was predicted in *Faretta* by the dissents of Chief Justice Burger[179] and Justice Blackmun.[180] These sentiments

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173. *See supra* note 3 (describing the constitutional analysis in *Faretta*).

174. The *Faretta* Court concluded that "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." Faretta v. California, 422 U.S. 806, 820 (1975).

175. *See* Tuitt v. Fair, 822 F.2d 166, 174 (1st Cir.) (holding that a defendant cannot refuse to waive the right to counsel while attempting to proceed pro se), *cert. denied*, 484 U.S. 945 (1987).

176. *See* Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990) (declaring that the right to self-representation is not absolute), *cert. denied*, 499 U.S. 982 (1991).

177. *See* Joan W. Garrott, *The Constitutional Right of Self-Representation:* Faretta *and the "Assistance of Counsel"*, 3 PEPP. L. REV. 336, 338 (1976) (stating that at early common law, a defendant's only "right" was the "privilege" of self-representation that enabled him to respond to accusations and evidence against him); *supra* note 78 (outlining the historical recognition of the right to self-representation).

178. *See, e.g.*, Brown v. Wainwright, 665 F.2d 607, 610 (Former 5th Cir. 1982) (holding that the right to assistance of counsel is effective until waived, while the right to self-representation is not in effect until it is asserted).

179. *See* Faretta v. California, 422 U.S. 806, 836 (1975) (Burger, C.J., dissenting). Chief Justice Burger's concern for just convictions led him to conclude that "there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges." *Id.* (Burger, C.J., dissenting). Chief Justice Burger advocated that, absent a statutory right to self-representation, trial courts should have discretion to require representation by counsel if the interests of justice require it. *Id.* at 836 n.1 (Burger, C.J., dissenting). "The system of criminal justice should not be available as an instrument of self-destruction." *Id.* at 840 (Burger, C.J., dissenting).

180. *Id.* at 849 (Blackmun, J., dissenting). Justice Blackmun was disturbed by the potential for misuse of the *Faretta* right:

> I cannot agree that there is anything in the Due Process Clause or the Sixth Amendment that requires the States to subordinate the solemn business of conducting a criminal prosecution to the whimsical—albeit voluntary—caprice of every accused who wishes to use his trial as a vehicle for personal or political

foreshadowed the modern judiciary's paternalistic protection of defendants.

In fact, *Fields* comports with Fourth Circuit precedent[181] that parallels the state of Sixth Amendment law prior to *Faretta*.[182] Despite the mandate of *Faretta*, concerns for fairness to the defendant and the criminal justice process have led trial courts to impose a heavy burden on defendants who desire to waive the right to counsel and proceed pro se.[183] Similarly, as the dissent in *Fields* argued, courts may hesitate to grant requests for self-representation because they dislike the consequences of allowing a defendant to present a pro se defense, including the defendant's personal confrontation of witnesses.[184] In a larger sense, the results in *Fields* and similar cases beg the question of what *Faretta* gained for pro se defendants.

In the second tier of the *Fields* opinion, the Fourth Circuit held that Fields was not entitled to self-representation because he merely sought the opportunity to cross-examine his accusers.[185] The court concluded that Fields did not desire any of the other benefits to which he was entitled as a pro se defendant.[186] In reaching its conclusion,

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self-gratification.

Id. (Blackmun, J., dissenting).

181. In its analysis of the rights to counsel and self-representation, the *Fields* court concluded that " '[o]f the two [rights], the right to be represented by counsel is preeminent.' " *Fields*, 49 F.3d at 1028 (quoting United States v. Gillis, 773 F.2d 549, 559 (4th Cir. 1985)). *But see* Cain v. Peters, 972 F.2d 748, 750 (7th Cir. 1992) (holding that "the two rights are equivalent").

182. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 69 (1932) (noting that even an intelligent and educated criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him").

183. *See, e.g.*, Tuitt v. Fair, 822 F.2d 166, 174 (1st Cir. 1987) (holding that when the two rights collide, favoring the right to counsel over the right to self-representation is reasonable because denial of the right to counsel "leaves the average defendant helpless").

184. The *Fields* dissent criticized the majority's motives in denying the request for self-representation: "The fact that this court does not like the consequences flowing from an application of a defendant's . . . rights does not justify its taking a defendant's request to represent himself any less seriously." *Fields*, 49 F.3d at 1044 (Ervin, C.J., dissenting).

185. *Id.* at 1034-37. Chief Judge Ervin, dissenting in *Fields*, rejected the majority's analysis of the facts as well as the law. *Id.* at 1042 (Ervin, C.J., dissenting). The dissent argued that in his three letters and at the pretrial hearing, Fields demonstrated more than simply a desire to cross-examine the witnesses. *Id.* at 1042-44 (Ervin, C.J., dissenting). Rather, in Chief Judge Ervin's view, Fields became dissatisfied with his attorneys' defense strategy and competence, and expressed his displeasure to the trial judge. *Id.* Under this analysis, Fields was entitled to the *Faretta* guarantee: "To thrust counsel upon the accused, against his considered wish, thus violates the logic of the [Sixth] Amendment." *Faretta*, 422 U.S. at 820.

186. *Fields*, 49 F.3d at 1037; *see supra* note 39 and accompanying text (discussing the majority's analysis of Fields's defense strategy).

the court applied a three-step syllogism. First, the majority found that, although the defendant effectively invoked his right to self-representation, he had done so only to cross-examine the child witnesses.[187] Second, applying the reasoning of *Maryland v. Craig*[188] to *Fields* by analogy, the majority concluded that the defendant was not entitled to cross-examine the witnesses.[189] Third, because the defendant's sole purpose in representing himself was not protected under the Sixth Amendment, the trial court committed no error in denying the defendant's request for self-representation.[190] Unlike the first part of the majority opinion, which rejected the defendant's request to defend pro se based on precedent aimed at protecting defendants,[191] the second part of *Fields* denied the request after applying a two-pronged analysis enunciated in *Craig* that ultimately favors protection of child witnesses.[192]

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187. *Fields*, 49 F.3d at 1034. The court assumed for the purpose of argument in the second tier that this invocation was effective, even though the court had ruled to the contrary in the first part of the opinion. *Id.* In response, the dissent termed the majority's analysis under *Craig* an "alternative" holding that was "not necessary for the proper resolution of the case." *Id.* at 1044 (Ervin, C.J., dissenting).

188. 497 U.S. 836 (1990). The Fourth Circuit extracted two primary requirements from the *Craig* opinion and applied them to the facts in *Fields*. First, while *Craig* required assuring the reliability of testimony from witnesses who were not subjected to face-to-face confrontation, *id.* at 850, the *Fields* court found that the purpose of the self-representation right would be "otherwise assured" by allowing a pro se defendant to conduct all of the other components of his defense. *Fields*, 49 F.3d at 1035. *Fields* held that the defendant's " 'dignity and autonomy' " would be affirmed and that he would still be able to present his " 'best possible defense.' " *Id.* (quoting McKaskle v. Wiggins, 465 U.S. 168, 176-78 (1984)); *see supra* note 96. Second, *Craig* held that restricting face-to-face confrontation could be justified only when it was necessary to further an important state interest, such as the protection of child witnesses. 497 U.S. at 850, 855. Applying this analysis, the Fourth Circuit concluded that the restriction of the right to personal cross-examination was justified. *Fields*, 49 F.3d at 1036; *see supra* note 44 and accompanying text (summarizing the *Craig* analysis and its application in *Fields*).

189. *Fields*, 49 F.3d at 1035-37. The majority held that denying the request to cross-examine the witnesses personally survived constitutional scrutiny because the purpose of the self-representation right—to affirm the defendant's dignity and autonomy—would have been otherwise assured, and denial of the request was necessary to further an important public policy. *Id.*; *see supra* note 188.

190. *Fields*, 49 F.3d at 1034. *But see* McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) (noting that denial of self-representation "is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless").

191. *See supra* notes 87-94 and accompanying text (describing the criteria for evaluating a defendant's request for self-representation).

192. *See supra* notes 43-46 and accompanying text. Despite the majority's reliance on *Craig*, the cases are distinguishable in two significant aspects. First, *Fields* dealt with a child sexual abuse trial in which the defendant requested to represent himself. *Fields*, 49 F.3d at 1025-28. In contrast, *Craig* discussed the limitation on a defendant's right to face-to-face cross-examination under the Confrontation Clause. *Craig*, 497 U.S. at 843. Hence,

The Fourth Circuit's opinion in *Fields* cited two supporting decisions reached in state courts, in part to demonstrate the importance of the state interest in protecting child witnesses.[193] In 1989 the Supreme Court of Rhode Island held that a pro se defendant in a child abuse case did not have a constitutional right to question the child victim personally following a showing of probable harm to the child during cross-examination.[194] The Rhode Island court, like the Fourth Circuit in *Fields*, strongly opposed the possibility of traumatizing the children.[195] Similarly, in *State v. Estabrook*[196] the Court of Appeals of Washington upheld the conviction of a pro se defendant who was required to submit his questions for cross-examination to be read by the judge.[197] *Estabrook* provided support for the Fourth Circuit's opinion because the defendant personally conducted all other major components of his defense, thereby retaining the "dignity and autonomy" ensured by *Faretta*.[198]

The majority's two alternative bases for decision in *Fields* illuminate the Fourth Circuit's view of the Sixth Amendment.[199] Under the Fourth Circuit's analysis, the Supreme Court's reasoning in *Craig* that upheld restrictions on face-to-face confrontation formed

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the *Fields* decision extends the reach of the *Craig* decision beyond the scope of confrontation rights to the right to self-representation under *Faretta*. Furthermore, the *Craig* opinion allowed the use of cross-examination by closed-circuit television only upon a particularized showing of trauma to the child witness. *Id.* at 855-56. Conversely, the *Fields* majority asserted that "we do not believe it was essential in this case that psychological evidence of the probable emotional harm to each of the girls be presented in order for the trial court to find that denying Fields personal cross-examination was necessary to protect them." *Fields*, 49 F.3d at 1037. Therefore, the *Fields* decision presumes that personal cross-examination of child witnesses by their alleged abusers will cause emotional harm that satisfies the *Craig* requirement of a particularized showing. *But see* Commonwealth v. Conefrey, 570 N.E.2d 1384, 1390-91 (Mass. 1991) (holding that a trial judge's belief that face-to-face cross-examination by a pro se defendant would traumatize a child witness, without an actual finding of trauma, was insufficient to justify restrictions on the self-representation right).

193. *Fields*, 49 F.3d at 1036 (citing State v. Taylor, 562 A.2d 445, 454 (R.I. 1989) and State v. Estabrook, 842 P.2d 1001, 1004-06 (Wash. Ct. App.), *rev. denied*, 854 P.2d 1084 (Wash. 1993)).

194. *Taylor*, 562 A.2d at 454 ("In a case where a defendant states at an early date and in an unequivocal manner that he or she wishes to proceed pro se, standby counsel will be appointed to conduct the examination of the child victim.").

195. *Id.* at 452-54.

196. 842 P.2d 1001 (Wash. Ct. App.), *rev. denied*, 854 P.2d 1084 (Wash. 1993).

197. *Id.* at 1004-06.

198. *Id.* at 1006.

199. The dissent was "disturbed by the court's decision to use this case as the vehicle by which it could reconsider the scope of the Sixth Amendment's right to self-representation." *Fields*, 49 F.3d at 1044 (Ervin, C.J., dissenting).

the foundation for restrictions on the right to self-representation.[200] The majority applied the *Craig* reasoning directly to the *Fields* case: "If a defendant's Confrontation Clause right can be limited in the manner provided in *Craig*, we have little doubt that a defendant's self-representation right can be similarly limited."[201] This analysis suggests that the *Craig* analysis may be a model for evaluating restrictions on other Sixth Amendment rights.

Despite the strong urging by the majority to protect the child witnesses from trauma,[202] the dissent rejected the extension of *Craig* to the *Fields* case.[203] According to the dissent, the *Fields* opinion "collapsed the distinction between rights under the Confrontation Clause and the right to self-representation."[204] Hence, the Fourth Circuit's opinion diminished the uniqueness of the *Faretta* right to self-representation by equating it with the explicit provisions under the Sixth Amendment.[205] According to the dissent, the logic behind the specific restriction of the right to self-representation involved in *Fields*—based on analogy to *Craig*—also marked a significant extension of federal court precedent. For example, it is true that the various circuit courts have consistently held that restrictions could be placed on pro se litigants to avoid delays[206] or to prevent an unruly defendant's behavior from interfering with normal judicial procedures.[207] Similarly, the constitutional right to self-representation is not guaranteed on appeal because the right to appeal itself,

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200. *See supra* notes 40-46 and accompanying text (describing the Fourth Circuit's application of a two-pronged test from *Craig* to the facts in *Fields*).

201. *Fields*, 49 F.3d at 1035. The dissent disagreed, stating that "[t]he majority's most significant mistake is assuming that the self-representation right described in *Faretta* and *Wiggins* and the Confrontation Clause right analyzed in *Craig* are based on similar concerns." *Id.* at 1046 (Ervin, C.J., dissenting).

202. *Id.* at 1036. The majority's analysis of *Fields* and *Craig* led it to conclude that "the State had an extremely important interest in preventing Fields from personally cross-examining the young girls here." *Id.*

203. *Id.* at 1046 (Ervin, C.J., dissenting).

204. *Id.* at 1045 (Ervin, C.J., dissenting).

205. *See supra* note 3 (describing the origin of the implicit right to self-representation within the structure of the Sixth Amendment).

206. *See, e.g.*, Hamilton v. Groose, 28 F.3d 859, 862 (8th Cir. 1994) (affirming the denial of a writ of habeas corpus to a defendant who requested waiver of counsel when "only three weeks remained before the scheduled trial date, and the trial court, the state, and [defendant's counsel] were prepared to begin"), *cert. denied*, 115 S. Ct. 741 (1995).

207. Faretta v. California, 422 U.S. 806, 834 n.46 (1975). *Faretta* makes clear that "[t]he right of self-representation is not a license to abuse the dignity of the courtroom." *Id.* For a comparison of self-representation in criminal and civil cases, see Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659 (1988).

unlike the constitutional right to trial, is granted only by statute.[208] In *Fields*, however, the dissent argued that the Fourth Circuit reached a new level of scrutiny for reviewing a defendant's request for self-representation.[209] In the future, a trial court following *Fields* may probe into the strategy of the pro se defendant and, in some cases, reject the strategy and consequently the request to proceed pro se. The result would contravene the *Faretta* right to make a personal defense[210] even if the pro se defense strategy was flawed and the assistance of counsel was advantageous to the defendant.

The court's opinion reflects a concern among the judiciary for eliciting testimony from child victims of sexual abuse.[211] Given the particularly abhorrent nature of the crime of child sexual abuse and the difficulties in prosecuting cases effectively,[212] legislatures and courts have responded with somewhat liberalized prosecutorial techniques[213] in order to effectuate presentation of the children's statements,[214] even though some researchers question the scientific

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208. United States v. Gillis, 773 F.2d 549, 559-60 (4th Cir. 1985).

209. *Fields*, 49 F.3d at 1044 (Ervin, C.J., dissenting). The dissent asserted the importance of protecting the right to self-representation for all criminal defendants: "[The right to proceed pro se] is particularly important, not only to the defendant . . . but also to our system of justice as a whole, which is made less fair by telling some defendants that they may not serve as their own defense." *Id.* at 1047 (Ervin, C.J., dissenting).

210. *See supra* text accompanying note 79 (highlighting the defendant's basic right to defend himself recognized in *Faretta*).

211. *See supra* note 23 (describing the trial judge's rejection of Fields's request to conduct his own defense).

212. Despite the availability of alternative evidentiary methods, several high-profile child sexual abuse cases have resulted in acquittals or reversed convictions. The McMartin preschool case in California ended in acquittals seven years after charges were filed. Malcolm Gladwell, *Children's Testimony No Longer Gospel in Day-Care Abuse Cases*, WASH. POST, Sept. 3, 1995, at A3. The North Carolina Court of Appeals granted a new trial to Robert Kelly, Jr., who was convicted of 99 sexual offenses in the "Little Rascals" case. State v. Kelly, 118 N.C. App. 589, 599, 456 S.E.2d 861, 869, *disc. rev. denied*, 341 N.C. 422, 461 S.E.2d 764 (1995). The court of appeals held, *inter alia*, that the opinion testimony of the victims' parents included behavioral observations that are admissible only when presented by expert testimony. *Id.* at 594-97, 456 S.E.2d at 866-68.

213. *See supra* note 129 and accompanying text (summarizing modified procedures to cross-examine child witnesses among Fourth Circuit states); *see also* FED R. EVID. 611(c) (permitting leading questions on direct examination when necessary to develop testimony); United States v. Nabors, 762 F.2d 642, 650-51 (8th Cir. 1985) (allowing prosecutor to use leading questions to prompt a response from a reluctant child witness).

214. After concluding that Fields's right to self-representation had been denied, the dissent discussed the possibility of protecting the child witnesses:

> The trial court properly could employ special procedures that preserve the core right of the defendant to conduct his own defense while adequately protecting the welfare of the child witnesses. Among the procedures from which the trial court could choose . . . would be: installing a screen or other barrier between the

basis and effectiveness of alternative methods of questioning.[215] The Supreme Court has provided little guidance on the subject of a defendant's right to confrontation in child sexual abuse cases. In particular, the contrary positions taken by Justice Scalia in *Coy* and Justice O'Connor in *Craig* reflect the Court's tendency toward a hair-splitting constitutional analysis of the Confrontation Clause.[216] The Supreme Court's two-pronged analysis enunciated in *Craig*[217]—and

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> defendant and the witnesses; conducting closed sessions out of the courtroom; placing the defendant and the witnesses in separate rooms; requiring the defendant to submit his questions to the judge who, after scanning them, would read them aloud to the witnesses; and requiring the defendant to remain seated at counsel table while questioning the witnesses.

Fields, 49 F.3d at 1047 n.4 (Ervin, C.J., dissenting). The majority would have allowed Fields to write out questions for cross-examination and then submit them to the court to be read by his attorney. *Id.* at 1034.

215. Leading experts in the field of child behavior in legal proceedings have questioned the presumption that "greater testimonial accuracy will result from modifications in courtroom interviewing. . . . [W]ithout exception this presumption has never been empirically satisfied." Stephen J. Ceci & Eduardus de Bruyn, *Child Witnesses in Court: A Growing Dilemma*, CHILDREN TODAY, Jan. 1993, at 6. For a thorough analysis of contemporary psychological insight into the role of child witnesses, see, e.g., LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 169 (1994) (arguing that in the wake of conflicting empirical data, "[w]e simply do not know if shielding produces as reliable or more reliable evidence from a child witness[]"); INGER J. SAGATUN & LEONARD P. EDWARDS, CHILD ABUSE AND THE LEGAL SYSTEM 184 (1995) (asserting that children may be traumatized by testifying in a courtroom setting, not simply by the presence of a defendant); Stephen J. Ceci, *Cognitive and Social Factors in Children's Testimony*, *in* PSYCHOLOGY IN LITIGATION AND LEGISLATION 1, 44 (Bruce D. Sales & Gary R. VandenBos eds., 1994) (concluding that "[t]he majority of children are neither as hypersuggestible and coachable as some pro-defense advocates have alleged nor are they as resistant to suggestions about their own bodies as some pro-prosecution advocates have claimed").

216. One commentator has argued that piecemeal analysis of the Confrontation Clause symbolizes a troubling trend in constitutional law:

> [T]he particular guarantees of the amendments have been studied in a fragmented manner that obscures the grand design of the Bill of Rights and its relationship to the Constitution . . . . Moreover, by focusing on the parts more than on the whole, we have lost sight of the Bill of Rights as a *political* document with a principal objective of restraining the power of the government vis-a-vis the individual.

Berger, *supra* note 103, at 560-61.

217. *See, e.g.*, Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?*, 53 OHIO ST. L.J. 49, 86 (1992) (describing the *Craig* analysis as a hybrid of a "middle" level scrutiny test and the "general approach" hearsay test of Ohio v. Roberts, 448 U.S. 56 (1980)). One commentator has remarked that the *Craig* opinion advocates "ad hoc balancing" in which the trial court must reconcile "all of the rights and interests presented in the particular case." David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1538 (1992). Conversely, Justice Scalia's dissent in *Craig* favored a "categorical mode of adjudication"

adopted in *Fields*—has received much scholarly criticism because it diverges from the Court's previous decisions on restrictions on fundamental constitutional rights.[218] Hence, exposure of these weaknesses in *Craig* leaves *Fields* open to similar attacks.

A more thorough approach to the issues in *Fields* would have included a discussion of the goal of fairness which the adversarial process seeks to ensure. In attempting to present legal arguments that embody the trial judge's instinctive aversion to face-to-face cross-examination by the defendant in *Fields*,[219] the Fourth Circuit's opinion overlooks the fact that the defendant's desire to cross-examine his accusers may be objectionable in layman's terms. Cross-examination enables a criminal defendant to attack the human components of the prosecution's case-in-chief through intimidation.[220] In certain cases, however, the intimidation of the witness during cross-examination and the tactical advantage gained by it may exceed what fundamental fairness in the adversarial process requires—and the Bill of Rights guarantees—to satisfy the defendant's right to confrontation. Ultimately, the *Fields* court could have remained faithful to *Craig* and *Faretta* by exploring the alternative but

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in its absolute form, under which the meaning of the constitutional provision is fixed and the government's interest in restricting a right is irrelevant. *Id.* at 1535-36. The two approaches to *Craig* are at opposite ends of the spectrum of constitutional methods. *Id.* at 1538.

218. *See* King, *supra* note 217, at 84-87 (arguing that the Supreme Court should have applied a strict scrutiny analysis under which the Court ordinarily allows a state's restriction of a fundamental right when the restriction is necessary to further a compelling interest and the state has chosen the least restrictive means of promoting the compelling interest); *see also* Beckett, *supra* note 111, at 1642 (arguing that an "original intent" analysis should be applied to all cases involving restriction of Confrontation Clause rights); Brent J. Fields, Maryland v. Craig*: The Constitutionality of Closed Circuit Testimony in Child Sexual Abuse Cases*, 25 GA. L. REV. 167, 191-93 (1990) (concluding that the *Craig* Court should have applied the two-pronged test from *Roberts* in order to reach the same result). For a detailed critique of the *Craig* decision within a cost-benefit framework, see Peter T. Wendel, *A Law and Economics Analysis of the Right to Face-to-Face Confrontation Post-*Maryland v. Craig*: Distinguishing the Forest from the Trees*, 22 HOFSTRA L. REV. 405, 489-91 (1993) (arguing that *Craig* rejects the traditional assumption that the benefits of face-to-face confrontation outweigh its costs).

219. *See supra* note 23 (summarizing the trial court's rejection of Fields's request for self-representation).

220. *See* ROBERT E. GOLDMAN, THE MODERN ART OF CROSS-EXAMINATION § 8.2 (1993) (arguing that intimidation allows the cross-examiner to maintain an advantage by exerting control over a witness already threatened by unfamiliar surroundings). Similarly, the Supreme Court has argued that cross-examination is the " 'greatest legal engine ever invented for the discovery of truth.' " California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940)).

pragmatic methods of cross-examination proposed by the dissent.[221] Unfortunately, the court resorted to an unnecessary dismantling of the *Faretta* right of self-representation.

As a consequence of the broadly-worded *Fields* decision, it appears that the Fourth Circuit has opened a doorway toward further erosion of the *Faretta* right and of the Sixth Amendment provisions.[222] The most troubling legacy of *Fields* is the court's revelation of a hierarchy of Sixth Amendment rights[223] that plainly contradicts the goal of *Faretta*.[224] As the dissent noted, "the majority gives insufficient respect to the self-representation right, ignoring the historical underpinnings of the right as discussed in *Faretta*."[225] Perhaps this subordination of the right of self-representation to enforcement of the right to counsel is rooted in the common experience of the judiciary which observes the prosecution and conviction of defendants in unfamiliar and unfriendly courtroom settings. Chief Justice Burger's dissent in *Faretta*, in which he predicted the erosion of explicit Sixth Amendment rights due to exercise of the implicit right to self-representation,[226] has advanced one step further in *Fields*. In the Fourth Circuit, trial courts can limit both explicit and implicit Sixth Amendment rights.

As a result of *Fields*, trial courts within the Fourth Circuit are now on notice that, for the purposes of Sixth Amendment provisions, pro se defendants in sexual abuse cases are a class unto themselves. By upholding the broad discretionary powers granted to trial judges in adjudicating sexual abuse cases,[227] the court demonstrated its agreement with the public outcry for expedited convictions of sexual abuse defendants. Yet in its desire to prevent emotional trauma to

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221. *See supra* note 214 (describing the dissent's proposed techniques for cross-examination of child witnesses in *Fields*).

222. The Supreme Court of North Dakota, relying principally on *Fields*, denied a pro se litigant the right to cross-examine witnesses personally during a child custody proceeding. *In re* Adoption of J.S.P.L., 532 N.W.2d 653, 661-62 (N.D. 1995). There is no constitutional right to either the assistance of counsel or self-representation in a state civil trial. *See* Bradlow, *supra* note 207, at 669-71. Nevertheless, this case suggests that the potential reach of *Fields* may be broad.

223. "While the Confrontation Clause right is guaranteed explicitly in the Sixth Amendment, . . . the self-representation right is *only* implicit in that Amendment." *Fields*, 49 F.3d at 1035 (emphasis added). *See supra* note 78 and accompanying text.

224. *See supra* note 3 (discussing the unique status of the Sixth Amendment right to self-representation).

225. *Fields*, 49 F.3d at 1045 (Ervin, C.J., dissenting).

226. Faretta v. California, 422 U.S. 806, 838-40 (1975) (Burger, C.J., dissenting).

227. *Fields*, 49 F.3d at 1033.

the child witnesses in sexual abuse cases,[228] the *Fields* court seemingly extinguished many of the pro se defendant's rights that were recognized in *Faretta* and enumerated in *Wiggins*.[229]

Along with its direct impact on child sexual abuse cases, the analysis of the right to self-representation presented in *Fields* may extend to other areas of criminal law. The protection of child witnesses serves many purposes, including the protection of the emotional well-being of the witnesses and the elicitation of accurate testimony. These same objectives would seemingly apply in other criminal cases in which a prior relationship between the defendant and the witness, coupled with an allegation of criminal activity, could exacerbate the process of testifying in court. For example, victims of rape or domestic violence may demand the same consideration as child sexual abuse victims;[230] thus, a pro se defendant in such cases, while clearly beyond the scope of *Craig* restrictions on confrontation, could be affected by the holding in *Fields*. Without a clear mandate from legislatures or additional direction from the Supreme Court, the protection of defendants and witnesses remains primarily within the discretionary powers of trial courts. Yet the *Fields* decision tilts the balance away from the defendant's ability to make his personal defense, even though the Sixth Amendment and *Faretta* guarantee that right. Despite its laudable policy goals, this result jeopardizes the Sixth Amendment protections that all criminal defendants possess.

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228. *Id.* at 1036.

229. *See supra* note 96 and accompanying text (listing the specific rights of a criminal defendant who conducts his own defense).

230. *See* FED. R. EVID. 412 (establishing "rape shield" evidentiary provisions to protect victims of sexual misconduct from invasion of privacy).